

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

GMI CONTRACTORS, INC.	:	
	:	April Term 2005
Plaintiff,	:	
v.	:	No. 3006
	:	
PKF-MARK III, INC., TRAVELERS	:	Commerce Program
CASUALTY and SURETY COMPANY	:	
of AMERICA a/k/a THE ST. PAUL	:	Control Nos. 081077, 081078
TRAVELERS COMPANIES, INC., and	:	
TRAVELERS CASUALTY AND	:	
SURETY COMPANY,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 29TH day of December, 2005, upon consideration of the Preliminary Objections to Plaintiff's Complaint of Defendants Travelers Casualty and Surety Company of America a/k/a The St. Paul Travelers Companies, Inc. and Travelers Casualty and Surety Company (control no. 081077) and the response thereto, the Preliminary Objections to Plaintiff's Complaint Defendant PKF-Mark III, Inc. (control no. 081078) and the response thereto, and in accordance with the attached memorandum, it is hereby **ORDERED** and **DECREED** as follows:

- 1) Defendants Travelers Casualty and Surety Company of America a/k/a The St. Paul Travelers Companies, Inc. and Travelers Casualty and Surety Company's Preliminary Objections are **OVERRULED**;
- 2) Defendant PKF-Mark III, Inc.'s Preliminary Objections are **OVERRULED**;
- 3) Plaintiff GMI Contractors, Inc. shall file a Second Amended Complaint within twenty (20) days of this Order that correctly identifies Defendants,

includes complete exhibits, and complies with the Rules of Civil Procedure; and

- 4) Defendants shall file an answer to Plaintiff's Second Amended Complaint within twenty (20) days of the filing of the Second Amended Complaint.

BY THE COURT,

C. DARNELL JONES, II, J.

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SURETY COMPANY,	:	
	:	
Defendants	:	

MEMORANDUM OPINION

JONES, J.

Presently before the court are the Preliminary Objections of Defendants PKF-Mark III, Inc. (“PKF”), Travelers Casualty and Surety Company of America a/k/a The St. Paul Travelers Companies, Inc.,¹ and Travelers Casualty and Surety Company (“Travelers”) to the Amended Complaint of GMI Contractors, Inc. (“GMI”). Defendants incorporate portions of each others’ Preliminary Objections in challenging Counts I (breach of contract against PKF) and V (breach of payment bond/third party beneficiary against Travelers) of the Amended Complaint.

Plaintiff commenced this action seeking payment for windows and components manufactured for installation on an elevated train reconstruction project in Philadelphia. GMI alleges that PKF breached their agreement and failed to make payment for its efforts and also seeks to hold Travelers liable as a surety.

¹ By agreement of the parties, Defendant Travelers Casualty and Surety Company of America a/k/a The St. Paul Travelers Companies, Inc. is dismissed. Pl. Brs. In Opp’n, at n.3.

DISCUSSION

In their Preliminary Objections to the Amended Complaint, Defendants raise demurrers and also assert that Plaintiff failed to conform to the Rules of Civil Procedure. In a demurrer posture, the court considers all material facts set forth in the Complaint as well as all inferences reasonably deducible therefrom as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. Moser v. Heistand, 545 Pa. 554, 559, 681 A.2d 1322, 1325 (1996).

Defendants assert that GMI failed to attach full and complete copies of the documents used to support its claims in contravention of Pa. R.C.P. 1019(i). This Rule only requires GMI to attach the “material part” of the writing that supports its claim. Pa. R.C.P. 1019(i). PKF points out that GMI submitted a copy of the subcontract that omits certain pages. GMI admits that it incompletely copied the subcontract between itself and PKF and seeks leave to submit a complete subcontract in an amended pleading, which will be allowed by the court. PKF also indicates that GMI failed to provide a copy of the main contract between PKF and SEPTA, the owner of the project. According to the Amended Complaint, GMI’s breach of contract claim against PKF does not require a copy of this main contract. Under section one of the subcontract between GMI and PKF, not every component of the main contract between PKF and SEPTA is incorporated. Although Travelers asserts that GMI’s failure to include enclosures to one of the exhibits attached to the Amended Complaint fails to meet the standards of Pa. R.C.P. 1019(i), it is clear the exhibit complies with the “material part” requirement of this Rule. All of Defendants’ objections based upon Pa. R.C.P. 1019(i) are overruled.

Defendant PKF demurs to the breach of contract claim against itself on the grounds that Plaintiff failed to allege that it satisfied all conditions precedent to its claim. The Amended Complaint complies with the requirements of Pa. R.C.P. 1019(c), which enables a party to “aver generally that all conditions precedent have been performed or have occurred.” PKF’s objection is overruled.

Defendant Travelers challenges the incorporation of storage costs in the Amended Complaint as an improper claim for delay damages. The Payment Bond provides that PKF and Travelers must “pay for labor, materials and equipment furnished for use in the performance” of the main contract between PKF and SEPTA, which is incorporated in the Payment Bond. Def. Travelers Prelim. Object., at ¶26; Am. Compl, Ex. 2, at ¶1. In part, the main contract between PKF and SEPTA provides that “payments will be made for materials or equipment which are not incorporated in the Work but delivered and suitably stored at the site and for materials or equipment properly stored off the site.” Def. Travelers Prelim. Object., at ¶48. Therefore, storage costs are proper under the Payment Bond and Travelers’ objection will be overruled.

BY THE COURT,

C. DARNELL JONES, II, J.