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

JAMES J. GORY MECHANICAL CONTRACTING, INC., Plaintiff	:	February Term, 2000
	:	No. 453
v.	:	Commerce Case Program
PHILADELPHIA HOUSING AUTHORITY, Defendant	:	

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

Plaintiff James J. Gory Mechanical Contracting, Inc. initiated the instant action against Defendant Philadelphia Housing Authority for breach of a construction contract. Unfortunately, both the facts and the procedural history of this matter reveal the Defendant's seeming inability to accomplish tasks in a reasonable period of time, as well as chronic missteps, errors and delays attributable to the Defendant in the conduct of this litigation. The Court has found in favor of the Plaintiff and against the Defendant and has awarded appropriate damages in the amount of $239,984.75, exclusive of interest.

FINDINGS OF FACT

1. James J. Gory Mechanical Contracting, Inc. ("Gory") is a Pennsylvania corporation engaged in business as a mechanical and plumbing construction contractor. N.T.[1] I:9.

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[1] All references to Notes of Testimony ("N.T.") are to testimony taken on April 17 and 18, 2000 at trial ("Trial") in Courtroom 443, City Hall, before the Honorable John W. Herron. References to testimony taken on April 17 are marked with a Roman numeral "I," and references to testimony from April 18 are marked with a Roman numeral "II."

2. James J. Gory ("Mr. Gory") has been Gory's president and owner for the past 14 years. N.T. I:9. Mr. Gory has been licensed as a master plumber for 34 years, has extensive work experience in the construction industry and extensive experience in preparing estimates and bids for public works construction contracts. N.T. I:9-I:11.

3. The Philadelphia Housing Authority ("PHA") is the owner of a public housing development known as "Emlen Arms," located at 6733 Emlen Street, Philadelphia, Pennsylvania 19119. N.T. I:12.

The Emlen Arms Project and the Contract

4. On May 9, 1996, PHA and Gory entered into a public works construction contract for plumbing construction ("Contract") in connection with the modernization of Emlen Arms ("Project"). N.T. I:10-I:11; Plaintiff's Ex. 5.[2] As part of the Project, Emlen Arms' nine floors would be gutted and remodeled, beginning with the bottom floor and continuing up to the ninth floor. N.T. I:21-I:22.

5. Gory was responsible for the Project's plumbing and sprinkler work ("Plumbing Work"). N.T. I:11. The original Contract price for the Gory's Plumbing Work was $1,227,900.00. Id. I:12.

6. About the same time, PHA entered into three other contracts for the Project: a "General Construction" contract with Daniel J. Keating ("Keating"); a "Mechanical Construction" contract with Ross/ARACO and an "Electrical Construction" contract with Nucero. N.T. I:12.

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[2] The Contract was composed of several documents, including the General Conditions of the Contract for Construction, Public and Indian Housing Programs" and "PHA General Conditions." Plaintiff's Exs. 2 and 3.

7. The Contract set forth a set of "Special Contract Requirements." Plaintiff's Ex. 4. The Special Contract Requirements identified Barclay White/McCrae ("Barclay") as the Project construction manager and Sheward & Associates ("Sheward") as the Project architect. Id. at ¶¶ 3-4. Each of Barclay and Sheward was "PHA's authorized representative to the extent set forth below and elsewhere in this contract." Id. at ¶¶ 5A, 7A.

8. According to the Special Contract Requirements, Barclay was to provide "services necessary to manage and coordinate construction on" the Project. Plaintiff's Ex. 4 at ¶ 5A. Barclay's specific duties included the following:

Preparing a comprehensive Project plan and schedule and requiring that each prime contractor take necessary and appropriate measures to maintain the schedule.

Requiring each prime contractor to coordinate work on the Project with the work to be performed with other contractors.

Establishing procedures for coordination between each prime contractor, PHA, other contractors, Sheward and the residents of Emlen Arms.

Calling meetings, which were to be attended by each prime contractor and their subcontractors and material suppliers, as necessary for effective pursuit and coordination of the work.

Determining the adequacy of each prime contractor's personnel and equipment and the availability of necessary materials and suppliers.

Taking action necessary to maintain the Project schedule.

Id. at ¶ 5B.

9. The Special Contract Requirements also included "Preliminary Project Milestones," which set forth "the number of calendar days by which defined work activities on the Project are to be completed." Plaintiff's Ex. 4 at D-37. According to the Preliminary Project Milestones, the

Project was to be completed within 500 days of the date on which the notice to proceed was issued. Id.

10. The Contract also included a provision requiring that Gory submit certain Contract disputes to a "Contracting Officer" for a written decision prior to filing suit in court ("Arbitration Provision"). Plaintiff's Ex. 2 at ¶ 31.

11. In preparing its bid for the Project, Gory relied on the terms of the Contract, especially the 500-day deadline for Project completion in the Preliminary Project Milestones. N.T. I:15. Specifically, this completion date impacted calculations as to overhead costs and bonding capacity. Id. at I:16-I:17.

12. PHA issued a "Notice to Proceed" in the Project on May 15, 1996. Plaintiff's Ex. 5. The Notice to Proceed directed Gory to begin work on the Project on May 20, 1996 and set October 1, 1997 as the Project completion date. Id.

13. The Notice to Proceed stated that Clarence Mosely ("Mr. Mosely") was the Contract representative and that he had "the responsibility of coordinating this work on a daily basis and, as such, will be [PHA's] principal contact person" with Gory. Plaintiff's Ex. 5.

14. When the Project began, Mr. Gory attended biweekly Project meetings and additionally was on the Project site approximately three times a week from May 1996 to April 1998 and once a week from May to July 1998. N.T. I:34, I:87-I:88.

Project Problems

15. On December 5, 1996, Gory advised Barclay by letter that Gory was being delayed in completing the Plumbing Work in 12 specific units on upper floors of Emlen Arms due to a lack

of metal studs. N.T. I:19-I:22; Plaintiff's Ex. 6. The responsibility for installing these studs fell on Keating, the general contractor for the Project. N.T. I:19-I:20. Gory received no response to this letter. Id. 21.

