

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

SAMUEL GROSSI & SONS, INC.,	:	SEPTEMBER TERM, 2004
	:	
Plaintiff,	:	NO. 3590
	:	
v.	:	(Commerce Program)
	:	
UNITED STATES FIDELITY & GUARANTY CO.,	:	
DRISCOLL/HUNT, A Joint Venture, and PHILLIES BALLPARK, L.P.,	:	
	:	
Defendants.	:	
	:	
v.	:	
	:	
RAMOS/CARSON/DEPAUL, A JOINT VENTURE, RAMOS & ASSOCIATES, INC., CARSON CONCRETE	:	
CORPORATION, TONY DEPAUL & SON, and ST. PAUL FIRE AND MARINE	:	
INSURANCE CO.,	:	
	:	Control No. 111625
Add'l Defendants.	:	

ORDER

AND NOW, this 29th day of June, 2007, upon consideration of additional defendants' Motion for Partial Summary Judgment, the response in opposition, the briefs in support and opposition, all other matters of record, and in accord with the Opinion issued contemporaneously, it is **ORDERED** that said Motion is **GRANTED, in part**. Driscoll Hunt's claims for delay damages, acceleration costs, indemnification, and defense costs against St. Paul Fire and Marine Insurance Co. are **DISMISSED**. The remainder of the Motion is **DENIED**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. June 29, 2007

This case is one of several that arise out of the construction of Citizens Bank Park, a baseball stadium (the "Project") built for defendant Phillies Ballpark, L.P. (the "Phillies"). The Phillies entered into an agreement with defendant Driscoll/Hunt, a Joint Venture ("DH"), to act as Construction Manager on the Project. In that capacity, DH entered into a sub-contract with Havens Steel Company ("Havens") to be the prime steel contractor on the Project.

Havens entered into two sub-sub-contracts with plaintiff, Samuel Grossi & Sons, Inc. (“Grossi”), to perform certain steel fabrication and steel erection work on the Project. Havens obtained a payment bond from defendant United States Fidelity & Guaranty Co. (“USF&G”). The Project was beset with numerous delays and disruptions which gave rise to claims by various subcontractors, including Grossi, for additional compensation for work allegedly not contemplated in its sub-sub-contract.

Grossi commenced this action in February, 2004 to recover additional compensation for its extra work on the Project. Grossi seeks these sums from USF&G under the Havens’ payment bond and/or from DH and/or the Phillies. Grossi did not assert a claim against Havens since Havens filed for bankruptcy protection towards the end of the Project.¹

DH filed a third party claim against additional defendant Ramos/Carson/DePaul, a Joint Venture, for breach of the sub-contract (the “Sub-Contract”) that DH had with RCD on the Project. DH also filed a third party claim against St. Paul Fire & Marine Insurance Co. (“St. Paul”) under the performance bond (the “Performance Bond”) it issued on behalf of RCD. In its Third Party Complaint, DH alleges that RCD caused the delays of which Grossi complains, so either RCD under the Sub-Contract or St. Paul under the Performance Bond must defend and indemnify DH with respect to Grossi’s claims. DH also claims that RCD and St. Paul must reimburse DH for the amounts it has paid to indemnify the Phillies in this action. Both RCD and St. Paul moved for summary judgment on DH’s claims against them.

¹ Havens filed for bankruptcy in March, 2004 in the United States Bankruptcy Court for the Western District of Missouri. The bankruptcy proceedings are pending.

I. DH's Delay Damages, Indemnification, and Defense Claims Against St. Paul Must Be Dismissed.

St. Paul argues that delay damages are not recoverable under the Performance Bond because the Bond does not expressly say such damages are recoverable. St. Paul also argues that it has no express duty under the Bond to assume RCD's indemnification and defense obligations under the Sub-Contract. DH argues that the Performance Bond incorporates by reference all of RCD's obligations under the Sub-Contract. DH further argues that, since the Sub-Contract requires RCD to pay delay damages to, and to indemnify and defend DH, St. Paul has the same duties to DH under the Bond.

The Performance Bond provides as follows:

Whereas [RCD] has . . . entered into a subcontract with [DH] . . . which subcontract is by reference made a part hereof, and is hereinafter referred to as the subcontract.

* * *

Whenever [RCD] shall be, and be declared by [DH] to be in default under the subcontract, [DH] having performed [DH's] obligations thereunder:

(1) [St. Paul] may promptly remedy the default subject to the provisions of paragraph 3 herein, or

(2) [DH] after reasonable notice to [St. Paul] may, or [St. Paul] upon demand of [DH], may arrange for the performance of [RCD's] obligation under the subcontract subject to the provisions of paragraph 3 herein,

(3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontract. If completed by [DH], and the reasonable cost exceeds the balance of the subcontract price, [St. Paul] shall pay to [DH] such excess, but in no event shall the aggregate liability of [St. Paul] exceed the amount of this bond. If [St. Paul] arranges completion or remedies the default, that portion of the balance of the subcontract price as may be required to complete the subcontract or remedy the default and to reimburse [St. Paul] for its outlays shall be paid to [St. Paul] at the times and in the manner as said sums would have been payable to [RCD] had there been no default under the subcontract. The term "balance of the subcontract price," as used in this paragraph, shall mean the total amount payable by [DH] to [RCD] under the subcontract and any amendments thereto, less the amounts heretofore properly paid by [DH] under the subcontract.

