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In the Third Circuit, Sureties are Protected by a Principal's Right to Cure

by Patrick R. Kingsley and Benjamin E. Gordon

The U.S. Court of Appeals for the Third Circuit recently held that an owner of a construction project may not evade a contractual notice-to-cure provision unless a contractor commits an *incurable* breach of contract. A *material* breach by the principal is not enough to excuse non-compliance with the cure provision unless the breach is incurable. Milton Regional Sewer Authority v. Travelers Casualty & Surety Co. of America, __ Fed.Appx. __ (3d Cir., 2016). Because the performance bond surety was to be protected by this language, the owner's failure to abide by the cure provision voided the bond's coverage.

The construction project at issue involved the refurbishment of a public sewer that was governed by a contract that included a notice-to-cure provision. The trial court held that the owner default terminated the contractor without first providing sufficient notice and an opportunity to cure in violation of the construction contract and, therefore, that the owner could not assert a bond claim against the surety. Further, the trial court held that the severity of the contractor's many alleged performance deficiencies did not allow the owner to ignore the notice-to-cure provision. The owner appealed the last holding only.

On appeal, the owner again argued that the contractor's conduct was so egregious that the owner could simply ignore the notice-to-cure provision. The Third Circuit soundly rejected this argument and found that, although the workmanship of the contractor that was "quite poor," it was not incurable. As the Court explained, only incurable conduct (such as fraud) would have excused the owner from honoring the notice-to-cure provision. The Third Circuit affirmed the trial court and held that the bond claim was negated by the owner's breach.

This decision is significant for at least two reasons. First, there is limited case law in Pennsylvania on the enforceability of a notice-to-cure provision in the context of a construction contract, and there is even less case law on what kind of breach of contract justifies an owner in violating such a provision. This decision provides some clarity by indicating what the law regards as *not* incurable. Second, the case was dismissed at the pleadings stage. This saved the surety considerable costs and fees that would have otherwise been incurred in discovery. Although the defendant was a surety, the holdings in the Milton decision are equally applicable to contractors.

Stradley Ronon represented the surety in this case. This is Patrick Kingsley's second Third Circuit appellate victory in as many years.

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