16. On December 19, 1996, Gory sent Barclay a second letter regarding the delay. N.T. I:22; Plaintiff's Ex. 7. Gory received no response to this letter. N.T. I:23.

17. On January 3, 1997, Gory sent Barclay a letter via certified mail advising Barclay that the studs still had not been installed and complaining that Gory was being "piecemealed" and "financially burdened" as a result. N.T. I:23-I:24; Plaintiff's Ex. 8.[3] Gory informed Barclay that the continuing delay was interfering with Gory's completion date and that Gory would withdraw its employees from the Project if the Project was not completed on time. Id. Although Barclay received this letter on January 10, 1997, Gory received no response. N.T. I:24; Plaintiff's Ex. 8.

18. On May 13, 1997, Gory sent Barclay a fourth letter, which requested $565 per month for each month after May 1, 1997 for storing plumbing fixtures. N.T. I:25; Plaintiff's Ex. 9. The need for storage arose because construction that had to be completed before Gory could install the fixtures was not completed. Id. Gory received no response to this letter. N.T. I:26.

19. On September 24, 1997, Gory advised Barclay that Gory was being delayed due to a lack of bathroom tile floors and kitchen cabinets and tops. N.T. I:26-I:27; Plaintiff's Ex. 11. The

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[3] "Piecemealing" refers to completing small portions of work in different areas and parts of a project and is contrary to typical construction procedures. N.T. I:24; Plaintiff's Ex. 19. In this case, it led to Gory "jumping around the building trying to find work to do. . . ." N.T. I:24.

responsibility for installing the bathroom tile floors and kitchen cabinets and tops fell on Keating. N.T. I:26. Gory received no response to this letter. Id. at I:27.

20. Gory sent Barclay a fax memorandum on October 9 and again on October 10, 1997 notifying Barclay that Gory anticipated being "out of work" as of the week of October 17, 1997 due to lack of progress in specific areas and floors. N.T. I:27-I:28; Plaintiff's Ex. 12. Gory received no response to this fax memo. N.T. I:28.

21. On October 20, 1997, Gory notified Barclay via fax memorandum that, for the reasons stated in its fax memo of October 10, 1997, it had removed its work force from the Project as of October 16, 1997. N.T. I:28; Plaintiff's Ex. 13.

22. On December 3, 1997, Gory faxed Barclay a letter advising that "[t]he delay past the completion date of 10/1/97 is not the fault of JJGory [sic] Mechanical and we expect to be compensated for any and all cost beyond that date." N.T. I:35-I:36; Plaintiff's Ex. 15. Gory also informed Barclay that it had not been paid since May 1997 and requested an open change order for $500.00 per diem past the completion date. Id. Gory received no response to this letter. N.T. I:36.

23. By a contract modification dated January 19, 1998 ("Modification"), PHA extended the Project completion date 190 days from October 1, 1997 to April 10, 1998. N.T. I:36-I:37; Plaintiff's Ex. 17. This extension purported to be at no additional cost to PHA. N.T. I:37-I:38; Plaintiff's Ex. 17.

24. Gory refused to accept the Modification at no cost and advised Barclay as much in a letter dated January 28, 1998. N.T. I:41; Plaintiff's Ex. 18. In its letter, Gory indicated that it would

accept a change order in the total amount of $95,000.00, based on a $500.00 charge per day for 190 days. N.T. I:43-I:44; Plaintiff's Ex. 18. Gory sent a copy of this letter to Mr. Mosely and attached copies of its previous letters informing Barclay of the delay. N.T. I:41-I:42; Plaintiff's Ex. 18. Mr. Mosely did not respond to this letter. N.T. I:43.

25. On February 3, 1998, Gory returned the signed Modification to PHA with the following language inserted:

> It should further be understood that the execution of this document neither prejudices, limits or adversely affects James J. Gory Mechanical Contracting, Inc.'s intended delay claim against the Philadelphia Housing Authority and/or others.

N.T. I:38; Plaintiff's Ex. 17. A representative of PHA signed the Modification on March 2, 1998. Plaintiff's Ex. 17. At no point thereafter did PHA make additional contract modifications extending the Project's completion date. N.T. I:50.

26. On January 28, 1998, Gory sent a letter to Barclay and Mr. Mosely stating that Gory was still being piecemealed and that the work necessary for Gory to install plumbing was "randomly missing throughout the 9th, 8th and 7th floors." N.T. I:45-I:47; Plaintiff's Ex. 19. In the letter, Gory advised Barclay and Mr. Mosely that Gory would "complete what is available" and would not return to "unfinished floors without additional compensation." Plaintiff's Ex. 19. Gory received no response to this letter. N.T. I:45.

27. In addition to sending letters and fax memoranda to Barclay and Mr. Mosely, Gory and others regularly raised the delay concerns at the biweekly Project meetings, at which Mr. Mosely and representatives of Barclay were present. N.T. I:29-I:30, I:89-I:90, I:114-I:115, I:157.

28. Between April 10, 1998, the Project completion date as modified, and July 11, 1998, PHA made at least four performance and installation requests of Gory. N.T. I:54-I:55; Plaintiff's Ex. 29. Although the Contract modification authorizing this additional work was not approved by a Contracting Officer until January 5, 1999, Gory did the work in question earlier based on the belief that PHA was behind on its paperwork and would subsequently authorize and issue payment. N.T. I:49-I:50; Plaintiff's Ex. 29.

29. All work on the Project was substantially completed in July 1998, and the building was occupied around that time. N.T. I:56-I:57, I:87-I:88, I:102, I:176.

Outstanding Amounts for Contract Work

30. On December 18, 1998, Gory submitted Application for Payment Number 16, in which Gory sought payment for ten items of change order work it had performed. N.T. I:72-I:74. The total amount requested in Application for Payment Number 16 at that time was $60,948.11. Id. at I:72.

31. Between December 18, 1998 and October 5, 2000, Gory repeatedly telephoned, faxed and sent letters to Mr. Mosely and PHA employee Daniel McCusker ("Mr. McCusker") regarding Application for Payment Number 16. N.T. I:72-I:76; Plaintiff's Exs. 34-39. At no point did PHA respond or make payment on Application for Payment Number 16. N.T. I:72-I:76.

