

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

FERRICK CONSTRUCTION COMPANY, :	April Term 2004
Plaintiff, :	
v. :	No. 3858
ONE BEACON INSURANCE COMPANY :	
Formerly CGU INSURANCE COMPANY, :	COMMERCE PROGRAM
Defendant. :	
:	Control Numbers 080963, 083322

ORDER

AND NOW, this 27TH day of December, 2004, upon consideration of Defendant One Beacon Insurance Company formerly CGU Insurance Company's Preliminary Objections to the Amended Complaint (cn 080963) and the Preliminary Objections to the Preliminary Objections to the Amended Complaint (cn 083322), response in opposition, memoranda, all matters of record and in accord with the Memorandum Opinion to be filed of record, it hereby is **ORDERED** and **DECREED** that

- (1) Defendant One Beacon Insurance Company's Preliminary Objection based on the statute of limitations is **Overruled**.
- (2) Defendant One Beacon Insurance Company's Preliminary Objection to Count II (Bad Faith) is **Sustained**. Count II is dismissed.
- (3) Defendant One Beacon Insurance Company's Preliminary Objections based on the prior pending action is **Sustained**. This action is stayed pending resolution of the current appeal before the Superior Court of Pennsylvania.

(4) Plaintiff's Preliminary Objection to Defendant's Preliminary
Objections to the amended complaint is **Sustained**.

BY THE COURT,

C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

Presently before the court are the Preliminary Objections of One Beacon Insurance Company (“One Beacon”), formerly CGU Insurance Company, seeking dismissal of the instant action. Also before the court, are Ferrick Construction Company’s (“Ferrick”) Preliminary Objections to One Beacon’s Preliminary Objections to the amended complaint. For the reasons discussed below, the court sustains in part and overrules in part One Beacon’s preliminary objections. As a result, Ferrick’s preliminary objection to the preliminary objections of One Beacon is sustained.

BACKGROUND

Ferrick commenced this action against One Beacon on April 19, 2004 alleging One Beacon failed to provide payment to Ferrick as required by the Performance Bond and the Labor and Materialmen’s Bond issued by One Beacon in connection with a public works project between Ernst Bock & Sons, Inc. and the City of Philadelphia. The court is familiar with the facts alleged by Ferrick for in November 2001 Ferrick filed a similar action against One Beacon seeking similar relief, i.e. payment under the Labor and Materialmen’s Bond. The earlier action was captioned Ferrick v. One Beacon,

November 2001, No. 2344. In the November action, after a bench trial the court found in favor of defendant One Beacon and against Ferrick. Thereafter, Ferrick filed post trial motions and after denial of the post trial motion, Ferrick filed an appeal with the Superior Court which is currently pending.

In the instant action, One Beacon filed preliminary objections to the complaint which resulted in the filing of an amended complaint. Thereafter the instant preliminary objections were filed by One Beacon in the nature of a demurrer seeking to dismiss the action based on the doctrine of prior pending action, the statute of limitations defense and failure to state a claim for bad faith. Ferrick responded to the preliminary objections and also filed preliminary objections to One Beacon's Preliminary Objections based on the statute of limitations defense.

DISCUSSION

I. The Bad Faith Insurance Statute 42 Pa. C.S. § 8371 Does Not Apply to Surety Bonds.

The question presented by a demurrer is whether on the facts averred the law says with certainty that no recovery is possible. McKeeman v. Coretstates Bank, N.A., 751 A.2d 655 (Pa. Super. 2000). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. Emerich v. Philadelphia Ctr for Human Dev., 554 Pa. 209, 213, 720 A.2d 1032, 1034 (1998).

In Count II of the Amended Complaint, Ferrick alleges a Bad Faith claim against One Beacon pursuant to 42 Pa. C.S. § 8371. One Beacon argues that Count II is legally insufficient because a subcontractor may not maintain an action against the prime contractor's surety for bad faith. For the reasons discussed below, the court agrees that Count II of the amended complaint is legally insufficient.

As both parties recognize, there are no reported Pennsylvania Superior Court or Supreme Court cases addressing the issue of whether a subcontractor like Ferrick may maintain a bad faith action against a prime contractor's surety like One Beacon. Although the Pennsylvania state courts have yet to address the issue, three district court opinions and one trial court opinion exist on this issue. Each of these courts refused to recognize a bad faith claim brought by a subcontractor against a prime contractor's surety. See Superior Precast, Inc. v. Safeco Ins. Co. of Am., 71 F. Supp. 2d 438 (E.D. Pa. 1999); Pullman Power Prods. Corp. v. Fidelity & Guar. Ins., 1997 U.S. Dist. Lexis 23554 (W.D. Pa. 1997); The Norwood Company v. RLI Insurance Co., 2002 U.S. Dist. Lexis 5560 (E.D. 2002); M.A. Bruder & Sons Inc. v. Williams, 47 Pa. D. & C. 4th 243 (2000).

