M. Chelman

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

EASTERN STEEL CONSTRUCTORS, INC. Plaintiff,	:	
v.	:	No. 2011-3233
INTERNATIONAL FIDELITY INSURANCE COMPANY Defendant.	:	
Attorney for Plaintiff:		*David Michelman, Esquire*
Attorney for Defendant:		*Avrum Levicoff, Esquire*

OPINION AND ORDER

Kistler, J.

Presently before this Court are Preliminary Objections filed by International Fidelity Insurance Company (hereinafter "Defendant") on November 29, 2011. Briefs for both parties were submitted to the Court, and oral argument was heard on January 30, 2011. Defendant's Preliminary Objections are OVERRULED.

BACKGROUND

This case arises out of a dispute between a contractor (Ionaldi) and one of its subcontractors (Eastern Steel) over payment for services rendered in the construction of the Millennium Science Center at Penn State University. Defendant was the surety issuer for a ten million dollar bond on the construction project for Ionaldi. After the construction was complete, Ionaldi failed to pay Plaintiff for some amount of their work, and subsequently Ionaldi declared bankruptcy. Plaintiff alleges that Defendant has failed to perform its obligations pursuant to the Payment Bond.

DISCUSSION

Defendant has raised several preliminary objections to the complaint filed by Plaintiff, all in the form of demurrers. A party may file a Preliminary Objection to a pleading under Pa.R.C.P. No. 1028 on the grounds of legal insufficiency (demurrer). *See* Pa.R.C.P. No. 1028(a)(4).

> When reviewing the dismissal of a complaint based upon preliminary objections in the nature of a demurrer, we treat as true all well-pleaded material, factual averments and all inferences fairly deducible therefrom. Where the preliminary objections will result in the dismissal of the action, the objections may be sustained only in cases that are clear and free from doubt. To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objections.

Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa., 2010 WL 3609368 (Pa. Super. Ct. 2010) (citing *Burgoyne v. Pinecrest Cmty. Ass'n*, 924 A.2d 675, 679 (Pa. Super. Ct. 2007)).

I. Demurrer to Count I

Defendant demurs to Count I on the grounds that Section 11 of the Payment Bond is a condition precedent which bars Plaintiff from seeking relief when the condition has not been met. Section 11 states that:

> No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the location in which the work or part of the work is located or after the expiration of one year from the date (1) on which the Claimant gave the notice required by Subparagraph 4.1 or Clause 4.2.3, or (2) on which the last labor or service was performed by anyone under the Construction Contract, whichever of (1) or (2) first occurs.

Defendant fails to show, however, an express intent to create a condition precedent in the crafting of the surety bond's Section 11. Plaintiff correctly notes that the Payment Bond does not use the words "condition" or "condition precedent" in Section

11, but indeed uses such language in other sections, showing an understanding of the need and effect of such terminology. *See* Payment Bond, §§ 4, 6. Pennsylvania law indicates that a provision of a contract will not be read as requiring a condition precedent in the absence of clear intent to do so. *American Leasing v. Morrison Co.*, 454 A.2d 555, 559 (Pa. Super. Ct.1982). Defendant's demurrer to Count I is OVERRULED.

II. Demurrer to Count II/Motion to Strike Count II

Defendant filed a demurrer to count II, or in the alternative, a Motion to Strike count II. Defendant argues that Plaintiff should not be permitted to plead count II, as it represents a duplicate or substantially similar claim to count I. Defendant's Preliminary Objection is without merit as alternative pleading is expressly permitted by the Pennsylvania Rules of Civil Procedure. Pa.R.C.P. No. 1020. Alternate claims for relief are permissible, and it will fall to the jury to determine which, if any, cause of action entitles the plaintiffs to relief. Defendant's demurrer and Motion to Strike count II are OVERRULED.

