IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

GUY M. COOPER, INC. Plaintiff, v. EAST PENN SCHOOL DISTRICT, Defendant, v. BILT-RITE CONTRACTORS, INC., UNITED STATES FIDELITY & GUARANTY COMPANY, THE ARCHITECTURAL STUDIO, O'BRIEN KREITZBERG & ASSOCIATES INC a/i/a URS CORPORATION, EAST PENN SCHOOL DISTRICT and BARRY ISETT & ASSOCIATES, P.C. Additional Defendants.	)	Case No. 2002-C-2114

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APPEARANCES:

RICHARD W. HUNT, Esquire
For the Plaintiff

DOMENIC P. SBROCCHI, Esquire
For the Defendant East Penn School District

PATRICK R. KINGSLEY, Esquire
For the Additional Defendant United States Fidelity & Guaranty Co.

NICHOLAS NOEL, III, Esquire
For the Additional Defendant The Architectural Studio

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OPINION

CAROL K. McGINLEY, J.

Before this Court is a motion for judgment on the pleadings of additional defendant United States Fidelity and Guaranty Company ("USF&G"), asserting that there are no genuine issues of material fact and USF&G is entitled to judgment as a matter of law because defendant East Penn's indemnity claim against USF&G must fail due to the application of the "no damages for delay" provision in plaintiff's contract with defendant East Penn.

Facts

Plaintiff, a mechanical contractor, performs a significant amount of work in installing heating and air conditioning systems. On June 6, 1997, plaintiff submitted a bid to defendant, East Penn School District ("East Penn"), to install the heating, ventilation and air conditioning systems at the new East Penn Middle School in Wescosville, Pennsylvania. East Penn accepted plaintiff's bid, and the two parties entered into a written agreement. The contract stipulated that the project be completed within 460 days from the issuance of the Notice to Proceed. Also included as a supplementary condition in the Project Manual was a "no damages for delays" stipulation, which read:

> "Owner shall not be liable to the contractor or any subcontractor for claims of damages of any monetary or any other nature caused by or arising out of delays, contemplated or not contemplated, at the signing of the contract. The sole remedy against the Owner for delays shall be the allowance to claimant of additional time for completion of work."

Supplemental Condition 15.8.1.

In addition to accepting plaintiff's bids, East Penn also accepted bids from other contractors to perform various tasks in the completion of the new middle school. Bilt-Rite Contractors, Inc. was selected as East Penn's general contractor for the new middle school project. United States Fidelity & Guaranty Company ("USF&G") served as Bilt-Rite's surety for the Project. At no time in this matter did plaintiff Cooper enter into a contract with either Bilt-Rite or its surety, USF&G. The building project's architect was The Architectural Studio ("TAS"). These other contractors were also advised to complete the project within 460 days of the issuance of the Notice to Proceed. The Notice to Proceed was issued on June 6, 1997.

As construction progressed, delays in construction became apparent. Ultimately, the new Middle School was finished on January 27, 2000, a full 505 days after the Project's original completion date.

On September 3, 2002, plaintiff launched the instant lawsuit against East Penn. On January 23, 2003, defendant East Penn joined as additional defendants Bilt-Rite Contractors, Inc., USF&G and TAS. In its joinder complaint, defendant East Penn avers that the delays in construction were caused by Bilt-Rite, and accordingly, demanded that both Bilt-Rite and its surety, USF&G, be held liable either solely liable, liable over to East Penn, or jointly and severally liable to East Penn.

Procedural History

On September 3, 2002, plaintiff filed its first complaint in this matter. On December 3,

2002, plaintiff filed a second amended complaint, and on March 11, 2003, plaintiff filed a third amended complaint. On January 23, 2003, defendant East Penn joined as additional defendants Bilt-Rite Contractors, Inc., USF&G and TAS. Additional defendant TAS joined as an additional defendant O'Brien, Kreitzberg & Associates, Inc. on February 19, 2003.

On October 20, 2004, defendant USF&G filed a motion for judgment on the pleadings. On November 5, 2004, defendant East Penn filed its answer to defendant USF&G's motion for judgment on the pleadings. Finally, on December 2, 2004, plaintiff Cooper filed its brief in opposition to additional defendant USF&G's motion for judgment on the pleadings. Argument was heard on July 20, 2005.

Discussion

In its complaint joining Bilt-Rite, USF&G and TAS as additional defendants, defendant East Penn raised an indemnity claim against Bilt-Rite and its surety, USF&G, in the event that East Penn is held liable for delay damages arising out of the school construction project. Additional defendant USF&G has motioned for a judgment on the pleadings, asserting that an indemnity claim against Bilt-Rite or its surety, USF&G, is precluded by the application of "the no damages for delay" provision in the contract between East Penn and plaintiff.