32. On October 5, 2000, Gory submitted a Revised Application for Payment Number 16 for $93,520.75. N.T. I:77; Plaintiff's Ex. 40. This amount represented payment for six items of change order work completed by Gory, totaling $56,864.92, and retainage withheld from

payment on an earlier application, totaling $36,655.83. Plaintiff's Exs. 33A, 40. To date, Gory has not received payment on Revised Application for Payment Number 16. N.T. I:77.

33. In addition to the amount outstanding on Revised Application for Payment Number 16, Change Order Number Eight reflects a charge of $4,964.00 for underground storm line testing done by Gory. N.T. I:78-I:79. Although PHA paid Gory for the amount due on this change order, it later retracted payment, and the $4,964.00 charge is not included in Revised Application for Payment Number 16. Id. I:79.

34. The **total amount** of the payment due and owing Gory by PHA **for contract work** performed and completed, inclusive of change order work, is **$98,484.75**.

Outstanding Amounts for Project Extension Costs

35. Gory's bid on the Project was based on a Project duration of 500 calendar days. N.T. I:16; Plaintiff's Ex. 4.

36. Gory was required to continue its presence at Emlen Arms for a period of 283 calendar days beyond the 500-calendar day period originally allotted for completion of the Project ("Extension"). N.T. II:18; Plaintiff's Ex. 18; Defendant's Ex. 2.[4] The reasons for the Extension are in no way attributable to Gory and arise from Keating's failure to complete its work in a timely fashion, PHA and Barclay's failure to coordinate and manage the Project efficiently and PHA and Sheward's design defects. N.T. I:29-I:35, I:174.

[4] Gory originally asserted that the Extension Period was 190 days long but amended its calculations to 283 days based on evidence presented by PHA at the Trial. N.T. II:24-II:28.

37. For each calendar day beyond the original 500-calendar day period that Gory continued its presence at Emlen Arms, Gory incurred additional expenses of $500.00. N.T. I:43. This amount included additional expenses for a project manager, superintendent, payroll preparation, bookkeeping, bonding capacity and other extended general conditions and administrative costs. Id. I:16-I:17, I:44, I:121-I:124.

38. Although PHA has disputed this additional expense amount, they have provided no substantive basis for their proposed expense amount. N.T. II:16-II:17. In addition, Mr. McCusker, who testified as to the expense amount proposed by PHA, had no involvement in the Project and has never owned or managed a construction company. Id. II:17-II:18.

39. The **total amount of costs** incurred by Gory **due to** the **delay** of the Project's completion beyond the 500-calendar day period amount to **$141,500.00**.

Procedural Issues

40. Gory commenced this action by filing a complaint against PHA ("Complaint") on February 9, 2000. In the Complaint, Gory asserted that it had "fully performed and completed all of the work required for the Plumbing Construction of the Project, and all conditions precedent to Gory's right to claim and have judgment entered against PHA in this civil action have been satisfied and discharged, or have been waived by PHA." Complaint at ¶ 10.

41. In its Answer, filed April 19, 2000, PHA purported to deny the allegations in Paragraph 10 of the Complaint:

> It is specifically denied that the plaintiff performed and completed all of the work required for the Plumbing Construction of the Project and further specifically denied that all conditions precedent have been satisfied,

> discharged or waived by answering defendant Philadelphia Housing Authority. On the contrary defendant incorporates its answer to paragraph nine above as if the answer was herein set forth at length.

PHA's answer to the Complaint and new matter ("Answer") at ¶ 10.[5]

42. As part of the Answer, PHA asserted as a new matter that the Court did not have jurisdiction over this dispute because of Gory's alleged failure to adhere to the Arbitration Provision's requirements and to submit the dispute to a Contracting Officer. Answer at ¶¶ 29-33.

43. Discovery in this matter, in which both Parties actively participated, was closed on August 7, 2000, and the deadline for filing pre-trial motions was October 16, 2000.

44. On November 27, 2000, over seven months after it filed the Answer, PHA filed a praecipe to demand a jury trial. Because this demand was not filed within 20 days of the last pleading, as required by Pennsylvania Rule of Civil Procedure 1007.1(a), the Court granted Gory's Motion to Strike Demand for Jury Trial on March 13, 2001.

45. The Parties attended a court-sponsored settlement conference on February 9, 2001. At no point between filing the Answer and attending this conference did PHA make any attempt to invoke the Arbitration Provision or request the extension of any deadline.

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[5] Paragraph Nine of the Answer states as follows:

> It is specifically denied that plaintiff undertook the performance of the work for the Plumbing Construction of the Project and did at all times stand ready, willing and able to furnish, install and complete all of the required work in accordance with the requirements of the Contract Documents. On the contrary plaintiff failed to adhere to the required provisions of the contract in question and therefore breached same. The specifics of the contract breach are in dispute and are the subject matter of this lawsuit.

Answer at ¶ 9.

46. On February 16, 2001, nearly one year after being served with the Complaint and a mere two months before the scheduled Trial date of April 17, PHA filed a motion for summary judgment requesting that the Court enter judgment in its favor based on Gory's alleged failure to abide by the Arbitration Provision's terms.

47. On February 27, 2001, PHA filed a motion requesting leave to amend its answer to the Complaint to include a counterclaim arising from Gory's alleged failure to complete its work on the Project. The Court denied this motion on April 5, 2001.

48. On April 10, 2001, the Court issued an order and an accompanying opinion denying PHA's motion for summary judgment. James J. Gory Mech. Contr., Inc. v. Philadelphia Housing Auth., February Term, 2000, No. 453 (C.P. Phila. Apr. 5, 2001) (Herron, J.).[6]

49. At the Trial, the Court ruled that PHA's denial in Paragraph 10 of the Answer was a general denial and constituted an admission that Gory had completed the Plumbing Work required of it in the Contract and had satisfied all conditions precedent. N.T. I:108-I:109. PHA sought leave to amend the Answer to include a more specific denial, but the Court denied PHA's motion and prevented PHA from presenting testimony as to Gory's alleged failure to comply with the Contract. Id. at II:7-II:7, II:11-II:12.

