225 Ct.Cl. 616
United States Court of Claims

Cross Construction Company, Inc.
v.
The United States

No. 99-80C
|
September 19, 1980

Opinion

***616** *Contracts; subcontractor's suit; amendment of petition to name prime contractor; relation back of amendment; applicability of Severin doctrine; Assignment of Claims Act.*-On September 19, 1980 the court entered the following order:

Attorneys and Law Firms

Jeffrey A. Davis, attorney of record, for plaintiff. *Reynolds, Allen & Cook,* of counsel.

John Charles Ranney, with whom was *Assistant Attorney General Alice Daniel,* for defendant.

Before FRIEDMAN, *Chief Judge,* DAVIS and KUNZIG, *Judges.*

Cross Construction Company, Inc., (Cross), the original plaintiff, is a subcontractor of Folk Construction Company, Inc. (Folk). The latter held a prime government contract for certain work connected with the Tennessee-Tombigbee Waterway. During the contract's course, Folk sought additional expenses as changes in contract conditions. These expenses were the initial responsibility of subcontractor Cross. The contracting officer issued his decision to Folk on March 9, 1979, denying most of the claim. With an assignment from Folk, Cross, the subcontractor, filed this "direct action" complaint in this court on March 4, 1980, under 41 U.S.C. § 609(a)(1) and (3)-part of the Contract Disputes Act of 1978.

Defendant immediately moved to dismiss on the grounds that, as a subcontractor without direct privity with the Government, Cross (a) had no right under this court's decisions or the Contract Disputes Act to file suit here against the Government, and (b) gained no right to sue from ***617** its assignment from Folk because Cross is not a financial institution allowed by the Assignment of Claims Act to sue on an assigned claim.

In response, Cross reassigned its claim to Folk and moved for leave to amend its petition to substitute Folk as the party plaintiff, with relation back to the filing by Cross of the original complaint. Defendant objects to the motion for leave to amend, saying, first, that there can be no relation back and accordingly Folk's complaint would be too late, [1] and, second, that in any event Folk cannot sue here because it has no liability to Cross.

Both the defendant's motion to dismiss and Cross's motion for leave to amend are now before us.

Contrary to defendant, we think this is an appropriate case in which to allow the amendment and to relate it back to the original filing on March 4, 1980. A "direct motion" suit is a new procedure, but Cross obviously should not have filed the suit in its own name; there were plenty of prior decisions of this court to warn it. Nevertheless, the "direct action" claim given by the Contract Disputes Act would be entirely forfeited [2] if we refused to allow the amendment or to relate it back. The authorities teach that relation back is appropriate where the amended pleading relates, as in this case, to the same conduct, transaction, or occurrence set forth in the original pleading, and therefore that the opposite party was given timely notice of the claim asserted against him. *Snoqualmie Tribe of Indians v. United States,* 178 Ct. Cl. 570, 372 F.2d 951 (1967); *Vann v. United States,* 190 Ct. Cl. 546, 557-58, 420 F.2d 968, 974 (1970); 3 *J. Moore's Federal Practice* § 15.15[2] and § 15.15[4.-2] (Second Ed. 1979). There is no doubt that in this case defendant had full and timely notice. We think, too, that the defendant will not be prejudiced in its defense on the merits by the ***618** mistake in originally naming Cross as the plaintiff. It would be too harsh to invoke formal rules, as defendant would have us do, by refusing Folk its undoubted right to prosecute this ""direct action" suit. [3]

Defendant's other claim is that, under the *Severin* doctrine (enunciated in *Severin v. United States,* 99 Ct. Cl. 435 (1943), *cert. denied,* 322 U.S. 733 (1944)), Folk must, but cannot, show that it is liable to Cross, its subcontractor, before it is allowed to sue on a contract claim for expenses initially borne by Cross. That cannot be done here, defendant says, because Cross first sued Folk on the same claim, and then dismissed the suit because, Cross says, it

found Folk not at fault, only the defendant. This must mean, according to the Government, that Cross is now entirely barred from suing Folk.

This court has refined the *Severin* doctrine so that it requires an iron-bound release or contract provision immunizing the prime contractor completely from any liability to the sub. *See J.L. Simmons Co. v. United States,* 158 Ct. Cl. 393, 304 F.2d 886 (1962). If the contract is silent as to the prime's ultimate liability to the sub, suit by the former will generally be permitted. *Ibid; Blount Bros. Constr. Co. v. United States,* 171 Ct. Cl. 478, 482-84, 346 F.2d 962, 964-65 (1965). *Simmons* held that the prime could sue even though the subcontractors had executed releases limiting their claims to the extent of the monies actually recovered and collected from the Government.

In this case we are pointed to no contract clause or document absolving Folk from all liability to Cross. The mere fact that Cross dismissed its suit against Folk, even if it be considered a dismissal with prejudice, does not necessarily mean that *Simmons* is inapplicable and that Cross has no right to demand any money Folk may recover from the Government in the present suit. Defendant (on whom the burden rests) has not made the strict kind of case it must if we are to apply the *Severin* doctrine as it exists in today's world.

***619** Accordingly, IT IS ORDERED, without oral argument, that plaintiff's motion for leave to amend is granted with relation back to March 4, 1980, and defendant's motion to dismiss is denied.

All Citations

225 Ct.Cl. 616, 1980 WL 13189

Footnotes

1 The Contract Disputes Act requires a "direct action" suit in this court to be filed "within twelve months from the date of the receipt of the contracting officer's decision concerning the claim." 41 U.S.C. § 609(a)(3). The contracting officer's decision was rendered on March 9, 1979, and Cross brought suit here within 12 months on March 4, 1980. However, Cross did not file its motion for leave to amend to name Folk as plaintiff until May 23, 1980, more than 12 months after receipt of the contracting officer's decision.

2 Under the Contract Disputes Act the alternative right to appeal to a Board of Contract Appeals is limited to 90 days from the date of receipt of the contracting officer's decision in March 1979. That time has already expired. We have not been informed whether an appeal to the Board was filed in time.

3 The retransfer and reassignment of the claim to Folk satisfies any real party-in-interest provision, as well as the Assignment of Claims Act. *Scanwell Laboratories, Inc. v. Thomas,* 521 F.2d 941, 944-45 n.3 (D.C. Cir. 1975).