

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7251

September Term, 2000

Bricks, Blocks & Concrete Co., Inc.,
Appellant

Filed On: December 12, 2000 [562400]

v.

Frontier Insurance Company and
Cosmopolitan Contractors Incorporated,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 97cv02121)

Before: GINSBURG, SENTELLE and HENDERSON, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and the oral argument by counsel. The court has determined that the issues presented occasion no need for an opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the judgment of the district court be reversed and remanded for further proceedings in accordance with the attached memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing en banc. *See* Fed. R. App. P. 41(b).

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

MEMORANDUM

Bricks, Blocks & Concrete Co., Inc. ("BBC") appeals from a district court decision holding it liable to Frontier Insurance Co. ("Frontier") for breaching a subcontract on a naval construction project. BBC argues that the district court committed a number of errors. Although we conclude that many of BBC's arguments on appeal are without merit, for reasons explained below, we must reverse the district court's decision and remand this case for further proceedings.

BBC first argues that the district court abused its discretion by denying its request for a jury trial. The district court denied BBC's one-sentence request on all of the following grounds: (1) the motion was not timely; (2) BBC did not provide any reason for initially failing to request a jury; (3) no facts were presented to justify the court's exercising its discretion under Federal Rule of Civil Procedure 39; and (4) BBC failed to comply with Local Rule 108, "including Rule 108(c), which provides for the submission of a proposed order." *United States ex rel. Bricks, Blocks & Concrete Co. v. Frontier Ins. Co.*, No. 97-2121 (D.D.C. Aug. 25, 1998). Contrary to these findings, however, BBC did submit a proposed order with its request for a jury trial. *See* App. at 24. While we agree with the district court that BBC's motion was not timely under Rule 38, we nevertheless must hold that the district court abused its discretion under Rule 39 by relying on at least in part a clearly erroneous factual finding. *See Linder v. Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998). Accordingly, we remand the case for the district court to reconsider whether BBC is entitled to a jury trial. *See BCCI Holdings v. Khalil*, 214 F.3d 168, 172-73 (D.C. Cir. 2000); *May v. Melvin*, 141 F.2d 22, 22 (D.C.

Cir. 1944).

BBC next argues that the district court erred in failing to find that Frontier was barred from recovery because the breach by Cosmopolitan Contractors, Inc. ("Cosmopolitan") constituted an anticipatory repudiation. Frontier's counterclaim against BBC is a plain breach of contract claim arising out of Cosmopolitan's contract with BBC. *See* Brief of Appellee, Supplemental App. at 7 (asserting a claim based on BBC's alleged "breaches of its subcontractual requirements"). It cannot be viewed as a recoupment defense under the Miller Act, which, were it available, would not permit an award of money damages to Frontier. *Cf. United Structures v. G.R.G. Eng'g, S.E.*, 9 F.3d 996, 999-1000 (1st Cir. 1993) (explaining that recoupment is "an appropriate *defense* in Miller Act cases" and "may reduce the award" to the plaintiff (emphasis added)); *Tuloka Affiliates, Inc. v. Moore*, 268 S.E.2d 293, 295 (S.C. 1980) ("A recoupment . . . does not allow recovery of an affirmative money judgment for any excess over [a plaintiff's] claim."). As a result, Frontier's action is susceptible to any defenses that could have been asserted by BBC against Cosmopolitan. *See Travelers Ins. Co. v. District of Columbia*, 382 A.2d 269, 271 (D.C. Ct. App. 1978).

In its complaint, BBC alleges that Cosmopolitan terminated the contract and that prior to that point BBC had performed its obligations under the contract in a timely and workmanlike manner. *See* App. at 826-27. Frontier's counterclaim contends that BBC was liable under the contract for deficient performance prior to Cosmopolitan's termination. *See* Brief of Appellee, Supplemental App. at 6. Frontier also acknowledged that it hired another company to complete BBC's work on the project. *See id.* When the district court granted Frontier's motion for permission to file a counterclaim, it stated that BBC "need not file an answer to the Supplemental Counterclaim and the allegations contained

therein will stand as denied." *United States ex rel. Bricks, Blocks & Concrete Co. v. Frontier Ins. Co.*, No. 97-2121 (D.D.C. Jul. 17, 1998) (Order Granting Permission to File Supplemental Counterclaim). Based on these pleadings, then, it is clear that BBC argued that (1) Cosmopolitan terminated the contract without cause and (2) BBC was not permitted to continue its work under the contract. In other words, BBC argued that Cosmopolitan's breach was an anticipatory repudiation that barred Frontier's ability to recover. *Accord* Transcript of Bench Trial, *United States ex rel. Bricks, Blocks & Concrete Co. v. Frontier Ins. Co.*, No. 97-2121, at 53-54 (D.D.C. Jan. 25, 1999) (overruling Frontier's relevancy objection when BBC contended that the evidence was relevant to show "there has been an anticipatory breach"); *cf. Hammond v. Miller*, 13 D.C. (2 Mackey) 145 (1882) (discussing the "well settled" principle that "if a man partly performs his contract and then refuses to complete it, he has no right of action upon the contract"). The district court, however, did not rule on this issue.

In its opinion, the district court found that Cosmopolitan "had abandoned the job ... and [BBC] was not allowed to return." *United States ex rel. Bricks, Blocks & Concrete Co. v. Frontier Ins. Co.*, No. 97-2121, Mem. Op. at 3 (D.D.C. Mar. 10, 1999). In addition to these facts, to successfully state an anticipatory repudiation defense, a party also must prove that it was able to perform under the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 254(1) & cmt. a (1979). On the other hand, a breaching party can justify its breach if "there was, at the time, an adequate cause" for breaching, even if that cause "did not become known to him until later." *See College Point Boat Corp. v. United States*, 267 U.S. 12, 16 (1925). Repudiation is not justified, however, if the other party has merely partially breached. The district court made no factual findings or legal conclusions concerning

(1) whether BBC was able to perform when Cosmopolitan abandoned the contract and (2) whether BBC's breach was material or partial. Thus, we must remand for the district court to make a record concerning these issues.

Finally, BBC argues that the district court clearly erred by awarding Frontier \$161,113. *See* FED. R. CIV. P. 52(a); *Safer v. Perper*, 569 F.2d 87, 100 (D.C. Cir. 1977). Frontier does not dispute this argument in its brief and at oral argument could not articulate why the calculation of its damages was not erroneous. In its opinion, the district court concluded that "Frontier was damaged in the amount of \$190,974." *Bricks, Blocks & Concrete*, No. 97-2121, Mem. Op. at 10. The court derived this figure by adding the \$167,574 required by the new subcontractor to repair damage on the project and the \$23,400 required "to remedy the defects ... in the work which was performed by" BBC in installing deficient anchor bolts. *Id.* at 8. The court ultimately awarded Frontier \$161,113.¹ *See United States ex rel. Bricks, Blocks & Concrete Co. v. Frontier Ins. Co.*, No. 97-2121 (Oct. 28, 1999) (order). This award double-counts \$23,400—the damage caused by the "Anchor Bolt Issue," which already had been included in the \$167,574 in damages Frontier alleged. *See* App. at 666. Consequently, if judgment is entered in favor of Frontier on remand, the district court shall avoid double counting this amount.

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings in accordance with this memorandum.

¹This award was calculated by subtracting the \$29,861 awarded to BBC from Frontier's damages of \$190,974. *See Bricks, Blocks & Concrete*, No. 97-2121, Mem. Op. at 10.