DISCUSSION

PHA's proposed findings of fact and conclusions of law are peculiar in that they discuss only the alleged errors made by the Court during the Trial and effectively ignore the substantive matters in

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[6] Available at http://courts.phila.gov/cptcvcomp.htm.

dispute in this case. Specifically, PHA focuses almost exclusively on the Court's refusal to enforce the Arbitration Provision and the Court's treatment of portions of the Answer as an admission that was unamendable at Trial.

PHA's assertions cannot mask the fact that the Court's conclusions are attributable not to "legal error" or to any fault of Gory. Rather, PHA's arguments are fatally undermined by its repeated failure to manage both the Project and this case in a responsible manner and by the prejudice that the course of action it urges would cause Gory. As a result, the Arbitration Provision does not preclude Gory from seeking redress in this forum, and Gory's substantive claims are meritorious.

I. PHA Has Waived its Right to Enforce the Arbitration Provision

In its proposed findings of fact and conclusions of law, PHA reiterates the previously rejected argument that the Arbitration Provision requires Gory to submit this dispute to a Contracting Officer before the Court can hear the matter. Because PHA did not act on this claim until two months before the Trial, however, it waived the right to raise this argument.[7]

In general, Pennsylvania favors the dispute settlement through arbitration[8] as a way "to promote swift and orderly disposition of claims." Midomo Co. v. Presbyterian Hous. Dev. Co., 739 A.2d 180,

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[7] Although the Court believes it addressed this matter adequately in its April 10, 2001 opinion, it has incorporated its justifications into this opinion for the sake of completeness and comprehensiveness.

[8] While PHA bases its argument on Gory's failure to exhaust administrative remedies, it has been noted that Pennsylvania's policy of favoring arbitration is comparable to the "long-standing public policy of hesitancy to interfere with administrative proceedings before all administrative remedies have been exhausted." Mid-Atlantic Toyota Distribs., Inc. v. Charles A. Bott, Inc., 101 Pa. Commw. 46, 52-53, 515 A.2d 633, 636 (1986) (citation omitted). Cf. Lancaster Cty. v. Pennsylvania Labor Relations Bd., 761 A.2d 1250, 1257 (Pa. Commw. Ct. 2000) (applying law on failure to exhaust administrative remedies to a request for arbitration).

190 (Pa. Super. Ct. 1999) (quoting Hazleton Area School Dist. v. Bosak, 672 A.2d 277, 282 (Pa. Commw. Ct. 1996)). See also In re Fellman, 412 Pa. Super. 577, 582, 604 A.2d 263, 265 (1992) ("[a]rbitration agreements are generally encouraged as a prompt, economical and adequate solution of controversies"). A line of Pennsylvania cases holds that a mandatory arbitration provision deprives a court of subject matter jurisdiction. See, e.g., Shumake v. Philadelphia Bd. of Educ., 454 Pa. Super. 556, 561, 686 A.2d 22, 25 (1996). Because "lack of subject matter jurisdiction is a defense that cannot be waived," LaChappelle v. Interocean Mgmt. Corp., 731 A.2d 163, 167 (Pa. Super. Ct. 1999), it could be inferred from this line of cases that an objection based on an agreement to arbitrate may be raised at any time and cannot be waived.

Recently, however, Pennsylvania courts have reached the opposite conclusion, and a pattern of cases holding that the defense of arbitration is waivable has emerged. See, e.g., Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. Partnership, 416 Pa. Super. 45, 49, 610 A.2d 499, 501 (1992) (concluding that the defendant "waived its right to enforce the arbitration clause"). Courts have looked at the following to evaluate a claim of waiver:

> The key to determining whether arbitration has been waived is whether the party, by virtue of its conduct, has accepted the judicial process. Acceptance of the judicial process is demonstrated when the party (1) fails to raise the issue of arbitration promptly, (2) engages in discovery, (3) files pretrial motions which do not raise the issue of arbitration, (4) waits for adverse rulings on pretrial motions before asserting arbitration, or (5) waits until the case is ready for trial before asserting arbitration.

St. Clair Area Sch. Dist. Bd. of Ed. v. E.I. Assocs., 733 A.2d 677, 682 n.6 (Pa. Commw. Ct. 1999) (citations omitted).

While a defense of arbitration clearly is waived if not raised as a new matter, the Superior Court made it clear in Goral v. Fox Ridge, Inc., 453 Pa. Super. 316, 683 A.2d 931 (1996), that merely raising an agreement to arbitrate in this manner is not sufficient to preserve the defense. In Goral, the defendants pleaded as a new matter that, "alternatively, any of [the plaintiffs'] claims that are not barred by the applicable statute of limitations are required by . . . agreement of sale to be submitted to common law arbitration." 453 Pa. Super. at 319, 683 A.2d at 932. Ten months later, the defendants objected to a request for discovery, arguing that the plaintiffs' claims had to be submitted to arbitration. Nearly six months after the discovery dispute, the defendants filed a motion to compel arbitration, which the trial court denied.

On appeal, the Superior Court affirmed the lower court's decision, concluding that the defendants' "repeated references to the arbitration [were] not sufficient to avoid a finding of waiver." 453 Pa. Super. at 321, 683 A.2d at 933. The fact that the defendants raised the question of arbitration in their new matter specifically was unpersuasive because "[t]hey did so . . . only as an alternative to their preferred option of winning a favorable ruling from the court." 453 Pa. Super. at 322, 683 A.2d at 933. The court also noted that, prior to filing their motion to compel, the defendants "did nothing to move the matter to arbitration" and instead "allowed the case to linger on the trial court's docket and awaited discovery." 453 Pa. Super. at 323, 683 A.2d at 934. Had the defendants truly wanted the matter resolved by arbitration, the court counseled, they could have, and, impliedly, should have, taken steps toward that end in their preliminary objections. 453 Pa. Super. at 322, 683 A.2d at 934.