The courts' holdings that section 8371 did not apply to a subcontractor's claim against a prime contractor's surety were based upon an analysis of the statute itself. The courts determined that the term "insurance policy", using the ordinary meaning of the word itself since it was not defined by the statute, means "An instrument in writing, by which one party (insurer, in consideration of a premium, engages to indemnify another (insured) against a contingent loss, by making him a payment in compensation, whenever the event shall happen by which the loss is to accrue." Norwood Co. v. RLI Ins. Co., supra at p. 8 (quoting Superior Precast, 71 F.Supp. 2d at 450 quoting Black's Law Dictionary 1156 (6th ed. 1991)). The courts also commented that a contract of insurance is not similar to a contract of suretyship. As Judge Giles observed in Superior Precast, "the United States Supreme Court ... noted that 'the usual view, grounded in commercial practice [is] that suretyship is not insurance,'" Superior Precast, 71 F.Supp. 2d at 451 (quoting Pearlman v. Reliance Ins. Co. 371 U.S. 132, 140 n. 19, 83 S.Ct. 232, 236 n. 19,

83 S.Ct. 232, 236 n. 19, 9 L.Ed. 2d 190 (1962)), but Pennsylvania courts have agreed, acknowledging that there exists “fundamental differences” between bilateral contracts of insurance and tripartite surety agreements. *Id.* The courts then concluded that based on the plain and popularly used language of the statute indicates that a suretyship is not included in § 8371’s reach.

Based on the well reasoned analysis set forth in the above referenced opinions, the court agrees that section 8371 was not intended to include surety bonds. Accordingly, One Beacon’s preliminary objection in the nature of a demurrer to Count II of plaintiff’s amended complaint is sustained.

II. The Instant Action Should be Stayed Pending Resolution of the Appeal in Ferrick v. One Beacon Insurance Company, November Term 2001 2344.

One Beacon also filed preliminary objections based on the doctrine of prior pending action. A party may raise preliminary objections based on the pendency of a prior action. Pa. R. Civ. P. 1028 (a)(6). In order to plead successfully, the defense of *lis pendens*, i.e., the pendency of a prior action, it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same. Crutchfield v. Eaton Corp., 806 A.2d 1259, 1262 (Pa. Super. 2002)(citing Penox Technologies, Inc. v. Foster Medical Corp., 376 Pa. Super. 450, 546 A.2d 114, 115 (1988)). The purpose of the *lis pendens* defense is to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. *Id.* The doctrine of *lis pendens* requires that the prior action be pending. *Id.* Under Pennsylvania law, the question of pending prior action “is purely a question of law determinable from an inspection of the pleadings.” *Id.* (quoting Davis Cookie Co. v. Wasley, 389 Pa. Super. 112, 566 A.2d 870, 874 (1989)). Once the defense is raised, a court must dismiss or stay the subsequent proceedings. *Id.*

One Beacon argues that the instant case should be dismissed since there is currently pending in the Court of Common Pleas of Philadelphia County a lawsuit captioned Ferrick Construction Co., Inc. v. One Beacon Insurance Company formerly CGU Insurance Company, docket at No. 02334, November Term, 2001 involving the exact same parties, causes of action, facts and circumstances involving a certain public works project. As noted by Ferrick, the November Term 2001, is not currently pending before this court but is on Appeal to the Superior Court. Although the November Term action is not currently pending before this court, finding that the matter currently on appeal may impact the currently filed action, the court finds that it would be in the interests of judicial economy to stay the instant action pending the outcome of the appeal to avoid a duplication of efforts on the part of the parties and create a spectacle of a race to judgment.¹

CONCLUSION

For the foregoing reasons, Defendant One Beacon's Preliminary Objections are overruled in part based on the statute of limitations and sustained in part as to Count II (Bad Faith) and the doctrine of prior pending action. This action is stayed pending resolution of the current appeal before the Superior Court of Pennsylvania.

Ferrick's preliminary objection to One Beacon's Preliminary Objection is Sustained.

¹ One Beacon also filed preliminary objections raising the statute of limitations as a defense. Ferrick filed preliminary objections to One Beacon's preliminary objection on this defense. This court finds that the statute of limitations defense is not properly raised in this matter at the preliminary objection stage. See Devine v. Hutt, 2004 Pa. Super. 460 (2004). Therefore One Beacon's Preliminary Objection is overruled and Ferricks' preliminary objection to One Beacon's preliminary objection is sustained.

An order consistent with this opinion will be contemporaneously filed.

BY THE COURT,

C. DARNELL JONES, II, J.