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CAUSE NO. 2005-76729

Centerpoint Energy Pipeline Serv., Inc.	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, T E X A S
A&L Underground, Inc., et al.	§	157 th 281 st JUDICIAL DISTRICT

Order

Numerous motions for summary judgment are pending. This order briefly states the disposition of each motion.

Centerpoint's Amended First Motion for Partial Summary Judgment on Equipment Issues. Centerpoint's traditional motion argues that A&L breached the Subcontract for Line 2-AD-24 Pipeline ("Contract") by failing to provide equipment in "first-class operating condition." Specifically, Centerpoint points to the following provisions of the Contract:

- § 2.1: A&L "shall furnish all . . . equipment . . . and whatever else is required to fully perform in a first-class, workmanlike manner in every respect the complete construction" of the pipeline;
- Ex. D to the Contract, § 1.02 (b): A&L "shall furnish all equipment and supplies required for the performance of the Project in the time specified herein. The equipment shall be adequate and serviceable and shall be kept in first-class operating condition. If the condition of any machinery or equipment is such that it would adversely affect the safety or the workmanship of the completed Project, or retard progress, it shall be repaired or replaced with equipment satisfactory to [Centerpoint's] Superintendent or Inspector."

Centerpoint proffers evidence that the equipment was not up to industry standards, and therefore A&L breached the Contract. As a result, Centerpoint argues that was within its rights to terminate A&L for cause.

A&L makes two responses. First, A&L argues that the contract does not require that equipment be first class; rather it requires that the work be performed in a first class manner. However, Ex. D that requires that the equipment be adequate and serviceable and “be kept in first-class operating condition”. Centerpoint attached numerous deposition designations demonstrating that there was an unacceptable degree of equipment failure. A&L provided no evidence to the contrary.

Second, A&L argues that Centerpoint failed to prove that it suffered damages by a breach, if any. Unquestionably, Centerpoint did not present any evidence that A&L’s “breach” caused damage. Rather, Centerpoint argues that, at the minimum, it is entitled to nominal damages as a result of A&L’s conduct. Following oral argument, the parties submitted post-submission briefs on the question of whether nominal damages are allowable in a breach of contract case. Although somewhat divided, the decisions appear to support Centerpoint’s position that nominal damages are available. *See Lubbock Mfg. Co. v. Sames*, 598 S.W.2d 234, 237 (Tex. 1980).

For the reasons stated in its motion and reply, Centerpoint’s Amended First Motion for Partial Summary Judgment on Equipment Issues is granted. Similarly, A&L’s Cross Motion for Summary Judgment on Equipment Issues is denied.

Centerpoint’s Second Motion for Partial Summary Judgment. Centerpoint’s traditional motion argues that many of A&L’s causes of action are barred for a variety of reasons. In response, A&L has re-pleaded and dropped its “wrongful termination,” quantum meruit, and declaratory judgment claim. In response to the remaining issues, A&L submitted affidavits attesting that Centerpoint committed the first material breach of the Contract. The

question is whether such material breach, if it occurred, deprives Centerpoint of its termination rights.

Centerpoint argues that, even if it committed a prior material breach, A&L chose to continue the project, and, as a result, A&L cannot now argue that Centerpoint is precluded from exercising its termination rights. Centerpoint's cites *Chilton Ins. Co. v. Pate & Pate Enter., Inc.*, 930 S.W.2d 877, 887-88 (Tex. App.—San Antonio 1996, writ denied), and this Court agrees with Centerpoint's interpretation.

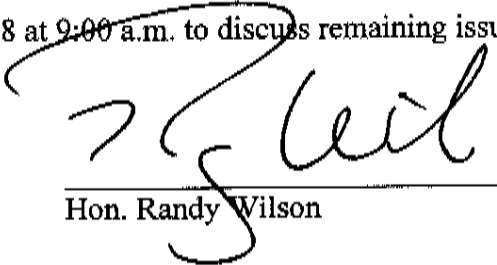
For the reasons stated in the motion and reply, Centerpoint's Second Motion for Partial Summary Judgment is granted.

A&L's Motion for Partial Summary Judgment. This motion is denied.

Finally, Acstar's Motion for Summary Judgment is denied.

A status conference shall be set on Oct. 17, 2008 at 9:00 a.m. to discuss remaining issues.

Signed October 2, 2008.



Hon. Randy Wilson

FILED
Theresa Chang
District Clerk

OCT 03 2008

Time: _____
By _____
Deputy _____
Harris County, Texas