III. Demurrer to Count III

Defendant's objection to count III, an action in assumpsit under the Public Works Bond Law, rests not with the contention that the law does not authorize such an action, but instead on the premise that this bond is not subject to the law. It is without contention that 8 PA.C.S.A. § 194(a) expressly authorizes an action in assumpsit for a party not in privity with the surety to seek recovery on the bond for any work or services performed but not paid by the principle contractor on the bond. *Id.*

This Court must determine, then, whether or not Penn State's Millennium Science Center's construction was a "public work" and therefore covered by the bond law's strictures. 18 Pa.C.S.A. § 193 states that "any public building or other public work" is a "public work" for purposes of the bond law. Section 193(b) goes on to indicate that, when the Commonwealth itself, or any "officer, employe, board, bureau, commission, department, agency, or institution thereof" is the contracting body, the surety shall be payable to the Commonwealth.

However, the law also expressly covers contracting bodies other than the Commonwealth itself in its subsequent language: "[i]f the contracting body is other than one of those enumerated in this subsection, such bond shall be payable to such other contracting body." 8 Pa.C.S.A. § 193(b). This language indicates that the General Assembly contemplated a wider definition of "public" than simply the Commonwealth itself. Finally, section 192 gives guidance as to the scope of the term "contracting body." "Contracting body means any . . . agency or institution of the Commonwealth of Pennsylvania or any State-aided institution, . . . educational institution, . . . or other public instrumentality." (internal quotes omitted) *Id.* at 192(2). Subsection (3) goes on to define "State-aided institution" as "any institution which receives State funds directly or indirectly for the construction, reconstruction, alteration or repair of its buildings, works or improvements." *Id.* at 192(3).

Given the substantial relationship between the Commonwealth and Penn State, it cannot be said that Penn State is not intended to be, and indeed directly covered by these provisions. Penn State was created by an act of the General Assembly in 1855. 24 Pa.C.S.A. § 2531. The Commonwealth Court has also recognized that Penn State is a

public institution. *Penstan Supply, Inc. v. Pa. State Univ.*, 403 A.2d 1054 (Pa. Commw. Ct. 1979). For these reasons, defendant's preliminary objection to count III is OVERRULED, and any further dispute as to the applicability of the Public Works Bond Law's applicability is resolved in favor of Plaintiff for purposes of the preliminary objections.

IV. Demurrer to Count IV

Count IV of the complaint seeks "indemnification" for fees and costs which Plaintiff has accrued in the course of attempting to seek payment from Ionaldi and Defendant. Section 6.3 of the Payment Bond indicates that the surety can be liable for reasonable costs and attorneys fees when the surety has failed to execute its duties under section 6. Defendant argues that count IV is insufficient in that count IV seeks relief based on section 6.3 of the Payment Bond which only requires Defendant to pay "uncontested" damages. Plaintiff is entitled, at the preliminary objection stage, to have this Court accept as true all well-pleaded facts in the complaint, as well as all reasonable inferences. *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101.

Plaintiff has pleaded that it complied with all the relevant prerequisites in order to seek relief under section 6.3 of the Bond, and has further pleaded that Defendant has failed to live up to its obligations under section 6.3. *See* Plaintiff's Complaint, ¶ 70-77. Specifically, Plaintiff has sufficiently alleged that Defendant did not pay undisputed amounts under the Bond, and that Defendant has, in bad faith, refused to comply with section 6.1 of the Bond. *Id.* At this stage of the litigation, this Court finds that the Plaintiff has alleged sufficient facts in order to move forward, and therefore Defendant's preliminary objection is OVERRULED.

V. Demurrer to Count V

Count V seeks enforcement of the award of the AAA arbitrator in the dispute between Eastern Steel and Ionaldi. Defendant argues that, because they were not a party to the arbitration, the award is not enforceable against them. Defendant misapprehends their role as a surety. The surety enters into a contract with the principal, in this case Ionaldi, for the purposes of insuring payment and performance by the principal to their subcontractors. The legislature thought this an important enough role to create a law specifically requiring a surety bond on any public work project. The Supreme Court of the Commonwealth has examined the role of the surety generally, and has conclusively found that the surety's obligations are coextensive with that of the principal insofar as those obligations arise out of the project for which the bond was issued. Plaintiff properly refers to *Com. to Use of Ulshofer v. Turner* in noting

> the rule of our cases seems to be that a judgment against a principal is conclusive against his sureties . . . . And the judgment is conclusive against them not only as to the misconduct or neglect of duty on the part of the principal, but also as to the amount of damages sustained by the plaintiff.

