

**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.,	:	Control No. 070731
DRISCOLL/HUNT, A Joint Venture, and PHILLIES BALLPARK, L.P.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 10th day of November, 2006, upon consideration of the Motion for Partial Summary Judgment of United States Fidelity & Guaranty Co. (“USF&G”), the responses 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 the Motion is **GRANTED, in part**, as follows:

1. Plaintiff’s claims against USF&G based upon Change Order Requests No. 17, 20, 21, 24, 25, 27, 32, 40, 42, 44, 45, 46, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 77, 78, 79, 80, 81, 82, 83, 84, 92, 95, 98, 99, 102, 103, 104, 107, 108, 109, 110, 113, 117, 119, 121, 124, 126, 138, 140, 141, 153, 157, 162, 165, 171, 173, 174, 181, 184, 190, 196, 201 and 205 have been **WITHDRAWN**.
2. Plaintiff’s claims against USF&G based upon Change Order Requests No. 131, 134, 135, 139, 145, 151, 154, 155, 163, 167, 168, 169, 172, 176, 179, 185, 188, 191, 193, 194, 195, 197, 198, 199, 200, 202, 203, 204, and 206 are **DISMISSED**.

The remainder of the motion is **DENIED**, and plaintiff's claims based on Change Order Requests No. 63, 71, 106, 111, 114, 115, 166, 118, 132, 133, 137, 150, 152, 161(revised), and 166 remain for resolution at trial.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. November 10, 2006

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 subcontract with Havens Steel Company (“Havens”) to be the prime steel contractor on the Project.

Havens entered into two¹ sub-sub-contracts with plaintiff, Samuel Grossi & Sons, Inc. (“Grossi”), to perform certain steel fabrication and steel erection work on the Project. Havens also obtained a payment bond (the “Payment Bond”) from defendant United States Fidelity & Guaranty Co. (“USF&G”) in the amount of \$26,632,000. Unfortunately, the Project was beset with numerous delays and disruptions which gave rise to claims by various subcontractors,

¹ There is apparently some dispute between the parties as to the exact terms of at least one of the contracts. The court is not called upon to resolve that issue at this time.

including Grossi, for additional compensation for work allegedly not contemplated by the subcontracts.

Grossi commenced this action in September, 2004 to recover the additional compensation it claims is due for its extra work on the Project. Grossi seeks to obtain that additional compensation from USF&G, as Havens' surety and/or from DH and/or the Phillies. Grossi did not assert any claims against Havens since Havens had filed for bankruptcy protection.

USF&G filed Preliminary Objections to Grossi's claim for breach of the Payment Bond. USF&G argued that delay damages are not recoverable under the Bond. This court agreed. Grossi then amended its Complaint to delete any reference to delay damages. The Amended Complaint asserts claims for acceleration costs, and also seeks to recover several other types of additional compensation from USF&G. USF&G has now filed a Motion for Summary Judgment seeking dismissal of most of Grossi's claims, which motion is presently before the court.

Grossi's claim against USF&G for breach of Payment Bond is based on numerous Change Order Requests ("CORs") that Grossi alleges it submitted to Havens and/or DH during the Project. The CORs were sequentially numbered and each constitutes a separate claim by Grossi for additional compensation. During the course of this litigation, Grossi withdrew its claims against USF&G based on CORs 17, 20, 21, 24, 25, 27, 32, 40, 42, 44, 45, 46, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 77, 78, 79, 80, 81, 82, 83, 84, 92, 95, 98, 99, 102, 103, 104, 107, 108, 109, 110, 113, 117, 119, 121, 124, 126, 138, 140, 141, 153, 157, 162, 165, 171, 173, 174, 181, 184, 190, 196, 201, and 205. They are no longer at issue. However, Grossi still asserts a claim under the Payment Bond for payment with respect to a number of CORs.

Under the Payment Bond, USF&G promised DH that it would pay claimants if Havens did not do so.

A claimant is defined as one having a direct contract with [Havens] for labor, material or both, used or reasonably required for use in the performance of the contract, labor and material being considered to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the subcontract.²

Since Grossi allegedly had two subcontracts with Havens: (1) to supply labor and (2) to supply material to the Project, Grossi may fit the definition of a “claimant” under the Bond to some extent. However, USF&G disputes whether CORs 63, 71,102, 131, 134, 135, 139, 145, 150, 151, 152, 154, 155, 163, 167, 168, 169, 172, 176, 179, 185, 188, 191, 193, 194, 195, 197, 198, 199, 200, 202, 203, 204, and 206 are for labor and material used or reasonably required for use in the performance of the sub-sub-contracts. Accordingly, USF&G has moved for summary judgment on those CORs on the grounds that they are not covered by the Payment Bond.

I. Grossi’s Claims Based on CORs 131, 134, 135, 139, 145, 151, 154, 155, 163, 167, 168, 169, 172,176, 179, 185, 188, 191, 193, 194, 195, 197, 198, 199, 200, 202, 203, 204, And 206 Must Be Dismissed.

CORs 131, 134, 135, 139, 145, 151, 154, 155, 163, 167, 168, 169, 172,176, 179, 185, 188, 191, 193, 194, 195, 197, 198, 199, 200, 202, 203, 204, and 206 represent claims for what Grossi terms “acceleration costs.”³ However, USF&G argues that Grossi’s “acceleration costs” are simply its previously dismissed delay damages masquerading under another name and therefore, are not recoverable under the Payment Bond.

