

Nazero Group Pty Limited v Top Quality Construction Pty Limited [2015] NSWSC 232

FACTS

In January 2014 the defendant (Top Quality) entered into an agreement with the plaintiff (Nazero) to provide formwork and concreting works. In January 2014, the defendant served a payment claim for monies owed, which the plaintiff argued were two payment claims sent on one reference date (prohibited by s 13(5) of the Building and Construction Industry Security of Payments Act 1999 (NSW) (“the Act”). The defendant received a determination in its favour, but had not entered a judgment on that basis. The plaintiff commenced proceedings but did not pay into Court the amount of the contested adjudication and Top Quality requested that the proceedings be stayed until the amount was paid into Court.

ISSUES

The mandatory provision of Section 25(4)(b) of the Act requires a respondent commencing proceedings to set aside an adjudication determination to pay into the Court the adjudicated amount owing to the applicant as security, pending the determination by the Court. The plaintiff submitted to the Court that Section 25(4)(b) of the Act did not apply as no judgment had yet been entered. The issue was whether the Court has discretion to order a person seeking to challenge an adjudication to pay the adjudicated amount to the Court pending judgement, where there has been no judgment filed to pay the adjudicated amount.

FINDING

Justice Hammerschlag held that the proceedings should be stayed until Nazero paid into the Court the adjudicated amount.

QUOTE

[33] “A principled approach as to whether a plaintiff should be required to pay money into Court (and if so, how much) where it challenges an adjudication determination, but there is no judgment, requires, because it involves the exercise of discretion, that regard be had to the particular circumstances of the case.....”

[40] ‘.....A general policy aim of the Act is to give enforceable rights to progress payments. Another is to ensure the speedy and effective determination of disputes about them....Where the claimant has not yet obtained judgment, the respondent remains under the statutory obligation to pay...”

[41] “The presence in the Act of s 25(4)(b) gives rise to no implication that the discretion of the Court to make the kind of orders sought here is narrowed. If anything, the fact that discretion is removed in only the particular circumstances where the section applies, indicates that there is discretion in all other circumstances”

Justice Hammerschlag then reasoned at:[42] “...The policy of the Act is not served by removing Top Quality’s protection pending determination of Nazero’s challenge even though s 25(4)(b) of the Act does not apply in terms.”

IMPACT

The general policy of the Act is to require payment into Court of the adjudicated amount in accordance with s 25(4)(b) upon a respondent’s commencement of proceedings to have a judgement set aside. Those who challenge adjudication determinations must pay for the privilege.

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