

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CONESTOGA CERAMIC TILE DISTRIBUTORS, INC.,	:	NO. 11 - 01,916
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
TRAVELERS CASUALTY AND SURETYCOMPANY	:	
OF AMERICA, IMC CONSTRUCTION, INC., PROFAST:	:	
COMMERCIAL FLOORING, INC. and	:	
PENNSYLVANIA COLLEGE OF TECHNOLOGY,	:	Preliminary Objections to
Defendants	:	Plaintiff's Complaint

OPINION AND ORDER

Before the Court are Defendants’¹ preliminary objections to Plaintiff’s Complaint, filed on November 23, 2011. Argument was heard March 19, 2012.

In connection with Defendant Pennsylvania College of Technology’s (hereinafter “the College”) construction of additional facilities through its “Stage X Building Program”, Plaintiff, acting as a “lower tier vendor”, provided tile and setting materials to Defendant ProFast Commercial Floors, a sub-contractor which worked for the general contractor, Defendant IMC Construction. Claiming an unpaid balance due of \$51,872.93 plus interest, Plaintiff filed a Complaint on October 20, 2011, raising claims of breach of contract against Defendant Traveler’s (which issued a payment bond) and IMC, claims under the Public Works Contractor’s Bond Law of 1967 against Travelers and under the Commonwealth Procurement Code against IMC and ProFast, and finally, a claim of unjust enrichment against IMC, Profast and the College. Defendants object to each of these counts on various grounds.

First, Defendants object to the legal sufficiency of Count I, Breach of Contract (Payment Bond), filed against Travelers. Defendants contend that since the terms of the Payment Bond render null and void its obligation to claimants “if the Contractor promptly makes payment, directly or indirectly, for all sums due”, and since Plaintiff has failed to plead

¹ Although the preliminary objections have been filed on behalf of only three of the four defendants, a default judgment having been entered against Defendant Profast, for convenience the court will simply refer to “Defendants”.

that IMC never made payment, either directly or indirectly, for the sums purportedly due and owing to Plaintiff, the claim must fail. Plaintiff contends it did make the requisite allegations, specifically directing the court to paragraphs 23, 33, 45 and 64. These paragraphs do not, however, plead that IMC never made payment, either directly or indirectly, for the sums purportedly due and owing to Plaintiff: Specifically, these paragraphs provide as follows:

23. Despite Plaintiff's demands, Defendants have refused and continue to refuse to pay Plaintiff in full for the materials it furnished for the Project.

33. Defendants' refusal to issue payment to Plaintiff in satisfaction of its total unpaid balance constitutes a breach of its duties under the Payment Bond.

45. Plaintiff has not been paid in full for its work on the project.

64. The benefit conferred on Subcontractor, General Contractor, and Owner is to Plaintiff's detriment since Plaintiff has not received payment for all materials supplied to the Project.

These paragraphs simply state that Defendants did not directly pay Plaintiff the balance allegedly due; they do not address whether Defendants made indirect payments. Accordingly, Plaintiff will be required to re-plead this count to add the required allegations.²

Next, Defendants contend Count II, Breach of Contract (Joint Check Agreement), filed against IMC, must be dismissed for failure to state whether the Joint Check Agreement is oral or written, and, if written, for failure to attach a copy to the Complaint. Plaintiffs argue that since it has attached a copy to its Reply to Defendants' Preliminary Objections, the objection is moot. The court takes this as a concession that the agreement should have been attached and since Plaintiff is being required to file an amended complaint, the court will require the agreement be attached to such.

Defendants also seek to dismiss Count II on the basis that Plaintiff has not identified any provision of the Joint Check Agreement that was breached by IMC. The court agrees with Plaintiff however, that its allegations in Paragraphs 37 ("The Joint Check Agreement modified any existing standard subcontract provision, and created a direct duty on the part of General

Contractor to pay Plaintiff for project supplies.”) and 38 (“General Contractor’s failure to pay Plaintiff for the materials supplied to the Project constitutes a breach of its duties under the Joint Check Agreement.”) sufficiently identify the alleged breached. While whether the Joint Check Agreement actually created such a direct duty remains the subject of further litigation, the objection at this time to the sufficiency of the pleading will be overruled.

Next, Defendants seek to dismiss Count III, a claim under the Public Works Contractor’s Bond Law of 1967 against Travelers, on the basis that the Bond Law has been repealed and replaced with the Commonwealth Procurement Code insofar as it relates to government agencies. Defendants argue that the Procurement Code (rather than the Bond Law) applies to the College because it is a “state-aided institution”, which is defined in the Code as one which receives state funds directly or indirectly for construction. In support of this assertion, Defendants state: “Undoubtedly Penn College is a state-aided institution”. While Defendants may very well be correct in this confident assertion, the record in this matter does not support such a finding at this time. Whether the Bond Law or the Procurement Code applies depends on facts which can be developed through the discovery process and is thus more properly the subject of a motion for summary judgment, rather than preliminary objections. This objection will therefore be overruled.

Next, Defendants seek to dismiss Count IV, a claim under the Commonwealth Procurement Code against IMC and ProFast, on the basis that IMC’s payment to Profast bars Plaintiff’s claims under Section 3939(b). As was the case with respect to Count III, however, that IMC made a payment to ProFast is not part of the record at this time. Therefore, again, this issue is more properly the subject of a motion for summary judgment, rather than preliminary objections. This objection will therefore be overruled.

Finally, Defendants seek to dismiss Count V, a claim for unjust enrichment against IMC, Profast and the College, on the basis that the College’s payment to IMC and IMC’s payment to Profast renders Plaintiff unable to prove that Defendants retained a benefit “without payment of value.” *See AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa.

² Although Defendants contend Plaintiff cannot make such allegations because the College did pay IMC and IMC did pay Profast, as these are not facts of record at this time, they are of no moment to this ruling.

Super. 2001). As with Count IV, this objection is based on facts not of record and will, therefore, be overruled.

Accordingly, the court enters the following:

ORDER

AND NOW, this 30th day of March 2012, for the foregoing reasons, Defendants' preliminary objections are hereby sustained in part and overruled in part. Within twenty (20) days of this date, Plaintiff shall file an Amended Complaint which includes the necessary allegations of non-payment in Count I and attaches a copy of the Joint Check Agreement.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Prothonotary
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