

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

FERRICK CONSTRUCTION CO., INC.,	:	November Term 2001
	:	
Plaintiff,	:	No. 2344
v.	:	
ONE BEACON INSURANCE COMPANY	:	Commerce Program
Formerly CGU INSURANCE COMPANY,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 18th day of October 2004, upon consideration of Plaintiff's Motion for Post Trial Relief, Defendant's response in opposition, all matters of record and after oral argument, it hereby is **ORDERED** that Plaintiff's Motion is **Denied**.

BY THE COURT,

C. DARNELL JONES, II, J.

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Defendant.	:	

MEMORANDUM OPINION

Presently before the court for consideration is the Post Trial Motion of the Plaintiff Ferrick Construction Co., Inc. (“Ferrick”). In this action, Ferrick instituted suit against One Beacon Insurance Company (“One Beacon”) pursuant to a Payment Bond issued to Ernest Bock and Young (“Bock”) to recover outstanding balances for work performed. A bench trial was held before this court on November 13, 2003. On April 12, 2004, the court found in favor of One Beacon and against Ferrick. Thereafter, Plaintiff filed Post Trial Motions claiming the court erred in its conclusion that Ferrick failed to satisfy a condition precedent of the Bond before filing suit and that One Beacon properly raised the defense of premature filing of suit in its answer and new matter. For the reasons set forth below, this court denies plaintiff’s motion for post trial relief.

FACTUAL BACKGROUND

In or about April 2000, The City of Philadelphia contracted with Bock to construct a police station. As a requirement under the contract, The City of Philadelphia required Bock to obtain two bonds, a performance bond and a payment bond. The respective bonds were issued by One Beacon to Bock.

Under the terms of the Payment Bond a corporation that has no contractual relation with Bock shall not have a right of action upon the bond, unless the corporation gives written notice of the claim within ninety days from the date on which the corporation last performed the labor for which the claim is being made. The notice required the party to state with substantial accuracy the amount claimed and the name of the party with whom the corporation contracted. The notice was to be sent as required by law or by mailing the notice by registered mail. (Plts Exhibit 1-Payment Bond).

The Payment Bond also provided that no suit shall be commenced prior to ninety days from the date upon which the corporation performed the last labor for which the said claim is made and every such suit shall be commenced not later than one (1) year from the date of final settlement under the said contract with the City of Philadelphia. (Id.).

In November 2000, Bock hired Pennsbury Paving and Excavating & Landscaping Inc. (Pennsbury) as a subcontractor for the project to demolish, clear soil erosion, control sediment and perform earth work, asphalt paving, sub drainage, concrete paving and landscaping. (N.T. p. 115). After the excavation began on the project, contaminated soils were discovered which necessitated the removal of same. (N.T. p. 119-120).

On March 2, 2001, Pennsbury hired Ferrick as a subcontractor to remove and dispose of the contaminated soils. (N.T. p. 15). According to the contract between Pennsbury and Ferrick, Ferrick agreed to remove and dispose of the soils generated from excavation at the project site at the rate of \$21.94/ton. (Plt. Exhibit 2). In addition to the removal and disposal of the contaminated soils, Ferrick was also required to generate and/or obtain certifications documenting the proper disposal of the contaminated soils. (Id.).

In order to perform under its contract with Pennsbury, Ferrick entered into an agreement with Soil Safe, a facility where the contaminated soil is taken to be recycled. (N.T. p. 16). Ferrick would excavate the contaminated soil and Soil Safe would haul the soil to its landfill. (N.T. p. 31). Ferrick's last performance at the project site was October 21, 2001. (N.T. p. 30, 50). Ferrick submitted its final invoice to Pennsbury on October 24, 2001. (N.T. 48-49).

Pennsbury paid Ferrick the sum of \$195,283.80 for its work (N.T. p. 45) and Ferrick claims \$179,660.48 remains unpaid. In or about the end of October or the beginning of November 2001, Ferrick contacted Bock to determine when payment for services performed could be expected. (N.T. p. 18). On November 15, 2001, Bock forwarded a letter to Ferrick regarding the outstanding balance owed to Ferrick. Bock stated that despite the retainage held, Pennsbury had been paid in full for work performed. (Plt. Exhibit 3).

On November 7, 2001, Ferrick forwarded a letter to the project manager George Ashjian by United States Parcel Service next day delivery stating that since Ferrick was not paid and that Bock was holding retainage for Pennsbury, if Pennsbury were paid a joint check should be issued. (N. T. 19, 33).

On November 8, 2001, Ferrick received a letter from Ashjian stating that Pennsbury was paid in accordance with the contractual agreement and suggested that Ferrick contact Pennsbury. (N.T. p. 20). On November 14, 2001, Ferrick forwarded a letter to One Beacon via next day mail explaining the circumstances of the outstanding balance, attaching the invoices and a copy of the check issued by Pennsbury to Ferrick. (N.T. p. 22-23, 29, 34).

