

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

MULTI-PHASE, INC.,	:	JULY TERM, 2005
	:	
Plaintiff,	:	NO. 02598
	:	
v.	:	COMMERCE PROGRAM
	:	
UNITED STATES FIDELITY & GUARANTY CO., DRISCOLL/HUNT, A Joint Venture, L.F. DRISCOLL CO., HUNT CONSTRUCTION GROUP, INC., And PHILLIES BALLPARK, L.P.,	:	Control No.: 111398
	:	
Defendants.	:	
	:	
v.	:	
	:	
SAMUEL GROSSI & SONS, INC.,	:	
	:	
Add'l Defendants.	:	

OPINION

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 sub-contract (the "Sub-Contract") with Havens Steel Company ("Havens") to be the prime steel contractor on the Project.

Havens entered into a sub-sub-contract with plaintiff, Multi-Phase, Inc ("MPT"), to erect and install structural steel, metal decking and structural precast on the Project. Havens obtained a payment bond (the "Payment Bond") and a performance bond (the "Performance Bond") from defendant United States Fidelity & Guaranty Co. ("USF&G"). The Project was apparently beset

with numerous delays and disruptions which gave rise to claims by various subcontractors, including MPI, for additional compensation for work allegedly not contemplated in its sub-sub-contract.

MPI commenced this action in July, 2005 to recover the additional compensation it claims is due for its extra work on the Project. MPI seeks these additional sums from USF&G under the Payment Bond and/or from DH and/or the Phillies. MPI did not assert a claim against Havens since Havens filed for bankruptcy protection towards the end of the Project.¹

DH filed a Performance Bond Cross-Claim against USF&G. In its Cross-Claim, DH alleges that Havens caused some of the delays that beset the Project, so its surety must pay such delay damages under the Performance Bond. DH also claims that USF&G must indemnify and provide a defense to DH under the Performance Bond with respect to MPI's claims against DH in this action.

USF&G moved for summary judgment on DH's claims under the Performance Bond. USF&G argues that delay damages are not recoverable under the Performance Bond because the Bond does not expressly say such damages are recoverable. USF&G also argues that it has no express duty under the Bond to assume Havens' indemnification and defense obligations under the Sub-Contract. DH argues that the Performance Bond incorporates by reference all of Havens' obligations under the Sub-Contract. DH further argues that, since the Sub-Contract requires Havens to pay delay damages to, and to indemnify and defend DH, USF&G has the same duties to DH under the Bond.

¹ Havens filed for bankruptcy in March, 2004 in the United States Bankruptcy Court for the Western District of Missouri. The bankruptcy proceedings are still pending.

The Performance Bond provides as follows:

Whereas [Havens] has . . . entered into a subcontract with [DH] . . . which subcontract is by reference made a part hereof, and is hereinafter referred to as the subcontract.

* * *

Whenever [Havens] shall be, and be declared by [DH] to be in default under the subcontract, [DH] having performed [DH's] obligations thereunder:

- (1) [USF&G] may promptly remedy the default subject to the provisions of paragraph 3 herein, or
- (2) [DH] after reasonable notice to [USF&G] may, or [USF&G] upon demand of [DH], may arrange for the performance of [Havens'] obligation under the subcontract subject to the provisions of paragraph 3 herein,
- (3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontract. If completed by [DH], and the reasonable cost exceeds the balance of the subcontract price, [USF&G] shall pay to [DH] such excess, but in no event shall the aggregate liability of [USF&G] exceed the amount of this bond. If [USF&G] arranges completion or remedies the default, that portion of the balance of the subcontract price as may be required to complete the subcontract or remedy the default and to reimburse [USF&G] for its outlays shall be paid to [USF&G] at the times and in the manner as said sums would have been payable to [Havens] had there been no default under the subcontract. The term "balance of the subcontract price," as used in this paragraph, shall mean the total amount payable by [DH] to [Havens] under the subcontract and any amendments thereto, less the amounts heretofore properly paid by [DH] under the subcontract.

