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‘Cannistraro’ gives SJC another chance to offer Prompt Pay Act guidance

Construction bar split on best way forward

■ KRIS OLSON

Members of the construction bar say they are looking forward to the Supreme Judicial Court‘s latest guidance on how to interpret the Prompt Pay Act, even if they disagree on what that guidance should be.

The case *J.C. Cannistraro, LLC v. Columbia Construction Co., et al.*, to be argued on Feb. 2, presents the issue of whether an arbitrator exceeded his authority in allowing a respondent that had missed its deadline to object to a demand for payment to bring a counterclaim seeking recoupment of that payment, which had been “deemed approved” under the act, G.L.c. 149, §29E.

A peculiarity of the *Cannistraro* case is that the arbitrator reached his decision before the SJC issued its 2024 ruling in *Business Interiors Floor Covering Bus. Tr. v. Graycor Constr. Co. Inc.*

In *Graycor*, the SJC held that a “necessary implication” of the “deemed approved” provision in the Prompt Pay Act is that “payment of overdue approved invoices must be made prior to, or contemporaneous with, raising common-law defenses, or the defenses cannot be raised.”

On Dec. 4, 2024, Superior Court Judge Keren E. Goldenberg relied on *Graycor* to allow a motion by the plaintiff in *Cannistraro* to vacate the arbitrator’s award.

As the appellant urges in its brief, the SJC could decide the case on the basis that *Graycor* should not be applied retroactively to the arbitrator’s decision or that, even if the arbitrator made an error of law, the Massachusetts Arbitration Act does not allow for vacatur of his award.

The appellee counters that there is nothing unfair to the appellant in applying *Graycor* retroactively, given that it was aware of its obligations under the act. Retroactive application of *Graycor* would further the act’s purpose of protecting lower-tier subcontractors from improperly delayed payments, the appellee adds.

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But attorneys who filed amicus briefs would prefer if the SJC clarified whether *Graycor*, in the words of one of those briefs, does in fact “nullify disputes on the merits of ‘deemed approved’ applications.”

To some, such a harsh result is not in keeping with the intent behind the Prompt Pay Act. They argue that the “deemed to be approved” provision was only meant to apply to the payment application and not meant to be an adjudication of rights more broadly.

However, the appellee, along with an attorney who authored the act, disagree, pointing to the multiple opportunities the appellant had to avert its fate.

THREE STRIKES, YOU’RE OUT?

The chronology in *Cannistraro* is “critical,” said the appellee’s attorney, J. Nathan Cole of Boston, in an emailed statement.

That chronology begins with defendant Columbia entering a contract to construct and renovate an office

and manufacturing facility in Walpole in 2017 and subsequently hiring plaintiff J.C. Cannistraro to perform heating, ventilation and air conditioning and plumbing work on the project.

Cannistraro submitted the change orders at issue in the early part of 2020. While Columbia purported to reject the plaintiff's change order requests, it did not certify that those rejections were made in good faith until Sept. 20, 2020.

By then, Cannistraro had sued Columbia, asserting breach of contract and other related claims.

In its original answer filed on Sept. 2, 2020, Columbia raised various defenses, including that the plaintiff inflated its claims.

The case was stayed while the parties participated in arbitration. As part of his interim order, the arbitrator found that Columbia had violated the Prompt Pay Act by failing to provide a timely, written rejection that was certified as made in good faith.

As a result, the arbitrator concluded that the total amount of Cannistraro's unpaid applications for payment, $951,855.05, was deemed approved on May 1, 2020, and became due and payable on June 15, 2020. Colombia ended up paying that sum plus interest, but only by the arbitrator's deadline of Sept. 9, 2022, more than two years later.

"That sequence is far from 'prompt payment,' and we believe the trial court correctly ruled that it is prohibited by the PPA and *Graycor*," Cole said.

David E. Wilson

I am very concerned about encouraging the court to rethink something they carefully thought out that makes sense. It's easy to follow. It's fair. Leave it alone.

— David E. Wilson, drafter of Prompt Pay Act

The defendant's attorney, Seth M. Pasakarnis of Boston, had not responded to a request for comment as of Lawyers Weekly's deadline.

What Cole characterized as Columbia's "strategic choices" must carry consequences, Cole argued.

"Otherwise, upper-tier contractors would be strongly incentivized to withhold payments or rejections, forcing lower-tier subcontractors to finance both the construction and any ensuing litigation," he said. "That's just too much for most subcontractors, and many will get rolled by better funded owners and GCs."

Like Cole, the drafter of the Prompt Pay Act, Woburn attorney David E. Wilson, who authored an amicus brief on behalf of the Associated Subcontractors of Massachusetts, is quick to point to the fact that owners and contractors have ample opportunities to preserve their rights under the PPA.

"They have no less than three chances to get it right," he said.

The first opportunity to reject a payment application is when it is first received, Wilson noted. If the contractor is not going to pay, it needs to explain why and certify that it is making its rejection in good faith.