A motion for judgment on the pleadings is in the nature of a demurrer. *Bata v. Central Penn Nat'l Bank,* 224 A.2d 174, 178 (Pa. 1966). It is proper to grant a motion for judgment on the pleadings only where the pleadings demonstrate that no genuine issue of fact exists, and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1034; *Consulting Eng'rs, Inc.*

v. Insurance Co. of N. America, 710 A.2d 82, 83-84 (Pa. Super. 1998). A trial court must confine its consideration to the pleadings and relevant documents. *Conrad v. Bundy*, 777 A.2d 108, 110 (Pa. Super. 2001). This Court must accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed, considering only those facts which were specifically admitted. *See id.* Further, this Court may grant judgment on the pleadings only where the moving party's right to succeed is certain and the case is so free from doubt that trial would clearly be a fruitless exercise. *See id.* Thus, we must use the pleadings to make a determination as to whether a genuine issue of fact exists or else grant defendant USF&G's motion as a matter of law.

Included in the contract between East Penn and plaintiff was a "no damages for delay" provision. Under this provision, the only available remedy to plaintiff in the event of delays was an extension of time to complete its work. Pennsylvania common law, however, has carved out an exception to no delay damages provisions, and allows for the collection of monetary damages under very specific circumstances. Specifically, in *Henry Schenk Co. v. Erie County*, 178 A. 662 (Pa. 1935), the Pennsylvania Supreme Court acknowledged the possibility of an owner's liability for delays damages in the event that the owner performed an affirmative or positive act that interfered with forwardness of the work to be done under contract. *See Schenk*, 178 A. at 664. Additionally, the *Schenk* Court stated that "where the work is dependent upon something essential, which is to be performed by the owner, the default of the owner for an unreasonable time, resulting in damages for the contractor, may [also] render the owner liable for such

damages."[1] *Id.* Thus, the exception to "no damages for delay" provisions as introduced by *Schenk* only applies to situations where the owner itself has, either by its action or inaction, caused material delays to the contractor.

This notion was expanded upon in a line of cases following the decision in *Gasparini Excavating, Co. v. Pennsylvania Turnpike Commission*, 187 A.2d 157 (1963). In *Gasparini*, the Pennsylvania Supreme Court set aside a "no damages for delay" provision when an owner issued a contractor its notice to proceed work on a highway despite the fact that the owner knew that the contractor would have no access to the worksite due to the presence of other contractors at that worksite. *See Gasparini,* 187 A.2d at 163. The contractor who was denied access to the site experienced severe delays as a result. The Court, in its opinion, pointed out that defendant-owner had actively interfered with the contractor's work by denying the contractor access to the work area that was occupied by another contractor at the time defendant issued its order to proceed with the work. *See Gasparini,* 187 A.2d at 162. Thus, this case exemplifies an interference by an owner in that the owner knowingly made it impossible for the contractor, Gasparini, to timely perform its contractual duties by ordering Gasparini to proceed when it was impossible to do so.

[1] As examples of owner's positive acts of interference the *Schenk* court suggested factual settings such as where the owner's engineers in the construction of a road gave a wrong grade, *Mulholland v. City of New York*, 113 N. Y. 631, (N.Y. 1889), where owner furnished defective materials, *McPherson v. San Joaquin County*, 56 P. 802 (Cal. 1899), or where owner willfully interfered with the contract, thus raising price of brick, *King & Kennedy v. Des Moines*, 68 N. W. 708 (Iowa 1896). As examples of an owner's negative actions, or failure to perform an act essential to the work, such that would cause a "no damages for delay" clause to be suspended, the *Schenk* court suggested such acts as failure by the owner to procure a permit to build, *Weeks v. Rector, etc., of Trinity Church*, 56 A.D. 195, 67 N.Y.S. 670 (N.Y. App. Div. 1900), or the owner's failure or neglect to dig foundations which it had agreed to do, *L. & N. R. R. v. Hollerbach*, 105 Ind. 137, 5 N. E. 28 (Ind. 1886), or delay in furnishing materials, *Langford v. U. S.* (C. C.) 95 F. 933 (C.C. Or. 1899), or delay forcing suspension of work, *U. S. v. Mueller*, 113 U. S. 153, 5 S. Ct. 380 (1885), or secure right of way necessary for the work, *Pitt. Const. Co. v. Dayton*, 237 F. 305 (C. C. A. 1916).

Following *Gasparini*, the Pennsylvania Supreme Court addressed "no damages for delay" contractual provisions in *Coatesville Contractors v. Borough of Riley Park*, 506 A.2d 862 (Pa. 1986). In *Coatesville*, a contractor was awarded a contract to remove silt and debris from an area of land in the vicinity of the location of a dried-up lake. In the contract, the Borough promised that the lake would remain drained the entire time the contractors were performing their work. Unbeknownst to both parties, the lake had refilled with water. Upon arriving at the work site on the designated start date and discovering the water, the contractor notified the Borough. Despite knowing that the worksite was not as promised in the contract, the Borough ordered the contractor to start work. The Borough sent workers out in boats in separate attempts to open a drainage valve at the bottom of the lake with a pole, but had no success. The Court in *Coatesville* found that there was "interference by the [owner] in ordering [the contractor] to start work without having the lake drained and kept in a drawdown condition.

