

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 120246-U

NO. 4-12-0246

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 30, 2013
Carla Bender
4th District Appellate
Court, IL

CW3M COMPANY, a Delaware Corporation; and BILL)	Appeal from the
SINNOTT,)	Circuit Court of
Plaintiffs-Appellants,)	Sangamon County
v.)	No. 09CH415
THE DEPARTMENT OF LABOR; and CATHERINE)	Honorable
M. SHANNON, Director of The Department of Labor,)	John W. Belz,
Defendants-Appellees.)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying CW3M's motion for summary judgment and granting the Department's cross-motion for summary judgment on CW3M's declaratory judgment action where a colorable argument exists the Department has statutory authority to subpoena CW3M's records.

¶ 2 In a declaratory judgment action, plaintiffs, CW3M Company and Bill Sinnott (hereinafter referred to collectively as CW3M) and defendants, the Illinois Department of Labor and its Director, Catherine M. Shannon (hereinafter referred to collectively as the Department), filed cross-motions for summary judgment concerning whether remediation work performed by CW3M on leaking underground storage tanks was subject to the Prevailing Wage Act (Act) (820 ILCS 130/1 to 12 (West 2008)). The trial court denied CW3M's motion for summary judgment and granted the Department's cross-motion for summary judgment. CW3M appeals, arguing the court's judgment was error. We affirm.

¶ 3

I. BACKGROUND

¶ 4 CW3M is an engineering company engaged in the business of soil and ground water cleanup. In July 2003, the estate of Tony Bugaieski (Bugaieski) hired CW3M to remove a leaking underground storage tank from a closed Sesser, Illinois, gas station. In March 2005, Roadway Investments Inc. (Roadway) hired CW3M to complete a nearly identical project in Cairo, Illinois.

¶ 5 Following the completion of each project, CW3M sought reimbursement through the Illinois Environmental Protection Agency (EPA) on behalf of Bugaieski and Roadway from the Illinois Leaking Underground Storage Tank Program (LUST Program) (415 ILCS 5/57 (West 2004)). The purpose of the LUST Program includes the following:

"(1) to adopt procedures for the remediation of underground storage tank sites due to the release of petroleum *** from certain underground storage tanks or related tank systems; (2) to establish and provide procedures for a Leaking Underground Storage Tank Program which will oversee and review any remediation required for leaking underground storage tanks, and administer the Underground Storage Tank Fund [(Fund)]; (3) to establish [a] [Fund] intended to be a State fund by which persons who qualify for access to the [Fund] may satisfy the financial responsibility requirements under applicable State law and regulations; (4) to establish requirements for eligible owners and operators of underground storage tanks to seek payment for any costs associated with physical soil classification, groundwater

investigation, site classification and corrective action from the [Fund]; and (5) to audit and approve corrective action efforts performed by Licensed Professional Engineers." 415 ILCS 5/57 (West 2004).

¶ 6 EPA approved both of CW3M's reimbursement requests. Following EPA's disbursement of those funds, the Department contacted EPA and Bill Sinnott, an officer of CW3M, requesting documents concerning the Bugaieski and Roadway projects. The request for documents related to the Department's investigation into CW3M's potential violation of the Act, which requires employees of public works contractors be paid wages equaling or exceeding the local prevailing wage. EPA responded it did not possess the requested documents. CW3M did not comply with the Department's request.

¶ 7 In November 2008, the Department served Sinnott and CW3M with subpoenas *duces tecum* for documents, including payroll records, relating to those projects. In response, CW3M filed with the Department a motion to quash the subpoenas, arguing the Department lacked the authority to issue the subpoenas because the Act did not apply to the projects at issue. The Department denied the motion to quash without a hearing.

¶ 8 On May 29, 2009, CW3M filed a complaint against the Department seeking a declaratory judgment the Act did not apply to the Bugaieski and Roadway projects.

¶ 9 On June 29, 2009, the Department filed a motion to dismiss CW3M's complaint, arguing the case did not present an actual controversy because the Department had neither concluded its investigation nor determined whether the projects were subject to the Act. The trial court denied the Department's motion.

¶ 10 In August 2010, the Department filed its answer to CW3M's complaint as well as a counterclaim, seeking a civil contempt finding against CW3M for its failure to comply with the Department's subpoenas.

¶ 11 On August 18, 2011, CW3M filed a motion for summary judgment, arguing (1) the legislature did not intend the Act to apply to LUST projects, (2) neither Bugaieski nor Roadway are "public bodies" as defined by the Act, and (3) the work performed by CW3M does not meet the Act's definition of "public works."

¶ 12 On October 6, 2011, the Department filed a cross-motion for summary judgment, arguing (1) Bugaieski and Roadway are "public bodies" because they received public funds and (2) the Bugaieski and Roadway projects qualify as "public works" under the Act. To its motion, the Department attached an affidavit from Thomas Whalen, the Department's conciliation and mediation division manager. According to the affidavit, the Department considers the following activities to be included in the term "construction" as used by the Act:

a. Work performed in uncovering, venting, removing, cutting ends off, cleaning, and scrapping underground storage tanks;

b. Work performed in removing the soil in the immediate vicinity of the underground storage tanks;

c. Work performed in the transportation and placement of clean backfill material with respect to the underground storage tanks;

d. Work performed in the excavation and placement back into the excavation of non-contaminated soil with respect to the underground storage tanks."

