

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANFORD INVESTMENT COMPANY, INC. : CIVIL ACTION
: :
v. : :
: :
AHLSTROM MACHINERY HOLDINGS, INC. : No. 97-CV-7978

M E M O R A N D U M

Ludwig, J.

October 26, 1998

Defendant Ahlstrom Machinery Holdings, Inc. moves for summary judgment on the ground that plaintiff Sanford Investment Company, Inc., as an assignor of contractual rights, lacks capacity to sue.¹ Fed. R. Civ. P. 56.² Jurisdiction is diversity. 28 § 1332. The parties agree that Pennsylvania law governs.

Both parties are successors to signatories to an agreement entered into in 1993 that is the subject matter of this action. Plaintiff's predecessor was American Power Corp. (American). Defendant's was Ahlstrom Kamyr, Inc. (AKI). The agreement in question involved the assignment to American of a portion of a "base fee" to be earned by AKI. In 1993 Adirondack GP and Adirondack Recycle, L.P. - two companies related to AKI - became partners in American Power Recyclers, L.P., a partnership

¹"[S]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997) (quoting Spain v. Gallegos, 26 F.3d 439, 446 (3d Cir. 1994)).

²Because of the dispositive significance of the standing to sue issue, it was decided, as a matter of case management, to deal with it first. The lawsuit is for a balance due of assigned partial fee payments of \$324,470, for which liability is disputed.

previously formed by American Power Corp. On November 2, 1993 the partnership entered into the "EPC/Initial Operation and Performance Testing Agreement" (EPC Contract), under which AKI agreed to build and operate a waste paper recycling facility in Sanford, West Virginia. Mot., ex. A. In return, the partnership promised to pay AKI (1) a base fee of ten percent of certain operating costs and (2) a bonus fee for exceptional performance. Mot., ex. A., ¶¶ 13.2, 13.3. On December 29, 1993 AKI signed an "O&M Fee Letter," committing itself to pay twenty-five percent of the base fee to American. Mot., ex. B.

About two years later, on December 20, 1995, American, AKI, and their affiliates entered into a bonus fee agreement, which included a fee arrangement and an assignment. Resp., ex. A, B. AKI assigned twenty-four percent of its bonus fee to Conduit & Foundation Corporation, another American affiliate, resp., ex. A, ¶ 4, and both Conduit and American assigned their rights to the bonus fee to National Union Fire Insurance Company of Pittsburgh, Pa. Resp., ex. B, ¶ 1. This assignment expressly reserved to American the right to sue the partnership for any unpaid and delinquent portion of the bonus fee – while specifying that the assigned percentage of the bonus fee was to be paid directly to National Union. Resp., ex. B, ¶ 2.

Six days thereafter, on December 26, 1995, American and Conduit entered into a "Surety Loan Agreement." This agreement assigned to National Union all fees and income American or Conduit were entitled to receive from the Sanford facility agreements – as well as "the rights to enforce the payments of same." Id. ¶ 4A.

On March 27, 1996 National Union sent AKI a letter, signed by American and Conduit, directing all payments related to the recycling facility to be paid to National Union instead of American. Mot., ex. D. According to the complaint, Sanford – American’s successor – received base fee payments through January 31, 1996 but not thereafter. Compl. ¶¶ 15, 16. Sanford contends that the two assignments to National Union, both made in December 1995, should be read in pari materia – and that since it has standing to sue for payments under the former, the same entitlement should apply to the latter.

As a general principle of contract law, “the assignee is usually the real party in interest and an action on the assignment must be prosecuted in his name.” Wilcox v. Register, 417 Pa. 475, 480, 207 A.2d 817, 820 (1965); see also Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 285, 687 A.2d 1167, 1172 (1997) (“Where an assignment is effective, the assignee stands in the shoes of the assignor and assumes all of his rights.”); West Penn Admin., Inc. V. Pittsburgh Nat’l Bank, 289 Pa. Super. 460, 470, 433 A.2d 896, 902 (1981) (finding that assignor could not bring action as to assigned trust fund). Here, the Surety Loan Agreement unambiguously assigns to National Union the rights of plaintiff’s predecessor – American – to the base fee. Under paragraph 4A of the agreement, American “assign[s] . . . all income . . . related in any way to the [recycling] Project” to National Union. Mot., ex. C, ¶ 4A. The assignment includes “payments of any kind payable” to American from AKI. Id. National Union is also given “the rights to enforce the payments.” Id.

Despite the Surety Loan Agreement's unequivocal language, Sanford argues that the rule of in pari materia should apply. Ordinarily,

when two or more writings are executed at the same time and involve the same transaction, they should be construed as a whole. If the writings pertain to the same transaction, it does not matter that the parties to each writing are not the same. This general rule also applies where several agreements are made as part of one transaction even though they are executed at different times.

Western United Assurance Co. v. Hayden, 64 F.3d 833, 842 (3d Cir. 1995) (citations omitted).

Here, it makes sense to attempt to read together the Surety Loan Agreement and the bonus fee agreement and assignment. All three were executed within six days, concerned payments from the same recycling facility, and had common parties. Doing so, however, does not result in giving plaintiff standing to maintain this lawsuit, for two reasons – one of which is explicitly set forth in the bonus fee agreement itself, as follows:

Nothing in this Agreement is intended to, nor shall, give [American] . . . any additional rights or obligations under the EPC Contract, including, but not limited to, any rights as a third party beneficiary to the EPC Contract . . . except for the right to enforce payment of the 24% of the Bonus Fee assigned to [American] as hereinabove provided.

Resp., ex. A, ¶3; see also resp., ex. B., ¶ 4 (similar language). To find that National Union, as assignee of the surety contract, is a third-party beneficiary as to the base fee would be inconsistent with the parties' clear intent to the contrary.

Moreover, no evidence has been offered to explain why the December 20 assignment of the bonus fee reserved to the assignor the right to enforce payment, while the December 26 assignment did not do so. One inkling may come from the characterization of National Union in the bonus agreement as a "third-party" beneficiary. In the subsequent assignment, the surety is "the assignee." It is also significant that the subsequent assignment embraces both the base and the bonus fees. Since it was entered into shortly after the bonus fee assignment and makes reference to it, its superseding effect would appear to limit plaintiff's rights – and not, as plaintiff claims, expand them. In any event, even if the assignments were read together and in the light most favorable to plaintiff, plaintiff's right to sue would persist for bonus fees due but not base fees. Given the contractual circumstances and the complex detail that went into the voluminous surety assignment, it would have been simple to include a reservation of the right to sue provision. There is no suggestion that this omission was inadvertent.³

Accordingly, plaintiff cannot sue for the base fee, and this action must be dismissed.

Edmund V. Ludwig, J.

³Even if the base fee provisions of the Surety Loan Agreement were construed according to the bonus fee contract, Ahlstrom would probably still prevail. The bonus fee agreement reserved American's right to sue the partnership – not Ahlstrom. Mot., ex. A, ¶ 4. Sanford might have standing to recover from the partnership but not from Ahlstrom.

