

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

INPRO COPORATION,	:	
Plaintiff	:	DOCKET NO. 11-01409
	:	CIVIL ACTION – LAW
vs.	:	
	:	
TRAVELERS CASUALTY AND SURETY COMPANY	:	PRELIMINARY
OF AMERICA,	:	OBJECTIONS
Defendant	:	

OPINION AND ORDER

AND NOW, this 19th day of April, 2012, following oral argument on Defendant’s Preliminary Objections to InPro Corporation’s Complaint, it is hereby ORDERED and DIRECTED that Defendant’s objections are SUSTAINED in part and OVERRULED in part. In particular, Defendant’s first and second objections are SUSTAINED, and Defendant’s third objection is OVERRULED. Plaintiff’s Complaint is DISMISSED with prejudice.

I. Factual Background

A brief factual background is as follows: on or around May 15, 2010, IMC Corporation entered into a construction contract with the Pennsylvania College of Technology (Penn College) to refurbish some of the college’s dormitories. On or around the same date, IMC Construction, Inc. (IMC) and Defendant, Travelers Casualty and Surety Company of America (Travelers), executed a Payment Bond for the project. IMC subcontracted with Universal Custom Millwork, Inc. (Universal) to provide material, labor, and services in connection with this project. Plaintiff sold various items and provided services to Universal for use in the project. Plaintiff last furnished services and material to Universal on or about August 27, 2010. To date, Plaintiff has not received any payment for the services and materials rendered for the project; Universal has been fully paid for all services and materials rendered for the project. Complaint, 1-3.

II. Legal Standard

Defendant filed all three of its objections pursuant to Pa.R.C.P. 1028(a)(4). Pa.R.C.P. 1028(a)(4) provides that a party may file a preliminary objection based on the legal sufficiency, or insufficiency, of a pleading (demurrer). A demurrer tests the legal sufficiency of the complaint. *Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 714 (Pa. Super. Ct. 2005). A demurrer should be granted only in situations that are clear and free of doubt. *Bourke v. Kazaras*, 746 A.2d 642, 642 (Pa. Super. Ct. 2000). When sustaining a demurrer, the trial court must be satisfied that the claims on the face of the complaint cannot be sustained. *Sullivan*, 873 A.2d at 714. If doubt or uncertainty exists, the trial court should overrule the demurrer. *Id.*

III. Preliminary Objections

a. Failure to Fulfill Conditions Precedent

In accordance with Defendant’s first objection, Plaintiff’s Complaint is dismissed because Plaintiff failed to fulfill conditions precedent under the terms of the bond. The relevant portions of the bond state:

4. The Surety shall have no obligations to Claimants under this Bond until:

* * * * *

4.2 Claimants who do not have a direct contact with the Contractor:

.1 Have furnished written notice to the Contractor and sent a copy, or notice thereof, to the Owner, within 90 days after having last performed labor or last furnished materials or equipment included in the claim stating, with substantial accuracy, the amount of the claim and the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed...

Bond, 2. Section 4 complies with Section 194(b) of The Public Works Contractors’ Bond Law of 1967, 8 P.S. §§ 191-202, which states:

(b) Any claimant who has a direct contractual relationship with any subcontractor of the prime contractor who gave such payment bond or other financial security but has no contractual relationship, express or implied, with such prime contractor may bring an action on the payment bond or other financial security only if he has given written notice

to such contractor within ninety days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.

8 P.S. § 194(b).

In this matter, on the face of the bond, IMC is listed as the Contractor, Travelers is listed as the Surety, and Penn College is listed as the Owner. Bond, 1. In Plaintiff's Complaint, it is averred that Plaintiff last furnished services and materials on or about August 27, 2010. Complaint, 2. Therefore, in order to comply with the bond, Plaintiff had to provide written notice to IMC and Penn College within ninety days of August 27, 2010. On September 20, 2010, Plaintiff provided written notice to Universal. Complaint, Ex. D. However, Plaintiff did not provide written notice to IMC until March 1, 2011, well beyond the ninety-day deadline. Complaint, Ex. E. Therefore, Plaintiff's failure to comply with the ninety-day notice requirement precludes Plaintiff's bond claim. *See United Plate Glass Co. Div. of Chromalloy American Corp. v. Metal Trims Industries, Inc.*, 525 A.2d 468, 471 (Pa. Cmwlth. Ct. 1987). Defendant's first objection is SUSTAINED.