The facts of this matter are similar to those of Goral. Here, before filing the Motion on February 16, 2001, PHA made no attempt to invoke the defense of administrative remedies after

raising it in its answer almost a year before.[9] Indeed, the court's reasoning in Goral is even more convincing here, as this case had progressed far beyond discovery and was scheduled for trial less than a month after the relevant motion was assigned.[10] By engaging in discovery, waiting until the eve of the Trial to submit its motion, participating in a court-sponsored settlement conference, demanding a jury trial and attempting to assert a counterclaim, PHA demonstrated a clear acceptance of the judicial process. In addition, referring this matter to arbitration after such extensive court involvement would fail to advance, and would even subvert, arbitration's purpose of increased efficiency and judicial economy. Cf. School Dist. of Phila. v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1322 (Pa. Commw. Ct. 1997) (refusing to enforce arbitration provision "because enforcement of the arbitration provision would frustrate the public policy interest in efficient dispute resolution"). Thus, PHA waived any right it may have had to enforce the Arbitration Provision, and PHA's argument that this matter must be submitted to a Contracting Officer must be rejected once again.

II. Gory Has Sustained its Breach of Contract Claim

To establish a claim for breach of contract, a claimant must show "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999) (citation

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[9] PHA's failure to raise the defense of administrative remedies is even more inadequate than the Goral defendants' "repeated references" to the arbitration provision in that case. In addition, the Goral defendants cited the relevant arbitration provision in their new matter, while PHA did not specifically invoke the Arbitration Provision or Gory's obligation to submit this matter to a Contracting Officer at any point before filing the Motion.

[10] According to the docket in this matter, PHA's motion for summary judgment was assigned on March 23, 2001, and its motion to amend was assigned on April 3, 2001.

omitted). While a breaching party may pursue a breach of contract claim against another breaching party, the pursuing party's recovery is limited to those benefits "in excess of the loss that he has caused by his own breach." Lancelotti v. Thomas, 341 Pa. Super. 1, 10, 491 A.2d 117, 122 (1985) (quoting Restatement (Second) of Contracts § 374(1) (1979)).

Gory has established, and PHA appears to acknowledge, that the Contract satisfies the first requirement of this cause of action, namely, the existence of a contract. The remaining questions are whether PHA breached the Contract and, if so, the amount of damages Gory suffered as a result.

A. By Failing to Pay Gory for its Work and by Failing to Ensure the Project's Timely Completion, PHA Breached the Contract

In the course of the Trial, Gory showed that PHA breached the Contract by failing to pay Gory for its work. Even a cursory examination of the record reveals a recurring pattern: Gory requested payment, and PHA invariably ignored to Gory's requests. Because of PHA's continuing delinquency, there remain outstanding amounts that PHA has never paid Gory, a clear breach of the Contract.

PHA also breached the Contract through the delay of the Project and its failure to ensure that the Preliminary Project Milestones were met. The Contract specifies that the Project is to extend 500 days and assigns responsibility for ensuring completion within that time frame to PHA and its representatives. Plaintiff's Ex. 4 at 5B, D-37. While Plaintiff's Exhibit 17 establishes that Gory agreed to the 190-day Extension proposed by PHA,[11] this was done with the express condition that Gory's consent "neither prejudices, limits or adversely affects" Gory's delay claim against PHA. Plaintiff's Ex.

[11] As an aside, there is no evidence that Gory consented to extending the completion date for the Project beyond the Extension Period.

17. In addition, the reasons for the delay are clearly attributable to PHA: in spite of the many specific notices Gory sent to PHA and its representatives informing them of the ongoing Project delays, PHA ignored these notices and took no action to remedy the situation.[12] Cf. Coatesville Contractors & Eng'rs, Inc. v. Borough of Ridley Park, 509 Pa. 553, 560, 506 A.2d 862, 865 (1986) ("exculpatory provisions in a contract cannot be raised as a defense where . . . there is a failure on the part of the owner to act in some essential matter necessary to the prosecution of the work"). Thus, PHA breached the Contract by failing to ensure that the Project was completed within the 500-day period set forth in the Contract and by failing to pay Gory amounts required by the Contract.

B. Gory Is Entitled to Damages for the Full Amounts Due for Work Completed and for the Project Delays

Gory contends that it is owed compensation for unpaid Plumbing Work it did on the Project and for the delays in completing the Project. The Court agrees and further concludes that PHA's allegations that Gory also breached the Contract do not entitle it to limit the amounts it owes Gory.

1. PHA's Breach of the Contract Has Damaged Gory in the Amount of 239,984.75, Exclusive of Interest

Gory's claim for damages can be broken down into two parts: damages for Plumbing Work for which it was never paid and damages for the delay in the Project's completion.

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[12] PHA also appears to take issue with the fact that Gory first communicated its concerns about the Project to Barclay and not to Mr. Mosely, the Contracting Officer or PHA directly. The Contract, however, indicates that Barclay is PHA's authorized representative on the Project, and the concerns that Gory was seeking to have addressed fall within the scope of Barclay's responsibilities. Plaintiff's Ex. 4 at ¶ 5A. In addition, Gory raised its concerns about the delay at meetings at which Mr. Mosely was present. As a result, even if Gory did not communicate with the official Contracting Officer or anyone else at PHA directly, its actions are understandable and excusable.

Plaintiff's Exhibit 40 shows that the total adjusted Contract amount payable to Gory was $1,523,097.77. This is within the payment modification amounts authorized by PHA. Plaintiff's Ex. 29.[13] To date, Gory has been paid only $1,429,577.02, leaving a balance of $93,520.75. Plaintiff's Ex. 40; N.T. I:77. In addition, PHA had paid Gory $4,964.00 for work done in accordance with Change Order Number Eight but subsequently withdrew its payment. N.T. I:77-I:79. Thus, the total amount outstanding for Gory's work on the Project is $98,484.75.

Gory contends that it is entitled to interest on the amount outstanding, and the Court must concur. Under 73 Pa. C.S. § 1628 (repealed as of Nov. 11, 1998), which was in effect at the time the Contract was executed, a contractor working under a public contract[14] is entitled to interest on a final payment:

> The final payment due the contractor from the contracting body after substantial completion of the contract shall bear interest at a rate of 6% per annum for all contracts without provisions for retainage and at a rate of 10% per annum for all contracts with provisions for retainage, such interest to begin after the date that such payment shall become due and

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[13] Although Plaintiff's Exhibit 29 indicates an adjusted authorized Contract amount of $1,537,174.66, it appears from Plaintiff's Exhibit 40 that subsequent modifications lowered this to $1,523,097.77.

