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

UNITED ELECTRIC COMPANY, D/B/A MAGIC AIRE,	:	October Term, 2001
Plaintiff,	:	No. 01555
v.	:	
ALLSTATES MECHANICAL, LTD, D/B/A ALLSTATES CONSTRUCTION COMPANY AND RLI INSURANCE COMPANY,	:	Commerce Program
Defendants,	:	
v.	:	Control Number 020729
CHASE & ASSOCIATES, INC.	:	
Additional Defendant.	:	

ORDER

AND NOW, this 17th day of June, 2004, upon consideration of Defendant Allstates Mechanical, Ltd.'s Motion for Summary Judgment, responses in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion filed of record, it hereby is **ORDERED** and **DECREED** that the Motion for Summary Judgment is **Granted** in part and **Denied** in part as follows:

1. The Motion for Summary Judgment to Count I (breach of contract) is **Denied.**

2. The Motion for Summary Judgment to Count IV (breach of surety agreement) is **Granted.** All claims including cross claims and counterclaims are dismissed against Allstates as it pertains to Count IV.

BY THE COURT,

C. DARNELL JONES, II, J.

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UNITED ELECTRIC COMPANY, D/B/A MAGIC AIRE, Plaintiff,	:	October Term, 2001
v.	:	No. 01555
ALLSTATES MECHANICAL, LTD, D/B/A ALLSTATES CONSTRUCTION COMPANY AND RLI INSURANCE COMPANY, Defendants,	:	Commerce Program
v.	:	Control Number 020729
CHASE & ASSOCIATES, INC. Additional Defendant.	:	

MEMORANDUM OPINION

Presently before the court is Allstates Mechanical, Ltd.'s ("Allstates") Motion for Summary Judgment to Count I (breach of contract) and Count IV(breach of surety agreement) of Plaintiff United Electric Company, d/b/a Magic Aire's ("Magic Aire") amended complaint.[1] For the reasons that follow, Allstates' Motion for summary judgment will be granted in part and denied in part.

BACKGROUND

Many of the facts surrounding the instant matter are disputed. For purposes of this opinion the following facts are applicable which appear to be uncontested from the briefs filed by the parties. Plaintiff Magic Aire is a manufacturer and supplier of HVAC equipment. Chase and Associates, Inc.("Chase") is a manufacturer representative for various manufacturers including Magic Aire. On or about April 13, 1999, Chase ("Chase") issued a quotation to all bidders on the contract with the School District

[1] In addition to the instant motion, there are three companion motions filed by the various parties which will be addressed in separate orders.

concerning the Locke Elementary School for provision of Magic Aire equipment as well as other manufacturers' equipment.

Allstates Mechanical Ltd., d/b/a Allstates Construction Group ("Allstates"), the general contractor, was awarded the contract with the School District of Philadelphia for the HVAC work to be performed in the school. (Amended Complaint ¶ 9). RLI issued a bond with Allstates as principal and RLI as the surety in the sum of $584, 000.00 to the School District of Philadelphia for the Locke project. (Amended Complaint ¶ 10; Exhibit B to the amended complaint).

Allstates issued the purchase order to Chase who passed it along to Magic Aire. (Amended Complaint ¶ 11). Magic Aire shipped the products in three shipments. (Amended Complaint ¶ 12). Magic Aire issued the invoices and debit memos to Allstate for said product and related charges. Partial payment was made on the invoices.

Magic Aire commenced this action against Allstates on October 10, 2001 seeking to recover the balance due. The complaint alleges causes of action for breach of contract (Count I), a claim under the Pennsylvania Contractor and Subcontractor Payment Act (Count II), unjust enrichment (Count III) and breach of surety agreement (Count IV). Allstates filed preliminary objections to Magic Aire's Complaint on December 21, 2001. In response, Magic Aire filed an amended complaint. Allstates filed preliminary objections to the amended complaint.

On May 2, 2002, Hon. John W. Herron entered an order sustaining the preliminary objections in part and ordered that Magic Aire join Chase as an indispensable party. The remaining preliminary objections were held under advisement pending the filing of a joinder complaint by Magic Aire.