b. Inability to Claim Under Bond

In accordance with Defendant's second objection, Plaintiff's Complaint is dismissed because Plaintiff does not have a right to claim an interest under the terms of the bond. Section 3 of the bond states: "[w]ith respect to Claimants, this obligation shall be null and void if the Contractor promptly makes payment, directly, or indirectly, for all sums due." Bond, 2. On the face of the bond, IMC is listed as the Contractor. Bond, 1. In paragraph 14 of its Complaint, Plaintiff avers that Universal has been fully paid for the services and materials furnished by Universal for this project; therefore, Plaintiff avers that IMC has paid all amounts due to Universal. Complaint, 3.

The Superior and Commonwealth Courts faced a similar issue in the cases of *Trumbull Corp. v. Boss Construction, Inc.*, 747 A.2d 395 (Pa. Super Ct. 2000), and *Trumbull Corp. v. Boss Construction, Inc.*, 768 A.2d 368 (Pa. Cmwlt. 2001). In that case, the Commonwealth entered into a public contract with a general contractor to improve an interstate; a surety subsequently issued a bond that expressly incorporated the Public Works Contractors' Bond Law of 1967, 8 P.S. §§ 191-202. The general contractor subcontracted with Defendant Boss Construction, Inc. (Boss), who further subcontracted with Plaintiff Trumbull Corp. (Trumbull) to supply asphaltic road materials. 747 A.2d at 396. The general contractor paid Boss for the material and supplies provided on the project; however, Boss never paid Trumbull for its materials and supplies. Our Commonwealth Court upheld the trial court's ruling that Trumbull's recovery from the general contractor and its surety were barred by the contractor's payment to Boss. 747 A.2d at 398; 768 A.2d 371. In so holding, the Commonwealth Court upheld the language of the Prompt Pay Act, which is nearly identical to the language in section 3 of the bond at issue.¹ *Id.*

In the instant matter, Plaintiff avers that IMC has paid to Universal all sums due. Therefore, this Court holds that Travelers has no duty to pay Plaintiff under the bond, and Defendant's second objection is SUSTAINED.

c. Statute of Limitations Satisfied

However, in accordance with Defendant's third objection, Plaintiff's Complaint is not time-barred. In *Centre Concrete Co. v. AGI, Inc.*, 559 A.2d 516, 518 (Pa. 1989), our Supreme Court held that "a statutorily imposed time ban against filing suit acts as a toll on the applicable statute of limitations period which does not begin to run until the expiration of the banned

¹ Section 3939(b) of the Prompt Pay Act provides that:

(b) *Barred claims.* -- Once a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred.

62 Pa.C.S. § 3939(b) (formerly 73 P.S. § 1626.9).

period.” *Id.* at 519. Specifically, the Court held that in actions brought pursuant to the Public Works Contractors’ Bond Law, 8 P.S. §§ 191-202, the applicable one-year statute of limitations period is tolled by a statutory ninety-day waiting period that is provided for in 8 P.S. § 194(a).² *Id.* Pursuant to Pa.R.C.P. 1007, a party commences an action by filing with the prothonotary either a praecipe for a writ of summons or a complaint. Pa.R.C.P. 1007.

In this instance, Plaintiff’s counsel filed a praecipe for writ of summons with the Lycoming County Prothonotary on August 16, 2011. In its complaint, Plaintiff alleged that it last provided materials for the project on August 27, 2010. This filing is well within the one-year and ninety day statute of limitations period applicable in this case. Therefore, Defendant’s third objection is OVERRULED.

BY THE COURT,

Date

Richard A. Gray, J.

RAG/abn

cc: Charles Szybist, Esquire
Steven M. Williams, Esquire
240 North Third Street, 7th Floor
Harrisburg, PA 17101
Honorable Dudley N. Anderson

² 42 Pa.C.S. § 5523(3) provides for a one-year statute of limitations for any action upon payment or performance bond.