

**IN THE CIRCUIT COURT FOR
BALTIMORE CITY**

APEX CONTRACTING, INC., *
1018 Weslee *
Paris, KY 40361 *

PLAINTIFF, *

v. * Case No. _____

MARYLAND STATE HIGHWAY *
ADMINISTRATION, *
707 North Calvert Street *
Baltimore, MD 21202 *

Serve on: *

William Kahn *
Assistant Attorney General *
State of Maryland *
Office of the Attorney General *
Contract Litigation Unit, 17th Floor *
200 St. Paul Place *
Baltimore, MD 21202 *

DEFENDANT. *

* * * * *

**MEMORANDUM IN SUPPORT OF COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiff, Apex Contracting, Inc. (“Apex” or “Plaintiff”), by and through its counsel, Scott A. Livingston and Lydia B. Hoover of Rifkin, Livingston, Levitan & Silver, LLC, hereby files this Memorandum in Support of Complaint for Declaratory Judgment.

LEGAL ARGUMENT

Plaintiff hereby incorporates the factual matters set forth in the Complaint for Declaratory Judgment.

The legal issue is whether the Maryland State Board of Contract Appeals (the “MSBCA”) has jurisdiction to hear and decide the merits -- -- in whole or in part or not at all -- -- of the Counterclaim brought by the Defendant, Maryland State Highway Administration (“SHA” or Defendant”) on April 27, 2000.

I. MFE Does Not Allow for the MSBCA's Jurisdiction to Grant Relief Requested by SHA.

The Court of Appeal's decision in University of Maryland v. MFE Inc./NCP Architects, Inc., 345 Md. 86 (1997) authoritatively decided that executive agencies, such as SHA, are not entitled to have the MSBCA decide claims brought against a contractor. This Court should follow the Court of Appeals opinion and declare that the MSABC lacks jurisdiction over the claims SHA brought.

In the alternative, the MSBCA has jurisdiction to have the MSBCA hear the merits of the claim up to the \$133,938.94 because this amount has been withheld by the agency from sums otherwise due. MSBCA may consider evidence in defense of Apex's claims and may grant SHA relief, in the nature of a set-off against sums otherwise recoverable by Apex on its claims, as Appellant in the administrative forum. In light of this alternative argument, SHA cannot be awarded damages against Apex for any portion of the \$553,021.02 , *ie.* the amount exceeding \$133,938.94 up to the \$686,960.00 liquidated damages which the Procurement Officer found Apex was liable for in the decision of May 10, 2000.

In MFE, the University of Maryland and MFE entered into a contract in 1981 for MFE to provide plans and specifications for certain university buildings. Twelve years passed after full payment of the design contract and after completion of the construction based on MFE's plans and specifications. At that point, the University sent notice to MFE that it was asserting a claim of \$2.4 million for costs incurred by the University as a result of MFE's alleged defective plans and specifications. Id. at 89.

The Court of Appeals held that the MSBCA lacked jurisdiction over the claim by the University. When the University asserted its claim, the State was not withholding any money owed to MFE under the contract. The Court found that the University was not attempting to “set off” its claim against funds otherwise due to MFE but rather was seeking to have MFE affirmatively pay the amount of the claim to the University.” Id. The Court held that the MSBCA administrative procedures do “not apply to a claim such as this one – an attempt by a State agency to force a former contractor to pay over money not then being held by an agency under the contract.” Id. at 92.

In reaching its determination that the MSBCA lacked jurisdiction, the Court discussed the legislative history of the State Finance and Procurement Article (the “Procurement Article”) and title 21 of COMAR, which are the implementing regulations for the Procurement Article. The Court discussed discrepancies between the Procurement Article and COMAR. Notably, the Procurement Article does not allow for claims (or MSBCA jurisdiction over such claims) by the State, although COMAR did not indicate any bar to such claims by the governing State. The Court of Appeals chose to read the Procurement Article and COMAR harmoniously, despite the discrepancies.

The Court noted that nothing in the legislative history or the record revealed why the Legislature chose not to provide for claims by the State – against the Contractor -- in the Procurement Article. Id. at 102. The Court stated:

It may not be the best approach, but it is not a wholly unreasonably one, and certainly not one that would make a plain reading of the statute absurd. *Ordinarily, a governmental unit having a claim against a contractor will know of the basis for its claim before it has accepted performance and paid the full amount of the contract price. In that circumstance, all the unit need to do is make a claim and inform the contractor that the claim will be set off against funds owing on the contract. The contractor would then make a claim for the disputed amount, which would be subject to the BCA procedure.* In most instances, therefore, it is unnecessary to make specific provision for the administrative adjudication of State contract claims. They can effectively be adjudicated in the context of the contractor's claim.

(Emphasis added). Id. at 102-03.

In accordance with MFE, Apex arguably presents the “ordinary” situation of a government claim against a contractor that is allowable after MFE. SHA withheld \$133,938.94 of the original Contract sum for retainage; therefore, arguably the MSBCA may rule on the validity of SHA's assessment of liquidated damages against Apex. Apex filed a claim against SHA for additional compensation for \$1,562,838 in order to recover funds including the \$133,938.94 that SHA failed to pay Apex pursuant to the original Contract sum. On May 20, SHA issued a final decision of the procurement officer that found SHA was entitled to \$686,960 and likewise filed its Answer demanding \$686,960 in a counterclaim. This presents an analagous situation of an allowable State claim contemplated by MFE. Arguably, the MSBCA has jurisdiction to hear the merits of Apex's claim and the merits of the circumstances surrounding the \$133,938.94 withheld by SHA. In the instant case, this \$133,938.94 represents the amount which the Court of Appeals contemplated would be “set off against funds owing on the contract.”

