

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

Hightec HVAC, Inc.	:	
	:	MARCH TERM 2005
	:	
v.	:	NO. 3580
	:	
	:	CONTROL NO: 052184
Travelers Casualty and Surety Co., et al.	:	
	:	

ORDER

AND NOW, this 15th day of July, 2005, upon consideration of Defendants Philadelphia Academy Community Development Corp. and Travelers Casualty and Surety Co.'s Preliminary Objections I – V to Plaintiff Hightec HVAC, Inc.'s Complaint and responses thereto, it is hereby ORDERED and DECREED that said Preliminary Objections are OVERRULED.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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MEMORANDUM OPINION

Before the Court are Defendants' Preliminary Objections to Plaintiff's Complaint to Enforce Mechanics Lien Claim. Defendant Philadelphia Academy hired D'Ascenzo Construction Co. Inc. as a general contractor for the construction of a new building. D'Ascenzo allegedly began work on the site on June 18, 2004 and filed a waiver of liens on July 16, 2004 for itself and any subcontractors it hired. Subsequently, D'Ascenzo, as general contractor, hired the Plaintiff Hightec HVAC, Inc. on July 20, 2004 as a subcontractor to install heating, ventilation, and air conditioning for the project. Defendant Philadelphia Academy dismissed the general contractor, D'Ascenzo, from the project which forced the general contractor to dismiss all subcontractors. At the time when Hightec was dismissed from the project it alleges it had completed a significant portion of the work required under the contract with D'Ascenzo and was not paid \$95,708 allegedly owed as a result. Plaintiff Hightec filed a Mechanics Lien on the Defendant Philadelphia Academy's property in order to secure payment for work completed. Consequently, Philadelphia Academy obtained a discharge of lien bond issued by Defendant Travelers Casualty.

In the present motion, Defendants have raised five (5) Preliminary Objections to Plaintiff's

Complaint. The Court will address each in turn.

I. Defendants' Preliminary Objection in the form of a Demurrer

The Defendants argue that the Complaint should be dismissed because the Plaintiff waived its right to file a lien claim. In order for a waiver of liens to be binding on subcontractors, the Mechanic's Lien Law, 42 P.S. § 1402, requires that the contractor file the waiver in compliance with one of three dates: (1) prior to the commencement of the work upon the ground, (2) within ten days after the execution of the principle contract, or (3) not less than ten days prior to the contract with the claimant subcontractor. The waiver of Mechanic's Liens filed by D'Ascenzo, on behalf of itself as general contractor and all subcontractors, was not filed in a timely fashion in accordance with the requirements of 49 P.S. § 1402(a). The waiver of liens was filed on July 16, 2004. The waiver of liens was filed after work was allegedly commenced on the ground by the contractor on May 1, 2004. Additionally, the waiver of liens was filed more than ten days after the execution of the principle contract on April 15, 2004. Finally, the waiver of liens was filed only five days before the execution of the formal subcontract on July 20, 2004. Therefore, the waiver of liens filed by the contractor was not timely and therefore is not binding on the Plaintiff.

The Court **Overrules** this Objection

II. Defendants' Preliminary Objection in the Form of a Demurrer

The Defendants argue that the Plaintiff's Complaint should be dismissed for failure to comply with 49 P.S. § 1305 which states that, "where, through no fault of the claimant, the improvement is not completed, the right to lien shall nevertheless exist." Specifically, the Defendants argue that the Complaint failed to aver that the failure to complete the improvements was through no fault of the Plaintiff's. However, the Complaint at paragraph nine states that the

Defendant Philadelphia Academy informed the Plaintiff that its services were no longer needed. Compl., ¶ 9. Therefore, in accordance with 49 P.S. § 1305 the Plaintiff has averred that the failure to complete the contract was through no fault of the claimant subcontractor.

The Court **Overrules** this Objection

III. Defendants' Preliminary Objection in the Form of a Demurrer

The Defendant argues that the Plaintiff's Complaint should be dismissed for failing to state a claim upon which relief may be granted against Defendant Travelers. According to Pennsylvania Supply Co. v. National Cas. Co., a third party has a direct cause of action on a construction bond. Pennsylvania Supply Co. v. National Cas. Co., 31 A.2d 453, 455 (Pa. Super. 1943). The construction bond in question exists between Defendant Philadelphia Academy and Defendant Travelers; the third party wishing to bring a direct cause of action on the construction bond is the Plaintiff Hightec. Furthermore, Travelers, as surety, has stepped into the shoes of Philadelphia Academy and has promised to pay any award granted by the court on the Mechanics Lien. Travelers is a proper party to this action.

The Court **Overrules** this Objection

IV. Defendants' Preliminary Objection to Plaintiff's Complaint for Failure of the Pleading to Conform to a Rule

Defendants argue that the joinder of Defendant Travelers is improper according to the Pennsylvania Rules of Civil Procedure. Rule 1654 states that "the plaintiff shall name as defendant the owner named in the claim." Pa.R.C.P. No. 1654. However, although the property owner, Philadelphia Academy, is an indispensable party who must be named, the Rule does not preclude the Plaintiff from naming additional parties as defendants so long as they are properly joined. Evangeliste v. KRC Westmoreland Associates, Inc., 28 Pa. D. & C.3d 763 (1982). As

stated above, Travelers as the surety company was properly joined as a Defendant in this action and therefore may remain as a party. Defendant Traveler's argument that Pennsylvania Rule of Civil Procedure 1657 precludes the joinder of it as a party to the action is of no merit. The Rule states that "no other cause of action may be joined with an action to obtain judgment" on a Mechanics Lien. Pa.R.C.P. No. 1657. Here, there is only one cause of action, the enforcement of the lien, brought against two Defendants. The joinder of Travelers is proper and it is not contrary to the Pennsylvania Rules of Civil Procedure governing Mechanics Liens.

The Court **Overrules** this Objection

V. Defendants' Preliminary Objection to Plaintiff's Complaint for Failure of the Pleading to Conform to a Rule

The Defendants argue that the Plaintiff's Complaint fails to conform to Pennsylvania Rule of Civil Procedure 1656. According to the Rule, the plaintiff must state in the complaint "the name and address of each party to the action and if the action is commenced by a subcontractor, the name and address of the contractor." Pa.R.C.P. No. 1656. While this is not the preferred practice, the Plaintiff included the Contractor's address in the exhibits which are part of the Complaint. Therefore, the Plaintiff did not fail to comply with Pennsylvania Rule of Civil Procedure 1656(1).

The Court **Overrules** this Objection

CONCLUSION

For all the foregoing reasons, defendants' Preliminary Objections to plaintiff's Complaint are overruled.

BY THE COURT,

HOWLAND W. ABRAMSON, J.