

LEXSEE



Cited

As of: Apr 02, 2010

**JAMES J. GORY MECHANICAL CONTRACTING INC., Plaintiff VS.  
TRAVELERS CASUALTY & SURETY CO. OF AMERICA, Defendant**

**NO. 1057**

**COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA,  
CIVIL COMMERCE DIVISION**

**2010 Phila. Ct. Com. Pl. LEXIS 20**

**February 8, 2010, Decided**

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff subcontractor sued defendant insurer, and issuer of a payment bond, to recover the remaining 5 percent due under a subcontract. The court found in favor of the insurer based on the statute of limitations and the fact that a contractual limitations period of the payment bond was enforceable. After its post-trial motion was denied, the subcontractor appealed. The court issue an opinion in support of its judgment.

**OVERVIEW:** The insurer issued a payment bond for a university project to the general contractor. The payment bond contained a limitation as to when suit could be brought. The subcontractor was hired to install plumbing. The subcontractor certified that it completed all of its contract work on the project. However, it was not paid in full under the subcontract. Rather, it was only paid for 95 percent of the work it completed. The subcontractor did not file the instant suit until approximately two years and eight months after the date the bond was issued. The court held the contractual limitation period barred the subcontractor's recovery from the insurer. The contractual limitation period was a defined date. A reasonable time, four months, elapsed between when the subcontractor finished working on the project and the date the

contractual limitations period expired. Likewise, the subcontractor knew it had not been paid but did not file a claim for payment under the surety bond. Thus, the contractual limitations period barred its recovery. Even in the absence of the contractual limitations period, the applicable statute of limitations period barred any recovery under [42 Pa.C.S. § 5523](#).

**OUTCOME:** The court recommended that its judgment be affirmed.

**JUDGES:** [\*1] ARNOLD L. NEW, J.

**OPINION BY:** ARNOLD L. NEW

**OPINION**

**New, J.**

For the reasons set forth below, the Court's October 29, 2009 finding in favor of Defendant Travelers Casualty and Surety Co of America should be affirmed.

***Factual and Procedural History***

This case arises out of the construction of student housing adjacent to Temple University. Torcon Inc. served as general contractor on the project. On February

28, 2005, Defendant Travelers Casualty and Surety Co. of America issued a payment bond for the project to Torcon in the amount of \$ 45,691,000. The payment bond contained the following limitation: "No claim, suit or action by reason of any default shall be brought against the Principal or Surety after two years from the date hereof."

On March 24, 2005, Torcon entered into a subcontract with Plaintiff James J. Gory Mechanical Contracting whereby Gory would install the plumbing for the project. Gory performed under the subcontract and on October 23, 2006, certified it completed all of its contract work on the project. Although it completed 100% of its subcontracting work, Gory was not paid in full under the subcontract.<sup>1</sup> Rather, Gory was only paid for 95% of the work it completed under the contract.

1 A dispute [\*2] over payment existed between Torcon and the project owners, Broad Street Development Inc. and Broad Residential Partners LP. See *Torcon Inc v. Broad Residential Partners LLP. et al*, Philadelphia Court of Common Pleas, January Term 2007, No 1912. Torcon eventually settled with the property owners for 95% of the contract price. In turn, Torcon only paid the subcontractors 95% of the value of the subcontract.

On November 2, 2007, Gory commenced the instant action against Travelers to recover the remaining 5% due under the subcontract. A one day, non-jury, trial of this matter was held on September 23, 2009. On October 29, 2009, after considering the evidence presented at trial, as well as the memoranda of law submitted by the parties, the Court found in favor of Defendant Travelers. After its post-trial motion was denied, Gory filed the instant appeal.

Gory raises three points of error on appeal. First, Gory believes this Court erred by finding the contractual limitations period of the payment bond was enforceable. Second, Gory argues this Court wrongfully found Gory's claims were barred by the applicable statute of limitation. Finally, Gory contends it was an error for the Court to rule [\*3] in favor of the defendant because Torcon was not joined as a party. Gory's failure to join Torcon in this action was not a contributing factor to the Court's decision; therefore, this issue need not be discussed.

### *Legal Analysis*

### **The Contractual Limitations Period**

Gory sued Travelers to recover \$ 264,967.10, the remaining 5% due under the subcontract. It is undisputed that Torcon and Travelers entered into a payment bond on February 28, 2005. The language of the bond explicitly requires any suits against the surety, Travelers, to be filed within two years of the date the bond is issued. See Ex. D-5. Gory did not file the instant suit until November 2, 2007, approximately two years and eight months after the date the bond was issued.