In the fall of 2001, Pennsbury filed for bankruptcy and did not complete the project. (N.T. p. 125-126).¹

On November 21, 2001, Ferrick instituted suit against One Beacon by writ of summons. On March 12, 2002, Ferrick filed a complaint.

DISCUSSION

The Payment Bond at issue provides:

It is likewise understood and agreed that no such suit shall be commenced prior to ninety days (90) from the date upon which the said...corporation furnished...rendered... or performed the last of the material or labor for which the said claim is made, and every such suit shall be commenced not later than one (1) year from the date of final settlement under the said contract with the The City of Philadelphia.

The plain and unambiguous language of the above provision specifically requires that ninety days lapse before suit is commenced under the Bond. Here, Ferrick undeniably did not wait the required ninety days before bringing suit. The facts of record demonstrate that the last performance of work on the job site was October 21, 2001. (Plaintiff's amend complaint ¶ 7; Plaintiff's finding of fact ¶ 13; Plaintiff's Exhibit 5- invoice; N.T. p. 30, 50). Suit was instituted November 21, 2001 by Ferrick. This court concluded after the trial that the ninety day waiting period is a condition precedent to bringing suit. After the submission of post trial motions and oral argument, this court continues to find that the ninety day waiting period is a condition precedent to bringing suit under the Bond.

A condition precedent may be defined as a condition which must occur before a duty to perform under a contract arises. ACME Mkts, Inc. v. Federal Armored Express, Inc., 437 Pa. Super. 41, 648 A.2d 1218 (1994). While the parties to a contract need not

¹ Ferrick filed a proof of claim for the balance owed by Pennsbury.

utilize any particular words to create a condition precedent, an act or event designated in a contract will not be construed as constituting one unless that clearly appears to have been the parties' intention. Id. In addition, the purpose of any condition set forth in a contract must be determined in accordance with the general rules of contractual interpretation. Id.

When construing agreements involving clear and unambiguous terms, this Court need only examine the writing itself to give effect to the parties' understanding. Id. (citing McMahon v. McMahon, 417 Pa. Super. 592, 612 A.2d 1360 (1992)). The court must construe the contract only as written and may not modify the plain meaning of the words under the guise of interpretation. Id. When the terms of a written contract are clear, this court will not rewrite it to give it a construction in conflict with the accepted and plain meaning of the language used. Id. (Litwack v. Litwack, 289 Pa. Super. 405, 433 A.2d 514 (1981)). Conversely, when the language is ambiguous and the intention of the parties cannot be reasonably ascertained from the language of the writing alone, the parole evidence rule does not apply to the admission of oral testimony to show both the intent of the parties and the circumstances attending the execution of the contract. Id. (Dewitt v. Kaiser, 335 Pa. Super. 258, 484 A.2d 121 (1984)).

In the present case, the waiting period contained within the Bond requires a subcontractor to wait ninety days before filing suit from the date upon which it last furnished, rendered or performed the last of its labor. This language demonstrates that it clearly and unambiguously conditions a subcontractor's commencement of suit after a ninety day waiting period, thus creating a condition precedent under the Bond.

Such an interpretation would allow the surety ninety days within which to investigate or make possible settlement of the breach before being liable for suit. Additionally, such an interpretation is consistent with the general rule in this Commonwealth that a surety is only obligated to the extent set forth in its agreement. Lezzer Cash & Carry, Inc. v. Aetna Insurance Company, 371 Pa. Super. 137, 537 A.2d 857 (Pa. Super. 1988)(citations omitted). Ferrick's right to recover against One Beacon arises from the Bond and therefore the suit must be initiated pursuant to the terms and conditions of the Bond. As such, this court is obliged to enforce the terms of the Bond and cannot impose upon One Beacon an obligation to answer for the debts of another when the Bond specifically excludes claims of a subcontractor who has not initiated suit as required under its provisions. Any other interpretation would nullify the provisions of the Bond.²

In an attempt to avoid the ninety day waiting period contained within the Bond, Ferrick argues that One Beacon waived its right to assert the ninety day suit provision since the defense was not raised by preliminary objection or plead as an affirmative defense. After reviewing One Beacon's Answer to Plaintiff's Amended Complaint with New Matter, the court does not believe that One Beacon waived its right to assert the waiting period as a condition precedent to suit. In paragraphs 26 and 27 of One Beacon's answer and new matter, One Beacon asserted as affirmative defenses Ferrick's failure to comply with the condition precedents to making claims under the Bond and Act and failing to provide proper notice as required under the Bond and the Act. Accordingly, the court finds that Ferrick failed to comply with the condition precedent contained within the Bond by instituting suit against One Beacon within the ninety day waiting period.

²Ferrick may have cured the defective filing with the filing of an amended complaint within the statute of limitations period.

CONCLUSION

For the above reasons, Plaintiff's Motion for Post Trial Relief is Denied.

BY THE COURT,

C. DARNELL JONES, II, J.