Commonwealth of Massachusetts
County of Suffolk
The Superior Court

CIVIL DOCKET#: **SUCV2008-03436-D**

RE: Travelers Property Casualty Company of America v Universal Drywall LLC

TO: Garrett J Harris, Esquire
Gallagher & Associates PC
14 Summer Street
Suite 102
Malden, MA 02148

NOTICE OF DOCKET ENTRY

You are hereby notified that on **10/19/2011** the following entry was made on the above referenced docket:

JUDGMENT ON FINDINGS OF THE COURT That the plff recover of deft the sum of $327,356.00 entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pusuant to Mass R Civ P 77(d)
Dated at Boston, Massachusetts this 19th day of October, 2011.

Michael Joseph Donovan,
Clerk of the Courts

BY: Jane M. Mahon
Assistant Clerk

Telephone: 617-788-8110

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Commonwealth of Massachusetts
County of Suffolk
The Superior Court

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CIVIL DOCKET# **SUCV2008-03436**

Travelers Property Casualty Company of America,
Plaintiff(s)

vs.

Universal Drywall LLC,
Defendant(s)

JUDGMENT ON FINDING OF THE COURT

This action came on for trial before the Court, Geraldine S. Hines, Justice, presiding, and the issues having been duly tried, and finding having been rendered,

It is **ORDERED and ADJUDGED:**

That the plaintiff (s), Travelers Property Casualty Company of America, recover of the defendant(s) Universal Drywall LLC, the sum of **$327,356.00**.

Dated at Boston, Massachusetts this 17th day of October, 2011.

By: .... Assistant Clerk

Entered: 10/17/2011

Notice
sent
10/19/11
GJH
GTT
FPS jr
WMAMYS
MJV
SPB&G
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JUDGMENT ENTERED ON DOCKET Oct 19 20 11
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

TRUE COPY OF JUDGMENT DULY ENTERED ON 10/19/11

cvdjudtrip_1.wpd 3380369 inidoc01 mahonjm

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION No. 2008-3436-D

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

vs.

UNIVERSAL DRYWALL, LLC

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

Notice SENT 10.17.11 GJH G+A Soc FPSJR HmAmts PC mgv SAB TG (md)

Introduction

Plaintiff filed this action asserting a claim for breach of contract against Defendant. Plaintiff seeks to recover damages caused by Defendant's failure to pay the full premium owed under a workers' compensation insurance policy. The insurance policy was effective from August 1, 2005 to August 1, 2006. The policy required that Defendant pay a premium based upon the number of Defendant's employees or other individuals who could receive workers compensation benefits.

This matter was tried to this court sitting without a jury from February 15-16, 2011. During the trial, the court heard testimony of the witnesses and received the exhibits offered by the parties. Based on the credible evidence and reasonable inferences drawn therefrom, I find and rule as follows.

FINDINGS OF FACT

Universal Drywall, LLC ("Universal") is a limited liability company incorporated in New Hampshire and registered to do business in Massachusetts. Its primary place of business is Auburn, New Hampshire. Richard Pelletier and Real Tanguay are co-owners of Universal. The

nature of its business is drywall installation in commercial and residential buildings. On August 1, 2005, Universal submitted an application for workers' compensation insurance to the Workers' Compensation Rating and Inspection Bureau of Massachusetts ("Rating Bureau"), in accordance with G. L. c. 152, § 65A. The Rating Bureau assigned Universal to Travelers Property Casualty Company of America ("Travelers"). Travelers issued a workers' compensation insurance policy effective from August 1, 2005, to August 1, 2006. Pursuant to Universal's application and the assignment from the Rating Bureau, the policy was subject to Massachusetts workers' compensation laws.