"If they mess that up — they don't do it right, or they don't do it at all — they still have another opportunity to reject it before the date payment is due," he said.

As outlined in *Graycor* and the lower court decision in *Cannistraro*, another chance comes just before the party heads into court or an arbitration proceeding, according to Wilson. If it pays, a party can still raise its defenses.

"That's at least three chances to get it right, so I don't understand the claim that there's some inequitable result here," he said.

'VAST INEQUITIES'

But "inequitable" is exactly what the result in *Cannistraro* is, and the next case could be even worse, argues a brief on behalf of the Associated General Contractors of Massachusetts and related industry groups.

The brief notes that the arbitrator found that most of Cannistraro's "deemed approved" claims were not meritorious. Referring to the arbitrator's determination that Cannistraro had incurred only $375,000 in damages relating to its HVAC and plumbing work, the brief characterizes Goldenberg's ruling as a "massive penalty for a procedural misstep," given that it awarded Cannistraro nearly $600,000 it otherwise would not have received.

"The Trial Court's treatment of *Graycor*'s payment-first condition on raising defenses to enforcement as a categorical waiver of counterclaims and other merits-based recovery theories is an interpretive leap that neither Graycor nor the statute supports," the brief argues.

Given that it will affect all private contracts above $3 million, the *Cannistraro* case is "a big deal for every-

body," said one of the co-authors of that brief, Nicholas A. Dube of Boston.

"We're all watching," he said.

Dube and his colleagues' brief warns of "vast inequities" if the lower court decision in *Cannistraro* is upheld. To illustrate that point, they use the hypothetical of a failure to certify a rejection of a $5,000 invoice invalidating a $1 million counterclaim against the subcontractor for defects that supported the rejection.

"In effect, the Trial Court's rule would convert any unpaid Prompt Pay Act claim into a practical immunity from liability, allowing a procedural misstep on a small invoice to extinguish substantial and otherwise meritorious contractual claims," the brief argues. "Nothing in the statutory text or purpose suggests the Legislature intended such a sweeping forfeiture or such a disproportionate penalty."

In Dube's view, the SJC in *Graycor* was trying to solve a problem: how to incentivize payment when a party is holding onto money in violation of the Prompt Pay Act.

"The question is going to be whether the SJC is going to try and solve all problems itself or to let the usual mechanisms of court — attachments or bonds or things like that — apply," he said.

There is nothing in the express language of the Prompt Pay Act that directly addresses the situation in *Cannistraro*, Dube posited.

In *Graycor*, the SJC added to the statute a waiver of common-law defenses, Dube said.

"The question is going to be how far does the SJC go to keep adding to the stuff that was in the margins or beyond what's in the statute," he said.

JUST WALK AWAY?

Members of the Real Estate Bar Association represent clients that touch all aspects of the construction industry, including contractors, subcontractors, developers, lenders and sureties, noted the author of its amicus brief, Robert W. Stetson of Boston.

Like the general contractors, REBA believes Goldenberg's decision was "a little bit off kilter" from what the text and the purpose underlying the Prompt Pay Act are.

To REBA, the "core question" is whether the Prompt Payment Act is meant to be enforced during construction "in the field" or later, in the courthouse.

Prior to the passage of the Prompt Pay Act, subcontractors would not walk off a project despite not being paid because they were afraid that they were going to be held in breach, Stetson explained.

"When you have the protection of the act, the way it was designed is you can walk off [the job] with that statutory protection," he said.

Where *Cannistraro* goes astray, in REBA's view, is that it allows "late-stage cure" and "forces that leverage shift from the ability to suspend on the project to the courthouse," Stetson said.

"We think that the way that *Cannistraro* has interpreted it, it's really changed the way that the statute was supposed to work, and we hope that the SJC corrects that," he said.

But Wilson said he was "stunned" to read that REBA and the general contractors were advocating for an interpretation of the Prompt Pay Act that would incentivize a subcontractor to "blow up the job" by stopping work rather than encouraging the use of the "interim measure" of trying to recover their money using the legal system.

"The riskiest and most damaging thing that can happen on a construction project is to shut it down and walk off the job," he said.

To Wilson, that is the opposite of the intent of the statute, which was to incentivize payors to make payments by making them aware of the consequences of a failure to do so, including an inability to raise defenses.

Usually, that word to the wise was enough for money to change hands, which was the reason that it took a while — until the Appeals Court's 2022 decision in *Tocci Bldg. Corp. v. IRIV Partners, LLC et al.* — for appellate cases interpreting the Prompt Pay Act to materialize, Wilson suggested.

"My experience was that it was working, and when it didn't work, a couple of phone calls or letters later pointing out: 'You have a problem here; you're not following the Prompt Pay Act properly,' people got paid," he said.

Tocci and *Graycor* clarified the consequences when that does not happen. At most, *Graycor* needs only modest clarification, Wilson argued.

"I am very concerned about encouraging the court to rethink something they carefully thought out that makes sense," he said. "It's easy to follow. It's fair. Leave it alone."