[14] A "public contract" is defined as follows:

> A contract exceeding $50,000 for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including heating or plumbing contracts, under the terms of which the contractor is required to give a performance bond and labor and material payment bond as provided by the act of December 20, 1967 (P.L. 869, No. 385) known as the "Public Works Contractors' Bond Law of 1967," but excepting work performed for the State Highway and Bridge Authority.

73 Pa. C.S. § 1621 (repealed as of Nov. 11, 1998). The Contract appears to satisfy these requirements.

> payable to the contractor: Provided, however, That where the contracting body has issued bonds to finance the project, interest shall be payable to the contractor at the rate of interest of the bond issue or at the rate of 10% per annum, whichever is less.

73 Pa. C.S. § 1628.[15] Here, the Contract includes a retainage clause, and there is no indication that PHA issued bonds to finance the Project. Plaintiff's Ex. 2 at ¶ 27(f). Moreover, it is apparent that the Project, including Gory's work under the Contract, was substantially completed[16] and that the outstanding amounts were payable and due by February 1, 1999, the date from which Gory has requested that the Court compute interest. Thus, Gory is entitled to interest on the outstanding amount of $98,484.75 at a rate of 10 percent per annum beginning February 1, 1999.

Gory is also entitled to damages caused by the PHA's failure to prevent the 283-calendar day delay of the Project. Pennsylvania law allows a plaintiff to establish damages by "expert witnesses, or by persons with knowledge and experience qualifying them to form a reasonably intelligent judgment as to value." Walnut Street Fed. Sav. & Loan Ass'n v. Bernstein, 394 Pa. 353, 356, 147 A.2d 359, 361 (1959) (quoting Westinghouse Air Brake Co. v. City of Pittsburgh, 316 Pa. 372, 376, 176 A. 13, 15

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[15] This statute may be treated as part of the Contract because "substantive laws in effect when the parties enter into a contract are implicitly incorporated into it." Parsonese v. Midland Nat'l Ins. Co., 550 Pa. 423, 428-29, 706 A.2d 814, 816 (1998) (citing DePaul v. Kauffman, 441 Pa. 386, 398, 272 A.2d 500, 506 (1971)).

[16] "Substantial completion" is defined as follows:

> Construction that is sufficiently completed in accordance with contract documents and certified by the architect or engineer of the contracting body, as modified by change orders agreed to by the parties, so that the project can be used, occupied or operated for its intended use. In no event shall a project be certified as substantially complete until at least 90% of the work on the project is completed.

73 Pa. C.S. § 1621 (repealed Nov. 11, 1998). Because Emlen Arms has been occupied, the Court has inferred that PHA has certified it as completed.

(1934)). Mr. Gory's credentials and extensive experience qualify him to estimate the delay-related damages, and the evidence supporting his conclusion that he suffered losses amounting to $500.00 per calendar day of delay is compelling. Cf. Pennsylvania Dept. of Transp. v. James D. Morrissey, Inc., 682 A.2d 9, 16 (Pa. Commw. Ct. 1996) (a contractor "is not required to prove its actual costs with mathematical certainty; rather, it need only introduce evidence which affords a sufficient basis for estimating the damages with reasonable certainty," and "estimates which have a basis in reason are legally sufficient to support an award"); Barrack v. Kolea, 438 Pa. Super. 11, 22, 651 A.2d 149, 155 (1994) (evidence is sufficiently substantial to support an award of damages if it is "relevant and adequate to support a reasonable person's conclusion"). Mr. McCusker, in contrast, does not have Mr. Gory's expertise or experience, was not involved in the Project and gave no substantive basis for his estimate of $75.00 per week in damages. Cf. Sprang & Co. v. USX Corp., 410 Pa. Super. 254, 264, 599 A.2d 978, 983 (1991) (discounting testimony of appellant's witnesses where they did no more than "attack the conclusions drawn by appellee's experts"). As a result, the Court must agree with Gory that it suffered damages attributable to PHA as a result of the 283-calendar day delay in the amount of $500.00 per calendar day, for a total of $141,500.00 in damages. When the amount owed for Gory's work on the Project is included, PHA owes Gory a total sum of $239,984.75 in damages, exclusive of interest.

2. Gory Fulfilled its Obligations under the Contract, Precluding Any Limitation on Damages

PHA has attempted to argue that Gory breached its obligations under the Contract, precluding it from recovering the full amount it claims is due.[17] In answering the Complaint, however, PHA admitted that Gory completed all the work required of it under the Contract. In addition, allowing PHA to amend the Answer at Trial and to withdraw its admission would have caused Gory substantial prejudice and would have been improper. Accordingly, the Court cannot find that Gory breached the Contract or that its damages should be limited.[18]

a. PHA's General Denial in its Answer Constitutes an Admission That Could Not Be Amended at Trial

Under Pennsylvania Rule of Civil Procedure 1019(c) ("Rule 1019(c)"), a pleading party may aver the satisfaction of conditions precedent generally. In contrast, Rule 1019(c) requires that a denial of the performance, occurrence or satisfaction of conditions precedent be made "specifically and with particularity." Rule 1019(c). When a denial of this kind is made without specificity, such a general denial "shall have the effect of an admission." Pa. R. Civ. P. 1029(b). See also First Wis. Trust Co. v. Strausser, 439 Pa. Super. 192, 199, 653 A.2d 688, 692 (1995) (mortgagor's general denial of mortgagee's allegation regarding total amount due on mortgage constituted admission, allowing

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[17] PHA sought to amend the Answer to assert a counterclaim on this basis. Due to the lateness of its motion to amend and the prejudice it would have caused Gory, however, the Court denied PHA's motion.