In accordance with the terms of the policy, Massachusetts law, and Rating Bureau regulations, Travelers determined the premium for the policy by the classification codes applicable to Universal's options, the remuneration or other premium basis attributable to each code, and the regulated rates applicable to each code. Universal's business records were subject to audit by Travelers for the purpose of determining the policy's premium basis. The payroll used for this audit was based upon Universal's work in Massachusetts, separate from its work in New Hampshire. Because the insurer is liable to any person entitled to benefits under the workers' compensation law, it is entitled to collect a premium for exposure to that risk. G. L. c. 152, §§ 55, 65A, 65I; see Locke, Workmen's Compensation § 126, p. 132 (2d ed. 1981). Based upon the final audit of the policy period, Travelers determined that the final additional earned premium, less the amounts paid by Universal, was $327,356.00.

During the policy period, Universal entered into or performed under several construction subcontracts across Massachusetts. Most of Universal's work in Massachusetts involved large multi-unit residential projects, including Brooksby Village (in Peabody), Linden Ponds (in

Hingham), Sherburne Commons (in Nantucket), and Arbor Point (in Burlington). At these sites, Universal subcontracted to provide drywall and metal framing services. According to the subcontracts, Universal was to supply all labor, materials, and an appropriate workforce to complete the job. This workforce was made primarily of individuals referred to as "independent contractors." All individuals who performed drywall-related services for Universal signed documents referred to as "independent contractor agreements." None of these contracts specified that an individual was hired for a single particular job. These individuals were paid every two weeks, required to carry liability insurance, and issued I.R.S. Form 1099 rather than W-2. Universal required that these individuals provide workers' compensation insurance coverage for any of their employees, but did not require any of the individuals to obtain workers compensation coverage for themselves.. Further, Universal required these individuals to sign in and out at job sites. When a time sheet indicated only the hours worked by an individual, Universal paid the individual on an hourly basis.

In order to perform its subcontracts, Universal was required to have a full-time field representative (or "foreman") present at all job sites. These foremen were responsible for inspecting the work, reviewing blueprints, and otherwise directing the workers at Universal's construction sites. They served as Universal's representatives at job sites. The foremen also received direction from Universal, and if a job was not moving quickly enough, the foremen would "speed up" the workers. (Testimony of David Hovey). Despite this control, all of the foremen signed the "independent contractor agreements" when hired. All foreman reported to Richard Pelletier or Real Tanguay.

The drywall subcontracts Universal signed further show the control that Universal had over its "independent contractors." The Sherburne Commons subcontract provided for payment to Universal of $36,000 for housing and $8,960 for meals for Universal's "employees." An addendum to this subcontract, which Universal signed, stated that any subcontractor employed on the project agreed not to use its own independent contractors. Further, the addendum required Universal to provide "proof of Worker's Compensation insurance coverage for all individuals working on [the job site] for [the] duration of subcontractor's work on the project." (Travelers Ex. 12). Additionally, the Brooksby and Arbor Point subcontracts each required Universal to designate a full-time foreman who could not be substituted without consent.

Universal expected its workers to be at a job site for eight hours a day to complete their work. If necessary, Universal required overtime and weekend work to finish a job to Universal's specifications. If a worker did not meet Universal's expectations, Universal would "let them go, and hire someone else." (Testimony of Richard Pelletier). These individuals were not free from control and direction in connection with the performance of their work. Though the "independent contractors" brought their own tools to the job site, Universal's employees also brought their own tools. Universal allowed workers to use a company pick-up truck if they needed to bring materials back to the job site, and reimbursed those individuals for any materials purchased for their jobs.

RULINGS OF LAW

Massachusetts law presumes that persons in the service of another under a contract of hire are employees. See G. L. c. 149, § 148B. "The Workmen's compensation act is to be construed broadly to include as many employees as its terms will permit." Warren's Case, 326 Mass. 718,

719 (1951). Individuals are considered employees unless (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; (2) the service is performed outside the usual course of the business of the employer; and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. G. L. c. 149, § 148B. The burden of rebutting this presumption lies with the employer, which must establish all three elements of the exception. Athol Daily News v. Board of Review of Div. of Employment & Training, 439 Mass. 171, 175 (2003).