Clearly, the Court of Appeals ruled that the MSBCA's jurisdiction does not extend to claims *in excess* of the amount withheld by the State (of moneys appropriated for the original Contract). Apex is pleased SHA did not withhold more than the \$133,938.94 on the \$2,456,343.30 Contract. SHA might contend it could have chosen to withhold a total of

\$686,960 of the original Contract funds (although Apex would have taken the position that neither \$133,938.94 nor \$686,960 should have been withheld). If SHA had withheld such sums, then Apex might have filed its claim and SHA could have defended against Apex by using \$686,960 funds “to be set off against funds owing on the Contract.”

As of December 1996, when Apex substantially completed the work, SHA knew that this completion date came long after the original contract completion date (June 1995). SHA knew of its basis for its tardy claim of \$686,960 prior to paying all but \$133,938.94 of the original Contract sum. Despite this knowledge, SHA paid out \$553,021.06 and chose to withhold only \$133,938.94.

Based on MFE, the MSBCA does not have jurisdiction to hear the merits of SHA’s counterclaim in the full amount of \$686,960. At most, the MSBCA only has jurisdiction to hear the merits of SHA’s Counterclaim for \$133,938.94, but can grant no relief with respect to the \$553,021.06 ($\$686,960 - 553,021.06 = \$133,938.94$).

II. Exhaustion of Administrative Remedies Is Unnecessary

While a party may not normally pursue a declaratory judgment action in court until it has exhausted any available administrative remedies, Apex is not required to seek relief at the MSBCA level in this case. See e.g., Abington Ctr. Assoc. Ltd. Ptrship. v. Baltimore County, 115 Md. App. 580, 590-93 (1997).

There are no remedies for Plaintiff to pursue through any administrative body, including the MSBCA. Based on MFE, the MSBCA only has jurisdiction to hear claims on the merits by the State pertaining to moneys appropriated for the original Contract *and* withheld by the State (i.e., the \$133,938.64 withheld by the State). In the instant case, the MSBCA does *not* have jurisdiction to hear SHA’s claims for \$686,960 damages in excess of the \$133,938.64 withheld by

SHA. Accordingly, because of the MSBCA lacks jurisdiction, there is no remedy available to Apex at the MSBCA and this declaratory judgment action is proper. See e.g., Abington Ctr., 115 Md. App. at 593 (noting exceptions to the exhaustion of administrative remedies, including cases where there is no administrative remedy or when the administrative remedy is not adequate). Also, in view of MSBCA's decision in the appeal of Alcatel NA Systems, Inc., Docket Nos. MSBCA 2072 & 2073 (Feb. 23, 1999), it would be an exercise in futility to seek administrative relief.

A judgment in Plaintiff's favor in this declaratory judgment action will bar the administrative, as distinguished from judicial, forum in which SHA may pursue its breach of contract claims (which Apex contends are not valid) especially for the additional \$553,021.06 (\$686,960 - \$133,938 = \$553,021) SHA alleges Apex owes based on SHA's assessment of liquidated damages for breach of the Contract. In the event SHA seeks judicial relief for its claims (which Apex contends are invalid), a circuit court may properly dispose of the claims. It would be inconvenient for similar issues to be litigated in two different fora, but this is not an issue for this Court; it is an issue that the Legislature may choose to address. This prospect of conflicting decisions can best be avoided if this Court declares MSBCA lacks jurisdiction to resolve the claims for \$686,960.

A declaratory judgment by this Court is appropriate in these circumstances.

WHEREFORE, the Plaintiff requests:

1. A declaratory judgment that the MSBCA lacks subject matter jurisdiction to hear and decide breach of contract claims brought by SHA arising out of Contract No. P-109-509-324.

- a. Apex is not required to exhaust any administrative remedies, or otherwise defend itself against a claim of breach of contract (including a counterclaim for breach of contract) brought by SHA.
 - b. The MSBCA lacks jurisdiction and, therefore, no adequate administrative remedy exists for the disposition of this matter.
2. In the alternative, a declaratory judgment that the MSBCA has jurisdiction to rule on SHA's claim (or counterclaim) up to the point of \$133,938.64.
 - a. The MSBCA may consider whether this amount may be set-off against the compensation, if any, due to Apex in the MSBCA's decision on Apex's claims.
 - b. No adequate administrative remedy exists for the disposition to the extent SHA's claim exceeds \$133,938.64. This is because the MSBCA lacks jurisdiction to resolve claims in excess of undisbursed funds appropriated for this Contract.
3. This Court issue an injunction to prohibit the MSBCA from hearing and deciding a claim (or counterclaim) against Apex for amounts in excess of the funds appropriated, but not paid out, under the Contract.

4. This Court will retain authority, in aid of its jurisdiction, to enforce these rulings.
5. This Court provide such other and further legal and equitable relief it deems appropriate.

Respectfully Submitted,

Scott A. Livingston
Lydia B. Hoover
Rifkin, Livingston, Levitan & Silver, LLC
Harbor Court, Suite 200
575 S. Charles Street
Baltimore, MD 21201
(410) 837-9700

Attorneys for Plaintiff