

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF GENERAL SERVICES;
and the UNIVERSITY OF PITTSBURGH OF
THE COMMONWEALTH SYSTEM OF
HIGHER EDUCATION,

Plaintiffs,

vs.

HAVENS STEEL COMPANY; UNITED
STATES FIDELITY AND GUARANTY
COMPANY; G&W ROOFING &
CONSTRUCTION, INC.; MORIN
CORPORATION; CINCINNATI
INSURANCE COMPANY; APOSTOLOU
ASSOCIATES/ROSSER INTERNATIONAL,
INC., a joint venture, APOSTOLOU
ASSOCIATES, INC.; and ROSSER
INTERNATIONAL, INC.,

Defendants,

vs.

NORTH COAST COMMERCIAL ROOFING
SYSTEMS OF PA, INC.; PITT CENTER
PARTNERS, a joint venture; P.J. DICK,
INC.; URS CORPORATION, as corporate
successor to O'BRIEN KREITZBERG &
ASSOCIATES, INC.; and THE MIZERAK
GROUP, INC., f/k/a MIZERAK TOWERS
AND ASSOCIATES,

Additional Defendants.

CIVIL DIVISION

GD 04-29062

**MEMORANDUM IN SUPPORT
OF ORDER AND ORDER
OF COURT**

Filed by the Honorable
JUDITH L. A. FRIEDMAN

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GROUP, INC., f/k/a MIZERAK TOWERS)
AND ASSOCIATES,)

Additional Defendants.) FRIEDMAN, J.

MEMORANDUM IN SUPPORT OF ORDER

The First Motion in Limine of Defendant United States Fidelity and Guaranty Company ("USF&G), in which Defendant Cincinnati joins, is in the nature of a motion to bar Plaintiffs from recovery under the bonds issued by the sureties and from amending their Amended Complaint to add Plaintiff University of Pittsburgh of the Commonwealth System of Higher Education ("Pitt") to the counts which seek recovery on those bonds. Pitt takes the position that the Commonwealth of Pennsylvania, Department of General Services ("DGS") assigned all its rights under the construction contract to Pitt, and among those rights is the right to be paid by the sureties for the performance failures of Havens Steel Company ("Havens") and G&W Roofing and Construction, Inc. ("G&W") regarding the construction of the roof. The sureties contend their bond contracts cannot be assigned so Pitt has no rights under those contracts and further contends that DGS also cannot recover under the bonds, because it suffered no loss given that Pitt, not DGS, paid for the replacement roof.

Regarding the issue of assignability, there are two well-settled principles that clash here, first that, absent an express or implicit prohibition, contracts in Pennsylvania are generally freely assignable and second, that surety bonds are strictly limited to their terms.

The bonds here expressly incorporate the Pennsylvania Procurement Code, 62 Pa. C.S.A. §101, et seq. ("the Code"). The "express" prohibition the sureties rely on is based on the Code, which does not include entities such as Pitt among those who are entitled to the protection of the surety bonds required by the Code.

The Court concludes that the policy reasons behind the surety bond rule of very strict construction far outweigh the policy reasons behind the free assignability rule. The Legislature has spoken, via the Code, as to who sureties such as USF&G or Cincinnati Insurance Company ("Cincinnati") should expect to file claims against them. Pitt is clearly not among those possible claimants. In the instant case, only DGS and its agents have rights under the performance bonds at issue.

As to the sureties' contention that DGS suffered no damages as a result of the failure of the roof because only Pitt paid for the replacement roof, the Court rejects this contention. DGS lost the money it had paid for the first roof. DGS expected to turn over to Pitt a building with a weather tight roof. DGS did not receive the performance to which it was entitled. The mere fact that Pitt paid for the replacement roof does not excuse payment under the bonds to DGS.

See Order attached hereto.

By the Court
J. Friedman, J.

DATED: May 7, 2007

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AND ASSOCIATES,)

Additional Defendants.) FRIEDMAN, J.

ORDER OF COURT

AND NOW, to-wit, this 7th day of May 2007, after consideration of the

First Motion in Limine of Defendant United States Fidelity and Guaranty Company in which Defendant Cincinnati Insurance Company joins, for the reasons set forth in the attached Memorandum in Support of Order, it is hereby ORDERED as follows:

1. Only Plaintiff Commonwealth of Pennsylvania, Department of General Services and its agents are protected by the bonds issued by the aforementioned sureties. Plaintiff University of Pittsburgh is not covered by those bonds.
2. The amount recoverable on those bonds is the reasonable cost of replacing the defective roof (that leaked) with a roof that conformed to the specs and was watertight, to the extent the defects that resulted in the leaks were caused by Havens Steel Company or G&W Roofing & Construction, Inc.

By the Court
Quedman, J.