These provisions do not expressly state that St. Paul is responsible for delay damages, indemnification or defense costs that may arise under RCD's Sub-Contract with DH. The fact that the "whereas" clause incorporates the Sub-Contract by reference does not make St. Paul's obligations under the Bond co-extensive with RCD's obligations under the Sub-Contract.² Furthermore, the fact that St. Paul is either to "complete RCD's performance" or "remedy RCD's default" does not mean that St. Paul is responsible for anything more than finishing the construction work required of RCD under the Sub-Contract.³ The purpose of a Performance Bond is to see that the Project gets completed, not to make the obligee, *i.e.* DH, whole.⁴ If DH wanted greater coverage, it could have added language to the Performance Bond requiring St.

² See Downingtown Area School Dist. v. International Fidelity Ins. Co., 769 A.2d 560, 566, n. 13 (Pa. Commw. 2001) (the whereas clause "only sets out the condition of [the surety's] liability rather than the scope of that liability"); Wise Investments, Inc. v. National Fire Ins. Co. of Hartford, 232 F.Supp.2d 390, 403 (E. D. Pa. 2002) (same).

³ Downingtown, 769 A.2d at 562, 566 (where bond called for surety to "promptly remedy the default or . . . complete the Contract in accordance with its terms and conditions," delay damages due under the Contract were not recoverable from the surety.); Wise, 232 F.Supp.2d at 399, n.5, 403 (where bond called for surety to "promptly remedy the default, or . . . complete the Contract in accordance with its terms and conditions," attorneys fees and liquidated damages due under the Contract were not recoverable from the surety.)

The bonds in the cases cited by DH were much more broadly worded than the bonds in this case, Downington and Wise, so a different result was warranted. See, e.g., Pittsburgh v. Parkview Constr. Co., 344 Pa. 126, 23 A.2d 847 (1942) (surety was liable for workers' compensation insurance premium where the bond required it to "faithfully perform the contract . . . and satisfy all claims and demands incurred in and for the same, or growing out of same . . . and fully indemnify and save harmless the obligee from any and all costs and damage which the said obligee may suffer by reason of failure to do so, and shall fully reimburse and repay the obligee any and all outlay and expense which it may incur by reason of any such default.")

⁴ Similarly, delay damages are not recoverable under most payment bonds, except in the unlikely event that the bond expressly says delay damages are covered. See J.C. Snively & Sons, Inc. v. Web M&E, Inc., 406 Pa. Super. 271, 594 A.2d 333 (1991) (attorneys' fees and finance charges were not recoverable under payment bond); Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc., 398 Pa. Super. 86, 580 A.2d 853 (1990) (costs for renting trailers and storing steel caused by delay were not recoverable under payment bond); Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co., Inc., 308 Pa. Super. 98, 454 A.2d 39 (1981) (service/finance charges were not covered by payment bond for "labor and materials" only). See also C. Arena & Co., Inc v. St. Paul Fire & Marine Ins. Co., 1993 U.S. Dist. LEXIS 15797 (E. D. Pa. Nov. 3, 1993) ("The scope of the bond's coverage is thus clearly delimited to 'labor, material or both,' and does not encompass delay costs.")

Paul to pay delay damages⁵ and to indemnify and defend DH in the event that RCD was unable to do so.

II. RCD's Motion For Summary Judgment Must Be Denied.

RCD moves for summary judgment on DH's claims regarding certain Change Order Requests ("CORs") submitted by Grossi. RCD argues that, since such CORs involve steel fabrication rather than steel erection, they could not have resulted from any delay attributable to RCD. However, there is a disputed issue of material fact as to what caused Grossi to need to fabricate steel at an accelerated pace. RCD's delay may have caused Grossi to have to fabricate and erect steel out of sequence. Or Grossi's fabrication CORs may have been necessitated by Grossi's late receipt of approved fabrication drawings. Or the CORs may have resulted from other circumstances.

RCD also moves for summary judgment on DH's claim that RCD must reimburse DH for any amounts DH paid or pays to indemnify and defend the Phillies in this action. Contrary to RCD's argument, DH is not trying to pass through its indemnification obligations to RCD. Instead, DH claims that the indemnification and defense costs constitute damages for which RCD is liable to DH under the Sub-Contract.⁶ If DH is able to prove that RCD's delay caused DH to incur such indemnification and defense costs, then DH may be able to recover them in this action.

⁵ On this Project, acceleration costs are the same thing as delay damages, so all claims for the former are dismissed as well. *See Samuel F. Grossi & Sons v. United States Fidelity & Guaranty*, 2006 Phila. Ct. Com. Pl. LEXIS 423 (November 10, 2006).

⁶ Paragraph 32 of the Sub-Contract provides that "[RCD] shall be liable to [DH] for all damages, including liquidated damages payable to the [Phillies] for delays caused in whole or in part by [RCD] . . . In addition to such damages assessed against [DH] by [the Phillies], [RCD] also shall be liable for all other actual damages to [DH] caused or contributed to by delays caused in whole or in part by [RCD]."

CONCLUSION

For these reasons, St. Paul's Motion for Partial Summary Judgment is granted, in part, and DH's claims against St. Paul for delay damages, acceleration costs, indemnification, and defense costs are dismissed. A contemporaneous Order consistent with this Opinion will be issued.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