[18] As noted supra, the fact that a claimant has also breached a contract does not foreclose the possibility of recovery completely but merely limits the claimant to damages in excess of the harm he or she has caused. Lancelotti v. Thomas, 341 Pa. Super. 1, 10, 491 A.2d 117, 122 (1985) (quoting Restatement (Second) of Contracts § 374(1))

summary judgment); Swift v. Milner, 371 Pa. Super. 302, 309, 538 A.2d 28, 30 (1988) (by failing to deny specifically, the defendant admitted all allegations as to liability, allowing summary judgment on that issue); City of Phila. v. Kenny, 28 Pa. Commw. 531, 543-45, 369 A.2d 1343, 1250-51 (1977) (because general denial of liability did not imply denial of alleged failure to file return or to pay tax, such allegations were deemed admitted).[19] To determine whether a denial has been made with the requisite degree of specificity, a court must look at the pleading as a whole. Commonwealth by Preate v. Rainbow Associates, Inc., 138 Pa. Commw. 56, 61, 587 A.2d 357, 360 (1991) (citation omitted); Cercone v. Cercone, 254 Pa. Super. 381, 391, 386 A.2d 1, 6 (1978).

PHA has asserted that Paragraphs Nine and Ten of the Answer constitute a specific denial of Gory's assertions of complete performance and satisfaction of conditions precedent:[20]

> 9. Denied. It is specifically denied that plaintiff undertook the performance of the work for the Plumbing Construction of the Project and did at all times stand ready, willing and able to furnish, install and complete all of the required work in accordance with the requirements of the Contract Documents. On the contrary plaintiff failed to adhere to the required provisions of the contract in question and therefore breached same. The specifics of the contract breach are in dispute and are the subject matter of this lawsuit.

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[19] In this sense, a general denial is unlike a general allegation in a complaint, which violates Pennsylvania's pleading rules and is subject to preliminary objections. See Connor v. Allegheny Gen. Hosp., 501 Pa. 306, 311 n.3, 461 A.2d 600, 602 n.3 (1983) (if the defendant believed that allegations in the complaint were insufficiently specific, it "could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of [the] complaint").

[20] PHA relies on Roban Construction, Inc. v. Housing Authority of City of Hazleton, 67 Pa. D. & C.2d 130 (C.P. Luzerne 1974), to assert that Gory's Complaint does not include the allegation that it completed the work required of it under the Contract. In Roban Construction, Inc., the court held that an averment of completed work does not constitute an allegation that conditions precedent have been satisfied if the contract in question imposed additional obligations on the plaintiff. In the instant case, however, Gory has specifically alleged that it satisfied all conditions precedent, rendering Roban Construction, Inc. irrelevant.

> 10. Denied. It is specifically denied that the plaintiff performed and completed all of the work required for the Plumbing Construction of the Project and further specifically denied that all conditions precedent have been satisfied, discharged or waived by answering defendant Philadelphia Housing Authority. On the contrary defendant incorporates its answer to paragraph nine above as if the answer was herein set forth at length.

Answer at ¶¶ 9-10.

In no way do these paragraphs constitute a specific denial. The second sentence of each paragraph does nothing more than preface Gory's allegations with the phrase "it is specifically denied that. . . ." The remaining sentences of Paragraph Nine essentially state that Gory breached the Contract by failing to comply with it and that the instant dispute relates to the Contract. Notwithstanding PHA's repeated use of "specific" and related words, there is nothing specific about PHA's denial whatsoever. As a result, PHA's failure to set forth a specific denial constitutes an admission that Gory fully performed and completed the work required of it and that all conditions precedent to its claim have been satisfied.

The Court's refusal to allow PHA to amend the Answer to provide greater specificity and thus to revoke its admission was also proper. While Pennsylvania trial courts are granted broad discretion to allow the amendment of a pleading, "Pennsylvania appellate courts have repeatedly ruled that an amendment will not be permitted . . . where the amendment will surprise or prejudice the opposing party." <u>Capobianchi v. BIC Corp.</u>, 446 Pa. Super. 130, 134, 666 A.2d 344, 346 (1995) (quoting <u>Horowitz v. Universal Underwriters Ins. Co.</u>, 397 Pa. Super. 473, 479, 580 A.2d 395, 398 (1990). <u>See also Burger v. Borough of Ingram</u>, 697 A.2d 1037, 1041 (Pa. Commw. Ct. 1997) (a pleading may not be amended "where surprise or prejudice to the other party will result"). A court may consider the question of timeliness "insofar as it presents a question of prejudice to the opposing party,

as by loss of witnesses or eleventh hour surprise." Pilotti v. Mobil Oil Corp., 388 Pa. Super. 514, 518-19, 565 A.2d 1227, 1229 (1989).

Here, there can be no question that Gory would be prejudiced by allowing PHA to withdraw its admission of Gory's complete performance. It goes without saying that a plaintiff's course of action, from discovery to trial, is framed by the matters in dispute. In the instant case, PHA's admission justified Gory's inference that PHA had acknowledged the satisfaction of its obligations under the Contract and that the Parties' dispute centered solely on the terms of the Contract, PHA's breach and damages. Thus, Gory, in preparing for Trial, reasonably omitted those facts and items that would have supported its allegation of full performance. To allow PHA now to withdraw its admission would effectively render Gory's work on this matter for the past year worthless and would amount to substantial prejudice, while rewarding PHA for its defective pleading and its ongoing failure to file motions in a timely manner.[21]

PHA contends that "the plaintiff was prepared for defendant's claim of lack of performance of the contract and in fact presented evidence that the final payment was made on the contract and therefore performance was not an issue." PHA's Proposed Findings of Fact and Conclusions of Law at ¶ 18. These allegations of preparedness, however, are unsubstantiated, and PHA's assertions that Gory presented extensive evidence of its performance are not supported by the record.

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[21] This prejudice is succinctly summarized by Gory's statement that it made "strategy decisions which were made relative to discovery which was undertaken and not undertaken" based on the Answer and "[t]he issues in the claims are framed by the pleadings." N.T. II:8.

PHA's reliance on the recent Superior Court decision in Ghaner v. Bindi, No. 30 MDA 2000, 2001 WL 729191 (Pa. Super. Ct. Jun. 29, 2001) is also misplaced. In Ghaner, the plaintiff failed to file a pre-trial statement, and the trial court granted the defendant's request for an order precluding the plaintiff from presenting any testimony or exhibits at trial on this basis. On appeal, the court reversed, finding that the trial court had abused its discretion by imposing such a severe sanction.