This court previously held, when sustaining USF&G’s Preliminary Objections to Grossi’s delay damages claims, that:

such damages are not recoverable from a surety, unless expressly provided by the language of the bond. Salvino Steel v. Fletcher & Sons, 398 Pa. Super. 86, 580 A.2d 853 (Pa. Super. 1990). The court finds no such provision within the

² Complaint, Ex. C.

³ Grossi has withdrawn its claims with respect to CORs 45, 102, 104, 162, 165, 173, 174, 181, 184, 190, 196, and 201, which USF&G also included in this category. Grossi does not address CORs 188 and 206 in its opposition to USF&G’s Motion. For purpose of this Opinion, the court assumes that Grossi contests their dismissal as well.

[Payment Bond] language. Accordingly, with respect to USF&G, all references to delay damages are Stricken.⁴

This holding is correct under Pennsylvania law. 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. Snavely & 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.")

In determining whether delay damages are covered under the Payment Bond here, "the bond is the proper place to start because the true intent and meaning of the instrument are the primary determinants of the extent of liability. . . It is the language of the bond that is determinative of the surety's obligation and not the underlying agreement between [DH or Havens] and [Grossi]." *Salvino*, 398 Pa. Super. at 91, 580 A.2d at 855-6. The Payment Bond does not contain any language encompassing delay damages. Instead, it provides coverage only for "labor, material, or both used or reasonably required for use in the performance of the contract" and "directly applicable to the subcontract" between Havens and Grossi. *See* Complaint, Ex. C. Under the reasoning of the cases cited above, such bond language does not encompass delay damages. Therefore, the court properly held that Grossi's delay damages are

⁴ Order filed February 11, 2005.

not recoverable under the Payment Bond.⁵ Since delay damages are not recoverable under the Payment Bond, the question is whether Grossi's "acceleration costs" constitute delay damages.

"Accelerate" is defined as "to increase the speed of; to cause to occur sooner than expected." American Heritage Dictionary, p. 9 (3d ed. 1992). "Delay" is defined as "to postpone until a later time, defer; to cause to be later or slower than expected or desired." *Id.* p. 493. At first glance, the two terms appear to be antonyms. However, in this case, it is more proper to view them as two sides of the same coin, which currency is not payable under the Payment Bond.

The speed at which Grossi was required to complete its work on the Project was apparently increased due to the compression of time, so that it can legitimately claim that its additional costs are for "acceleration." However, the time compression that caused the acceleration of Grossi's work was itself caused by delay in the work of predecessor trades. Because the early stages of the Project were not completed as quickly as planned, Grossi's work could not commence until later than expected. In other words, Grossi was delayed and thereby forced to accelerate the pace at which it performed its work in order to meet the Project's unchanging deadline - - Opening Day of Baseball Season 2004. Because Grossi's "acceleration" costs were the result of delay, and delay damages are not recoverable under the Payment Bond, Grossi's claims based on acceleration cost CORs must be dismissed.

⁵ Not only is the court's prior holding correct, it is also the law of this case, and the court will not alter it now. "The various rules which make up the law of the case doctrine serve not only to promote the goal of judicial economy . . . but also operate (1) to protect the settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end." Commonwealth v. Starr, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995)

II. Grossi May Proceed To Trial On Its Claims Based On CORs 150 And 152.

USF&G argues that several CORs describe work for which Grossi was already paid or which was already included in signed Change Orders. However, Grossi claims the materials for which it requests payment in CORs 150 and 152⁶ were additions to certain Change Orders and that they were not covered by those Change Orders. Since there is a dispute of fact regarding whether Grossi was or should have been paid for the materials listed in those two CORs, the court cannot dismiss Grossi's claims based upon those CORs at this juncture.

III. Grossi May Proceed To Trial On Its Claims Based On CORs 106, 111, 114, 115, 116, 118, 132, 133, 137, 161(Revised), And 166.

USF&G argues that several of the CORs describe labor or materials for which Grossi already received partial payment. Grossi agrees, but it argues that it is entitled to some additional payment on CORs 106, 111, 114, 115, 116, 118, 132, 133, 137, 161(Revised), and 166. Since there is a dispute of fact regarding whether Grossi was or should have been paid more for the work described in those CORs, the court cannot dismiss Grossi's claims based upon those CORs at this juncture.

IV. Grossi May Proceed To Trial On Its Claims Based On CORs 63 And 71.

USF&G argues that several of the CORs describe work that Grossi never performed, so Grossi cannot claim that it is entitled to payment for such work. However, Grossi claims that it fabricated, but did not erect, certain steel wall clips listed in CORs 63 and 71.⁷ Since there is a dispute of fact regarding whether Grossi supplied the materials described in those CORs, the court cannot dismiss Grossi's claims based upon those CORs at this juncture.

⁶ Grossi withdrew its claims with respect to CORs 17, 20, 25, 27, 45, 55, 59, 78, 79, 80, 81, 82, 83, 84, 98, and 140, which USF&G also included in this category.

⁷ Grossi withdrew its claims with respect to CORs 68 and 69, which USF&G also included in this category.

CONCLUSION

For these reasons, USF&G's Motion for Summary Judgment is granted, in part and denied, in part. The court will issue an Order consistent with this Opinion

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.