On May 22, 2002, Magic Aire joined Chase to this action as an additional defendant. Chase filed an answer and counterclaim.

On June 26, 2003, the court overruled the pending preliminary objections. Allstates filed its answer and asserted new matter against Chase.

DISCUSSION

A. Standard of Review

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc. v. Cohen, 2002 WL 1472340,* 2 (Pa. Com. Pl. 2002) (J. Herron) Under Pa. R.C. P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. The nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the moving party, "summary judgment is proper when if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory he has pled." Id; quoting Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999); citing Pa. R. Civ. P. 1035.2). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id.

B. Count IV (Breach of Surety Agreement)

Allstates argues that Count IV (breach of surety agreement) should be dismissed as a matter of law since it fails to allege any breach and since the bond agreement does

not inure to the benefit of Magic Aire. After considering the positions presented by the parties, the court finds Allstates' argument persuasive.

Count IV of plaintiff's amended complaint alleges that under the terms of the bond, Allstates and RLI are jointly and severally liable to Magic Aire for the principal amount owed. (Amended Complaint ¶ 33). In order to determine whether the bond in issue covers the damages sought by MagicAire, the proper place to start is the bond since the true intent and meaning of the instrument are the primary determinants of the extent of liability. Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc., 398 Pa. Super. 86, 580 A.2d 853 (1990). In examining the clear language of the bond attached to the amended complaint and as an exhibit to the pending motions before this court, the surety, RLI, was guaranteeing only Allstates' performance under the contract which Allstates executed with the School District. The bond specifically states that Allstates and RLI are "jointly and severally held and firmly bound unto the School District of Philadelphia in the sum of $584,000.00 to be paid to the School District…" (Exhibit "B" of the amended complaint). The bond does not contain language concerning the responsibility for the payment of labor and materialmen. The bond language refers only to the School District. Thus, under the terms of the bond Allstates is not in breach of the surety agreement with respect to Magic Aires claims. [2] Accordingly, Allstates' motion for summary judgment

[2] Pursuant to 8 P.S.A. § 193, Bonds Required, when any contract exceeding $5,000.00 is issued for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement , including highway work, the prime contractor (Allstates) is required to furnish a performance bond and a payment bond. Id. A performance bond is issued at 100% of the contract amount and is conditioned upon the faithful performance of the contract in accordance with the plans, specifications of the contract. The performance bond is solely for the protection of the contracting body (the School District) which awarded the contract. 8 P.S.A. § (a)(1). The payment bond is issued at 100% of the contract amount and is solely for the protection of claimants supplying the labor and material (Magic Aire) to the prime contractor to whom the contract was awarded, or any of his subcontractors. 8 P.S.A. §193 (a)(2). Here, the parties have produced only one bond, a performance bond which inures to the benefit of the School District. No other bond is part of the record before the court nor was any evidence

as it pertains to Count IV is Granted and Count IV is dismissed against Allstates only as well as any counterclaims or crossclaims related thereto. [3]

CONCLUSION

For the foregoing reasons, Defendant Allstates Mechanical, LTD's Motion for Summary Judgment is granted in part and denied in part as follows:

1. Allstates' Motion for Summary Judgment to Count I (breach of contract) is Denied; and
2. Allstates' Motion for Summary Judgment to Count IV (breach of surety agreement) is Granted. All claims including crossclaims and counterclaims are dismissed against Allstates only as it pertains to Count IV.

A contemporaneous Order will be issued.

BY THE COURT,

C. DARNELL JONES, II, J.

presented that Allstate failed to procure a payment bond. This causes the court to believe that a payment bond was never issued.

[3] Allstates' motion for summary judgment with respect to Count I (breach of contract) is denied. Summary Judgment may only be granted in cases where "it is clear and free from doubt that the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954 (Pa. Super. 1999). Here genuine issues of material fact exist as to whom Allstates contracted with for the unit ventilators.