¶ 13 In its February 14, 2012, order, the trial court denied CW3M's motion for summary judgment, granted the Department's cross-motion for summary judgment, and ordered CW3M to comply with the Department's subpoenas. Specifically, the court found the following:

"1. That [CW3M] contracted with [Bugaieski and Roadway] to perform remediation work on leaking underground storage tanks;

2. That Bugaieski and Roadway were, at least in part, paid for this remediation work with public funds, and as such, are both considered 'public bodies' as defined by the [Act];

3. That the [Department] construes the Act to include the remediation work performed by CW3M as falling within the Act's definition of 'construction' (as the Act existed at the time the remediation work was performed), and further, the Court finds the Department's statutory construction reasonable;

4. That the [Department] properly served [CW3M] with subpoenas *duces tecum* but that [CW3M] ha[s] not produced the documents sought in those subpoenas."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 A. Scope of Appeal

¶ 17 On appeal, CW3M argues the trial court erred in granting the Department's cross-motion for summary judgment and requiring CW3M to comply with the Department's subpoenas. Specifically, CW3M contends the Department lacked the authority to issue CW3M

subpoenas under the Act because (1) Bugaieski and Roadway are not "public bodies," (2) the Bugaieski and Roadway projects were not "public works," and (3) the legislature did not intend the Act to apply to the kind of work performed by CW3M.

¶ 18 The Department argues, *inter alia*, this appeal is premature. The Department contends this case fails to present an actual controversy where the Department has not yet determined CW3M must pay the prevailing wage. However, the Department prevailed below and did not file a cross-appeal as required by Supreme Court Rule 303(a)(3). See Ill. S. Ct. R. 303(a)(3) (eff. May 30, 2008). "Appellees may not argue alleged errors unless they timely file a cross-appeal." *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1024, 905 N.E.2d 920, 927 (2009). "When an appellee does not file a cross-appeal, the reviewing court is confined to the issues presented by the appellant." *Martis*, 388 Ill. App. 3d at 1024, 905 N.E.2d at 927. As a result, we will not address the Department's argument.

¶ 19 B. Standard of Review

¶ 20 "Summary judgment is appropriate whenever the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show there is no genuine issue of material fact between the parties and that the moving party is entitled to judgment as a matter of law." *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 228, 864 N.E.2d 176, 185 (2007). We review a trial court's grant of summary judgment *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 21 C. Administrative Subpoenas

¶ 22 While much has been made by both parties in their briefs and during oral argument regarding whether Bugaieski and Roadway were public bodies engaged in public works, this case

is really about CW3M's challenge of the Department's authority to subpoena its records. CW3M argues the Act did not apply to the Bugaieski and Roadway projects and thus the Department lacks subpoena power over CW3M in this situation. However, the ultimate issue of whether CW3M must pay prevailing wage was not before the trial court and is not before this court. Instead, we examine whether a colorable argument can be made the Department has authority to issue subpoenas to CW3M. For the reasons that follow, we find that it does.

¶ 23 "In testing the validity of an administrative subpoena, the appropriate considerations are: (1) the constitutionality of the statute, (2) whether the contemplated agency proceedings are included within the statutory authority, (3) the reasonableness of the demand, and (4) the relevance of the information sought." *Scott v. Ass'n for Childbirth at Home, International*, 88 Ill. 2d 279, 296, 430 N.E.2d 1012, 1021 (1981).

¶ 24 In this case, CW3M has not challenged the Act's constitutionality. As to the third and fourth factors, the Department's request for payroll records as part of its investigation into whether CW3M had paid prevailing wages is both reasonable and relevant. As to the second factor, our review is limited to whether the Act contemplates the Department's power to subpoena records as part of an investigation. *Illinois Department of Public Aid v. Kessler*, 72 Ill. App. 3d 802, 805, 391 N.E.2d 160, 162 (1979) (in the context of administrative subpoenas, courts cannot consider, *inter alia*, whether an agency has probable cause for contemplated agency proceedings); *Scott*, 88 Ill. 2d at 292, 430 N.E.2d at 1019 (the validity of an administrative subpoena does not depend on pendency of a formal charge or probable cause to believe a violation has occurred).

¶ 25 Here, section 6 of the Act charges the Department with authority to enforce the Act.

820 ILCS 130/6 (West 2010). Section 10 of the Act expressly affords the Department authority to subpoena records as part of an investigation into the Act's enforcement. 820 ILCS 130/10 (West 2010); *People ex rel. Bernardi v. Lawrence & Ahlman, Inc.*, 105 Ill. App. 3d 470, 471, 434 N.E.2d 503, 504 (1982) (Department's investigative powers include the authority to subpoena records relative to the matter under investigation). An investigation into the Act's enforcement is precisely what the Department was engaged in when it requested the records from CW3M. Thus, the Department had statutory authority to subpoena CW3M's records.

¶ 26 Accordingly, the trial court did not err in denying CW3M's motion for summary judgment and granting the Department's cross-motion for summary judgment on CW3M's declaratory judgment action. We make no finding regarding whether CW3M was required to pay prevailing wage. That determination is left to the Department following its review of the requested documents and the completion of its investigation.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment.

¶ 29 Affirmed.