Moreover, the evidence show[ed] that there was failure in the essential matter of the [owner] not having the lake in a drained state when work was ordered to commence." *Coatesville*, 506 A.2d at 867-68. In *Coatesville*, as with *Gasparini*, the contractor was ordered to proceed with their work despite the fact that the worksite was not as it was promised in the contract. Moreover, like in *Gasparini*, such a problem with the worksite was not contemplated at the time of the contract. The owner's "failure to have the lake in a drained and drawdown condition when commencement of the work was ordered and to maintain that drained condition during prosecution of the work was not in the class of difficulties which were contemplated by the parties." *Coatesville*, 506 A.2d at 867. As a result of the owner's failure to maintain the lake

in a drained condition, the *Coatesville* Court set aside the no damages for delay provision in the contract.

Plaintiff has also cited two Commonwealth Court cases in support of the proposition that defendant East Penn interfered with plaintiff's ability to perform the contract. In *Commonwealth of Pennsylvania, State Highway and Bridge Authority v. General Asphalt Paving Co.*, 405 A.2d 1138 (Pa. Cmwlth. 1979), a contractor entered into a contract with PennDOT to perform roadwork services. As part of their contract, there was a provision providing for no delay damages other than a time extension in the event of delays caused by the owner's failure to adjust structures on or underneath the worksite while work is ongoing. Before the commencement of the project, PennDOT was aware that a water main had to be relocated in order to give the contractor access to the worksite. The contractor had a start date of April 3, 1967, but upon its arrival at the worksite, they found that they were unable to perform their duties due to the presence of the water main. Actual commencement of work was delayed until June 13, 1967. Thus, there was almost 3 months of delay to the contractor. The Court held that the case was substantially similar to *Gasparini,* because PennDOT knew from the outset that the worksite contained a water main that would prevent the contractor from carrying out its duties. Despite having this knowledge, PennDOT still ordered the contractor to start work and therefore interfered with the contractor's performance of the contract. *See Asphalt,* 405 A.2d at 1140-41. Furthermore, like in *Coatesville*, PennDOT failed to expeditiously resolve the water main situation so that the contractor could start working. *See id.* The Court held that such a problem with the worksite was beyond contemplation of the parties at the time the contract was signed.

See id.

Finally, plaintiff submitted *Commonwealth of Pennsylvania Dept. of Highways v. S.J. Groves and Sons, Co.*, 343 A.2d 72 (Pa. Cmwlth. 1975). In *Groves*, the Pennsylvania Department of Highways took contracting bids for roadway construction. Unknown to the bidders, however, was that underneath the work site were cables that AT&T needed to move. Also unknown to the contractors was that the Highway Department had made arrangements with AT&T for AT&T to remove the cables. This cable removal work was scheduled concurrently with the date that Groves was ordered to start working. As a result of AT&T's cable removal work, Groves could not access the worksite because the Highway Department promised AT&T exclusive control of the site. Just as in *Gasparini*, the Court found that excluding Groves from the worksite at the same time that Groves was ordered to start work was an interference with the contract. *See Groves*, 343 A.2d at 76.

In each of these cases, the owner issued an order to proceed despite the owner's knowledge that the conditions at the worksite were not as promised at the time of entering into the contract. Thus, in order for the "no damages for delay" provision to be set aside, the owner must actively interfere with the completion of the contract. In this matter, therefore, plaintiff needs to demonstrate that the owner, defendant East Penn, interfered with the contract pursuant to either *Schenk* or the *Gasparini* line of cases. Establishing East Penn's interference with the contract will result in the setting aside of the "no damages for delay" provision.

But, in order to claim indemnity, defendant East Penn must be in no way responsible for the injury plaintiff incurred. "[U]nlike comparative negligence and contribution, the common

law right of indemnity is not a fault sharing mechanism between one who was predominantly responsible for an accident and one whose negligence was relatively minor." *Walton v. Avco Corp.*, 610 A.2d 454, 460 (Pa. 1992). "Rather, it is a fault shifting mechanism, operable only when a defendant who has been liable to a plaintiff solely by operation of law, seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss." *Id.* (quoting *Sirianni v. Nugent Brothers, Inc.*, 506 A.2d at 871 (Pa. 1986)). "Where a party seeks indemnity, the issue is whether that party 'had any part in causing the injury.'" *Id.* at 871 (1986).

The parties are in a paradoxical position whereby the only way to set aside the "no damages for delay" provision in plaintiff's contract is to find the owner, East Penn, responsible for interfering with the plaintiff's contract. If such interference is proven, East Penn cannot assert any claims for indemnity against Bilt-Rite or its surety, USF&G, because the party asserting the indemnity claim is responsible for causing the injury. East Penn's claims for indemnification against Bilt-Rite and USF&G must fail as a matter of law.

Accordingly, because allowing defendant East Penn's claim for indemnification against additional defendant USF&G would be fruitless if allowed to proceed to trial, and because there are no genuine issues of material fact, additional defendant United States Fidelity and Guaranty's motion for judgment on the pleadings is granted.

BY THE COURT:

Dated: November 7, 2005

CAROL K. McGINLEY, J.