These provisions do not expressly state that USF&G is responsible for delay damages, indemnification or defense costs that may arise under Havens' Sub-Contract with DH. The fact that the "whereas" clause incorporates the Sub-Contract by reference does not make USF&G's obligations under the Bond co-extensive with Havens' obligations under the Sub-Contract.² Furthermore, the fact that USF&G is to either "complete Havens' performance" or "remedy Havens' default" does not mean that USF&G is responsible for anything more than finishing the

² See Downingtown Area School Dist. v. International Fidelity Ins. Co., 769 A.2d 560, 566, n. 13 (Pa. Commw. 2001) (the whereas clause "only sets out the condition of [the surety's] liability rather than the scope of that liability"); Wise Investments, Inc. v. Bracy Contr., Inc., 232 F.Supp.2d 390, 403 (E. D. Pa. 2002) (same).

construction work required of Havens under the Sub-Contract.³ The purpose of a Performance Bond is to ensure that the Project gets completed, not to make the obligee, *i.e.* DH, whole.⁴ If DH wanted greater coverage, it could have added language to the Performance Bond requiring USF&G to pay delay damages⁵ and to indemnify and defend DH in the event that Havens was unable to do so.

CONCLUSION

For all the foregoing reasons, USF&G's Motion for Summary Judgment is granted, and DH's Cross-Claims for delay damages, acceleration costs, indemnification, and defense costs are dismissed.

BY THE COURT,

PURSUANT TO Pa.R.C.P. 236(b)

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HOWLAND W. ABRAMSON, J.

³ Downingtown, 769 A.2d at 562, 566 (where bond called for surety to "promptly remedy the default or . . . complete the Contract in accordance with its terms and conditions," delay damages due under the Contract were not recoverable from the surety.); Wise, 232 F.Supp.2d at 399, n.5, 403 (where bond called for surety to "promptly remedy the default, or . . . complete the Contract in accordance with its terms and conditions," attorneys fees and liquidated damages due under the Contract were not recoverable from the surety.)

⁴ Similarly, 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. Snively & 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.")

⁵ On this Project, acceleration costs are the same thing as delay damages, so all claims for the former are dismissed as well. See Samuel F. Grossi & Sons v. United States Fidelity & Guaranty, 2006 Phila. Ct. Com. Pl. LEXIS 423 (November 10, 2006). Furthermore, DH's claims against USF&G based on the delay damages claims assigned to DH by other entities are dismissed since DH paid nothing on them. See Carson/DePaul/Ramos v. Driscoll/Hunt, 2006 Phila. Ct. Com. Pl. LEXIS 278 (June 29, 2006).

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CIVIL TRIAL DIVISION

MULTI-PHASE, INC., : JULY TERM, 2005
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 Plaintiff, : NO. 02598
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 v. : COMMERCE PROGRAM
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 UNITED STATES FIDELITY & : Control No.: 010721
 GUARANTY CO., DRISCOLL/HUNT, :
 A Joint Venture, L.F. DRISCOLL CO., :
 HUNT CONSTRUCTION GROUP, INC., :
 And PHILLIES BALLPARK, L.P., :
 :
 :
 Defendants. :
 :
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 v. :
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 SAMUEL GROSSI & SONS, INC., :
 :
 :
 Add'l Defendants. :

ORDER

AND NOW, this 27th day of June, 2007, upon consideration of defendant United States Fidelity & Guaranty Company's ("USF&G") Motion to Stay Count One of the Complaint, the response thereto, and the briefs in support and opposition, and after hearing oral argument on March 23, 2007, it is hereby **ORDERED** that said Motion is **DENIED**.¹

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BY THE COURT,


HOWLAND W. ABRAMSON, J.

¹ The purpose of a Payment Bond is to ensure that lower tier sub-contractors, such as plaintiff, get paid if the party with whom they contracted goes bankrupt or is otherwise unable to pay. It would defeat the purpose of the Payment Bond if the court were to stay this action pending the outcome of Havens Steel Company's bankruptcy proceedings. USF&G's supposed difficulty in mounting a defense to plaintiff's claims in this action is of USF&G's own making.

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GUARANTY CO., DRISCOLL/HUNT, :
A Joint Venture, L.F. DRISCOLL CO., :
HUNT CONSTRUCTION GROUP, INC., :
And PHILLIES BALLPARK, L.P., :
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Defendants. :
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v. :
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SAMUEL GROSSI & SONS, INC., :
: :
Add'l Defendants. :

ORDER

AND NOW, this 27th day of June, 2007, upon consideration of defendant United States Fidelity & Guaranty Company's ("USF&G") Motion for Summary Judgment, the response thereto, the briefs in support and opposition, and after hearing oral argument on March 23, 2007, and in accordance with the Opinion issued contemporaneously, it is hereby **ORDERED** that said Motion is **GRANTED** and Driscoll/Hunt, A Joint Venture's Cross-Claims against USF&G for delay damages, acceleration costs, defense, and indemnification are **DISMISSED**.

BY THE COURT,


HOWLAND W. ABRAMSON, J.

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