To determine whether a worker is an employee or an independent contractor for purposes of the workers' compensation act, the finder of fact must weigh all of the circumstances of the contract of hire. Strong's Case, 277 Mass. 243, 245-246 (1931). The standard of analysis is the same as that of the common law of agency. Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 591 n.13 (2000). If the right of control exists, even if that right was not exercised, the worker is an employee. McDermott's Case, 283 Mass. 74, 76 (1933). A right of control likely exists if (1) an employee is paid based upon the time worked, (2) an employee is provided equipment and materials by the employer, and/or (3) the relationship can be terminated without any liability on the part of the employer.[1] Brigham's Case, 348 Mass. 140, 141-42 (1964);

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[1] In MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992), the Court listed the relevant factors as: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Commonwealth v. Savage, 31 Mass. App. Ct. 714, 717-718 (1991); MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992). "A worker whose services form a regular and continuing part of the employer's business, and whose method of operation is not such an independent business that it forms in itself a separate route through which his costs of industrial accidents can be channeled, should be found to be an employee and not an independent contractor." Id. at 177.

The court considers the following facts in determining whether someone acting for another is a servant or an independent contractor. In this case, Universal had nearly complete control over its workers. Foremen reported directly to Richard Pelletier or Real Tanguay, and those foremen oversaw virtually every aspect of the work done at each job site. Foremen directed the workers on the job sites, and told them to "speed up" work if necessary to complete a job. If the workers did not meet satisfactory performance standards, they could be fired. Workers signed time sheets at job sites, and Universal paid them by the hour - not by the job. Universal paid the workers every two weeks, and did not limit them to work at one particular job site. Universal reimbursed workers for travel between job sites, and for the purchase of materials needed in order to perform their jobs.

Universal was in the regular business of providing drywall-related services on construction sites throughout Massachusetts and New Hampshire. Typically, this type of work is directed by the employer. In other words, a subcontractor like Universal oversees the work done at job sites in order to ensure that the job is completed to the specifications of the contract. In fact, many of the subcontracts Universal signed required that Universal oversee the job through a foreman who would be present at all times on the job site. Coordinating a drywall project on

large construction projects like those for which Universal subcontracted requires many workers, so the requirement for supervision is typical on such projects. Therefore, Universal's workers could not be said to be "specialist[s] without supervision."

Finally, though Universal's "independent contractors" brought their own tools, Universal's own employees also brought their own tools. Merely bringing tools to a job site does not greatly affect a worker's status as an employee. See Locke, Workmen's Compensation, § 144, p. 146 (2d ed. 1981) ("The finding that the claimant is an employee is little affected by his ownership of personal tools of the trade, customarily possessed by mechanics and tradesmen."). Additionally, Universal provided pick-up trucks for any worker who needed to purchase materials to bring back to the job site.

Perhaps most importantly, the relationship between Universal and its workers could be terminated without any liability on the part of the employer. If Universal determined that an employee did not perform satisfactorily, Universal could "let them go, and hire someone else." (Testimony of Richard Pelletier). This is highly persuasive in the determination of a worker's status as employee. See MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. at 177. Universal had the right of control; the workers acted as agents on behalf of Universal.

The workers hired by Universal were not independent, and in fact were a "regular and continuing part of [Universal's] business . . . [who] should be found to be . . . employee[s] and not . . . independent contractor[s]." MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992) (citing A. Larson, Workmen's Compensation, Desk Edition, § 43.50 at 8-10). The workers were an integral part of Universal's business, necessary for the completion of the large subcontracts Universal undertook throughout Massachusetts. The facts make it clear

that Universal had near complete control over every aspect of their work, and treated them as employees rather than independent contractors.

Weighing all of the circumstances of the contract of hire, Universal's workers were person who could cause Travelers to be liable under the Policy to pay benefits in accordance with the workers' compensation law. Because of this exposure to liability, Travelers was entitled to collect an additional premium of $327,356.00, which Universal refused to pay. Therefore, Universal's failure and refusal to pay the additional premium was a breach of contract. Travelers is entitled to damages in the amount of $327,356.00.

ORDER

Based on the foregoing, it is hereby **ORDERED** that judgment shall enter in favor of Plaintiff, Travelers Property Casualty Company of America, in the amount of $327,356.00.

Geraldine S. Hines
Justice of the Superior Court

Dated: October 4, 2011

Notice SENT
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