17 A.2d 352, 354 (Pa. 1941).

The Court went on to indicate that the rationale of those decisions is to protect the plaintiff from re-litigating already-found facts against the same defendant. *Id.* In this case, an arbitrator already entered a substantial award against Ionaldi on behalf of Plaintiff, and because Defendant is the surety of Ionaldi, dismissal of count V as a matter of law is inappropriate at this stage. Therefore, defendant's demurrer is OVERRULED.

VI. Demurrer to Count VI

Count VI of the Complaint asserts an action in assumpsit pursuant to the Public Works Bond Law for enforcement of the arbitration award. Defendant argues that the claim is confusing, unauthorized by the Bond Law, and re-asserts the defense of condition precedent and inapplicability of the Bond Law. Pursuant to this Court's rulings in *supra* parts II, III, and V of this opinion, this objection is OVERRULED.

VII. Demurrer to Count VII

Plaintiff seeks relief under the Pennsylvania "Bad Faith Statute" which authorizes special damages where insurers refuse their obligations in bad faith. 42 Pa.C.S.A. § 8371. Defendant demurs on the grounds that they are not an insurance company and therefore are not covered by the statute's provisions.

While it appears that no court of the Commonwealth has squarely confronted the issue of whether or not a surety is encompassed by the statute, there are several indicia which suggest that it is, or should be. First and foremost, Pennsylvania courts have long recognized, generally, that a surety bond is an insurance policy. *See Fiumara v. American Surety Co. of N.Y.*, 31 A.2d 283, 288 (Pa. 1943) (indicating that a surety is "in all essential particulars . . . an insurance company"); *South Phila. State Bank v. Nat't Surety Co.*, 135 A. 748, 750 (Pa. 1926) ("While such corporations may call themselves 'surety companies' their business is in all essential particulars that of insurance").

Defendant cites a great deal of federal authority to support the proposition that surety is not insurance, including a United States Supreme Court case and many lower court decisions. *See* Defendant's Preliminary Objections, 33-35. Additionally, Defendant points to a case where the Supreme Court of Pennsylvania discusses the

technical differences between insurance and surety and concludes that surety is more akin to a "commercial guarantee instrument rather than policies of insurance." *Id.* at 34 (quoting *Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 614 A.2d 1086 (Pa. 1992). Plaintiff also cites to federal authority on the matter, indicating that the federal courts are split both on the general difference between surety and insurance, and specifically whether a surety is encompassed by the Bad Faith Statute.

Because there is virtually no controlling authority on point, and further because both parties' arguments carry persuasive weight, Defendant's demurrer to count VII must fail under the strict standard for demurrers as it is not clear that the law will not permit recovery. Defendant's demurrer is OVERRULED.

VIII. Demurrer to Count VIII

Defendant demurs to Plaintiffs count VIII, a claim based in the doctrine of promissory estoppel. Defendant attempts to argue that the doctrine is inapposite on the grounds that the only inducement which the Plaintiff can allege is the issuance of the Payment Bond to Ionaldi. Defendant asserts that, because the only articulable inducement is a contract, promissory estoppel must fail as a matter of law. However, Plaintiff has alleged sufficient facts to support its claim that its reliance was in the form of expectation that its work was guaranteed for payment by Defendant, and that Defendant has not paid that guarantee. As such, Defendant's demurrer is OVERRULED.

ORDER

AND NOW, this 15th day of February, 2012, the following shall be the Order of this Court:

I. Defendant's Preliminary Objections in the form of demurrers to counts I-VIII of Plaintiff's Complaint are **OVERRULED**

II. Defendant's Preliminary Objection in the form of a Motion to Strike count II is **OVERRULED**

BY THE COURT:

Thomas King Kistler
President Judge