While there are some similarities, the differences between Ghaner and the instant case are numerous:

The deficiency in Ghaner was a failure to file a pre-trial statement, which was due sixty days before trial. Pa. R. Civ. P. 212.1(b)(1). The Superior Court thus concluded that the prejudice to the defendant was "in his immediate trial preparation" and was "curable on remand." 2001 WL 729191, at *5. In the instant matter, PHA's admission dates back to the Answer and has had an impact on every aspect and stage of this case for the past year.

In Ghaner, the plaintiff attributed her failure to file a pre-trial statement to withdrawal of her counsel, changes in court procedure and difficulties in communicating due to severe hearing loss. Here, PHA has presented no justification for its general denial and its delay in seeking to amend the Answer.

Under Pennsylvania Rule of Civil Procedure 212.2, a trial court has discretion as to what sanctions to impose for a failure to file a pre-trial statement and "may" include in the relief ordered a preclusion on testimony or exhibits. Pa. R. Civ. P. 212.2(c). In contrast, the Pennsylvania Rules of Civil Procedure implicated here are mandatory and direct that a denial of conditions precedent "shall be made specifically and with particularity" and that a general denial "shall have the effect of an admission." Pa. Rs. Civ. P. 1019(c), 1029(b) (emphasis added).

The Ghaner record revealed "only a single failure to comply with the Rules of Civil Procedure" and "no evidence of repeated failure to comply with the Rules of Civil Procedure or other orders of the trial court." 2001 WL 729191, at *4-*5. In this case, PHA has repeatedly filed documents with the Court in an untimely manner.

In Ghaner, the trial court's order prohibited the plaintiff from presenting any testimony or exhibits at trial whatsoever and "was tantamount to a dismissal" of the action. 2001 WL 729191, at *3. Here, the Court refused to allow evidence as to Gory's supposed failure to satisfy conditions precedent but granted PHA wide latitude in exploring Gory's other actions, the Contract's terms, PHA's own conduct and the amount and extent of damages.

Because Ghaner is easily distinguishable from the instant case, it does not support PHA's claims of error.[22] Thus, for the foregoing reasons, granting PHA leave to amend the Answer would have prejudiced Gory, and PHA is bound by its admission in the Answer.[23]

b. PHA's Admission Establishes That Gory Fully Performed Under the Contract, Precluding Any Limitation on Damages

An admission in a pleading, such as PHA's admission in the Answer, constitutes a judicial admission and has "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." Durkin v. Equine Clinics, Inc., 376 Pa. Super. 557, 567, 546 A.2d 665, 670 (1988) (stating further that such admissions are "conclusive in the case"). See also Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d 1038, 1054 (Pa. Commw. Ct. 1997) (judicial admissions, which include "statements made by a party in the pleadings," are "conclusive" and "have the effect of withdrawing a fact from issue and dispensing it without the need for proof of the fact"). As a result, PHA's admission was dispositive, and the Court must conclude that Gory performed fully and completed all work required of it under the Contract.

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[22] PHA also complains that, until Trial, Gory did not highlight PHA's admission by filing preliminary objections, a motion for judgment on the pleadings or any other manner. This argument verges on the absurd. In the first place, it would be laughable for a party to file preliminary objections on the grounds that an opposing party's failure to deny an allegation specifically and with particularity has resulted in an admission. Additionally, PHA has not supplied the Court with a single case that would require a party to file a motion for judgment on the pleadings, a request for admissions or any other document to confirm admissions made in the answer to a complaint. PHA's argument must therefore be rejected.

[23] In spite of PHA's protestations to the contrary, the Court's decision at Trial to allow Gory to amend the length of the Extension Period does not conflict with this conclusion. Gory's motion was based on PHA's own exhibits and evidence, as presented to the Court, and thus could not have prejudiced PHA.

Because Gory satisfied its responsibilities under the Contract, no limitation on damages applies. Thus, PHA is responsible to Gory for $141,500.00 in damages stemming from the delay in completing the Contract and $98,484.75, plus interest on that amount computed at a rate of 10 percent per annum from February 1, 1999, owed for Gory's work on the Project.

CONCLUSIONS OF LAW

1. Because PHA waived its right to invoke the Arbitration Provision, Gory need not present its claim to Contracting Officer, and the Court has subject matter jurisdiction in the instant matter.
2. There was a contract, in the form of the Contract, between Gory and PHA.
3. PHA breached the Contract by failing to pay Gory the full amounts required under the Contract and by failing to ensure that the Project was completed within the 500-calendar day period set forth in the Contract.
4. Gory fully performed and completed all of the work required of it under the Contract.
5. As a result of PHA's breach of the Contract, Gory has suffered the following damages: $98,484.75 for Contract work performed and completed, inclusive of change orders; and $141,500.00 for the 283-day delay in completing the Project.
6. Gory is entitled to prejudgment interest on the amount owed for its work under the Contract. Such interest is to be computed at a rate of 10 percent per annum beginning February 1, 1999.

7. The Court awards Gory $98,484.75, plus interest on this amount to be computed at the rate of 10 percent per annum from February 1, 1999 until the date on which PHA makes payment, and an additional $141,500.00.

BY THE COURT:

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JOHN W. HERRON, J.

Date: July 11, 2001

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

JAMES J. GORY MECHANICAL CONTRACTING, INC., Plaintiff	:	February Term, 2000
	:	No. 453
v.	:	Commerce Case Program
PHILADELPHIA HOUSING AUTHORITY, Defendant	:	

ORDER

AND NOW, this 11th day of July, 2001, upon consideration of the pleadings, trial, and the briefs of counsel, and for the reasons set forth in the contemporaneously filed Findings of Fact and Conclusions of Law, this court finds in favor of Plaintiff James J. Gory Mechanical Contracting, Inc. and against Defendant Philadelphia Housing Authority. It is hereby ORDERED and DECREED that the Defendant shall pay the Plaintiff $98,484.75, plus interest on this amount to be computed at the rate of 10 percent per annum from February 1, 1999 until the date on which PHA makes payment, and $141,500.00.

BY THE COURT:

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JOHN W. HERRON, J.