For the past eighty years, Pennsylvania courts have upheld contractual limitations periods which prohibit filing suit beyond a defined day. In [Watters v. Fisher, 291 Pa. 311, 139 A. 842 \(1927\)](#), a contractor and a surety entered into a performance bond for the construction of a private dwelling. The bond included the condition that no suit "shall be brought against the principal or surety after the 1st day of December, 1919 ...." [139 A. at 842-43](#). When the contractor [\*4] defaulted, the owner took over construction, finished the construction, and then filed suit against the surety. [Id. at 842](#). However, the owner did not file suit against the surety until early-1920, well past the December 1, 1919 deadline imposed by the language of the surety bond. The Supreme Court upheld the contractual limitations period because the owner failed to file suit by the deadline imposed by the bond despite the fact 1) the owner knew of the contractor's failure to perform and 2) a reasonable time existed between when the owner learned of the contractor's failure and when the owner had to file suit against the surety. [Id. at 843-44](#).

More recently, in [Solomon v. A. Julian Inc., 304 Pa. Super. 119, 450 A.2d 130 \(Pa. Super. 1982\)](#), the Superior Court recognized a contractual limitations period bars recovery on a surety bond. In *Solomon*, the surety issued a labor and material bond in connection with a construction project. Solomon, a subcontractor, brought suit against the surety to recover for services provided under the contract. The Superior Court held the contractual limitations period would bar Solomon's suit; however, the surety waived this argument when it failed to raise the contractual [\*5] limitations period as an affirmative defense in New Matter. [Id. at 132](#).

In this instant case, the contractual limitation period bars Gory's recovery from Travelers. The contractual limitation period at issue in this case is a defined date, two years from February 28, 2005. Just as in [Watters](#), a reasonable time, four months, elapsed between when

Gory finished working on the project and the date the contractual limitations period expired. Likewise, Gory knew it had not been paid by Torcon but did not file a claim for payment under the surety bond. For these reasons, the contractual limitations period bars Gory's recovery.

#### Statute of Limitations

Even in the absence of the contractual limitations period, the applicable statute of limitations period bars any recovery by Gory. The applicable statute of limitations states: "The following actions and proceedings must be commenced within one year: ... (3) an action upon any payment or performance bond." [42 Pa.C.S.A. § 5523\(3\)](#)

The question in this action is "when did the statute of limitations begin to run?" The time in which a matter must be commenced under the applicable statute of limitations shall be computed from the time the cause of action [\*6] accrued. [42 Pa.C.S.A. § 5502](#). A cause of action accrues when the right to institute and maintain a suit arises. [Pocono International Raceway, Inc. v. Pocono Produce, Inc.](#), 503 Pa. 80, 84, 468 A.2d 468, 471 (1983); [Meehan v. Archdiocese](#), 2005 PA Super 91, 870 A.2d 912, 919 (Pa. Super. 2005). With respect to a performance bond, a cause of action accrues when obligee knows, or should know of a breach of the underlying contract. See [Altoona Area School District v. Campbell](#), 152 Pa. Commw. 131, 618 A.2d 1129, 1135 (Pa. Commw. 1992).

Gory's cause of action accrued on October 23, 2006, the day on which Gory certified it had completed all work

under the contract. Trial Trans. Vol. 1:41-46 (September 23, 2009). On that day, Gory was entitled to be paid in full for work performed. When he was not paid in full, Gory's cause of action accrued and the statute of limitations period began to run; therefore, the one year statute of limitations period expired on October 23, 2007. 2 Gory's suit was not filed until November 2, 2007, ten days after the limitations period expired. For this reason, Gory's claim is barred by the statute of limitations.

2 The Court is not persuaded by Gory's argument that the cause of action did not accrue until [\*7] after his invoices went unpaid. If the cause of action does not accrue until after demand for payment is refused, a contractor could extend the statute of limitations period indefinitely by simply not requesting payment. Such a result runs counter to the policy underlying statutes of limitations. [McCreesh v. City of Philadelphia](#), 585 Pa. 211, 888 A.2d 664, 671 (2005) (stating that statutes of limitations serve to expedite litigation and discourage delay); See also [United States v. Oregon Lumber Co.](#), 260 U.S. 290, 43 S. Ct. 100, 67 L. Ed. 261 (1922).

For all of the foregoing reasons, the Court properly found in favor of Defendant Travelers and against Plaintiff James J. Gory Mechanical.

#### BY THE COURT:

/s/ Arnold L. New

**ARNOLD L. NEW, J.**