

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Conestoga Ceramic Tile Distributors, :  
Inc., :  
Appellant :  
v. : No. 2085 C.D. 2012  
: Submitted: June 20, 2013  
Travelers Casualty and Surety :  
Company of America, IMC :  
Construction, Inc., ProFast :  
Commercial Flooring, Inc., and :  
Pennsylvania College of Technology :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: August 22, 2013

Conestoga Ceramic Tile Distributors, Inc. (Conestoga) appeals an order of the Lycoming County Court of Common Pleas (trial court) that granted judgment to defendants on Conestoga’s breach of contract action. In granting judgment on the pleadings, the trial court held that Conestoga had admitted in the pleadings that it had received payment for labor and materials it had provided on a construction project. Conestoga argues that its failure to respond to defendants’ new matter on time did not result in these admissions. It also contends that, in any case, these “admissions” did not affect its right to sue the insurer that issued a payment bond on the project. We affirm.

In 2009, the Pennsylvania College of Technology (Penn College) began a construction project, known as “Stage X,” at its Williamsport, Pennsylvania campus. Penn College chose IMC Construction, Inc. (Contractor) to do the work after a round of competitive bidding. Contractor gave Penn College a payment bond issued by Travelers Casualty and Surety Company of America (Travelers). Under the bond, Travelers agreed to accept liability where, *inter alia*, Contractor defaulted on its payment to subcontractors furnishing labor, materials and equipment for the project. One such subcontractor was ProFast Commercial Flooring, Inc. (Subcontractor), which, in turn, contracted with Conestoga to provide tile, setting materials and labor.

On December 20, 2009, Conestoga signed a “Lower Tier Vendor Final Waiver and Release” (Final Waiver and Release), which stated, in relevant part, that

[Conestoga] forever releases and discharges IMC [Contractor], Subcontractor, and Owner [Penn College] from all claims, demands and causes of action, arising from or relating to [Conestoga’s] labor, materials and/or services provided to [Stage X].

Reproduced Record at 218a (R.R.\_\_). Thereafter, on two occasions during 2011, Conestoga requested Contractor to pay Conestoga by joint check with Subcontractor.

On October 12, 2010, Conestoga sent Subcontractor a letter demanding payment on outstanding invoices that totaled \$169,419.09. The letter also stated that Conestoga intended to file a claim under the payment bond. On November 15, 2010, Conestoga sent a similar letter to Travelers about its intention to pursue a claim under the payment bond.

On January 4, 2011, Contractor, Subcontractor and Conestoga entered into the first of two joint check agreements.<sup>1</sup> The first joint check agreement provided for a payment of \$14,228.68 to Subcontractor and Conestoga from Contractor. The agreement also stated that “[Contractor] has no contractual relationship with [Conestoga], nor does [Contractor] have any legal obligation of any type whatsoever to [Conestoga].” R.R. 322a. On February 23, 2011, Contractor, Subcontractor and Conestoga entered into the second joint check agreement for \$70,000.00. The second joint check agreement contained substantially identical language as the first joint check agreement.

With each joint check agreement, Conestoga also executed a “Lower Tier Vendor Partial Waiver and Release” (Partial Waiver and Release). The first Partial Waiver and Release, dated January 6, 2011, acknowledged Conestoga’s acceptance of a partial payment of \$14,228.86 and \$4,473.41 toward a balance due of \$161,748.21. It also provided for Conestoga’s waiver and release of “all claims . . . all actions, liens, causes of action, [and] mechanic lien rights” against Contractor, sureties, and Penn College “with regards to Partial Payment and for any sum over the total amount due.” R.R. 348a. The second Partial Waiver and Release contained substantially similar language, but the amounts differed. The

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<sup>1</sup> A joint check agreement, or “joint-payee” agreement

is an instrumentality specific to the construction industry, in which one contractor enters into an agreement calling for it to write a check jointly payable to two other contractors. Pursuant to the agreement, one of the contractors then takes from the check only so much to pay his labor costs and dedicates the remainder of the check to pay for supplies obtained by other contractors. . . . [A] joint check arrangement provides that the general contractor will issue the progress payments to the subcontractor for its material suppliers.

*Diener Brick Company v. Mastro Masonry Contractor*, 885 A.2d 1034, 1036 n.3 (Pa. Super. 2005).

total balance due from Contractor was \$142,045.94, and the partial payment was \$70,000. On March 17, 2011, Conestoga sent a letter to Travelers demanding payment for the unpaid sum of \$68,045.95.

Thereafter, Conestoga filed a five-count civil action against Subcontractor, Contractor, Penn College and Travelers. Count I alleged a breach of contract by Travelers for not honoring the terms of its payment bond. Count II alleged a breach of the joint check agreement by Contractor. Count III alleged a violation of the Public Works Contractors' Bond Law of 1967<sup>2</sup> (Bond Law) by Travelers. Count IV alleged a violation of the Commonwealth Procurement Code<sup>3</sup> (Procurement Code) by Contractor and by Subcontractor. Count V alleged unjust enrichment by Contractor, Penn College and Subcontractor, which received goods and services from Conestoga without paying for them. Subcontractor, which is no longer in business, did not respond to the suit, and a default judgment was entered against Subcontractor.<sup>4</sup>

Contractor, Penn College and Travelers (collectively, Appellees) filed preliminary objections to Conestoga's complaint, and they were sustained in part and overruled in part. On April 16, 2012, Conestoga filed an amended complaint with the same five counts. On May 7, 2012, Appellees filed an answer and new matter, endorsed with a notice to plead. The answer and new matter also contained a cross-claim against Subcontractor, asserting that Subcontractor was solely liable

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<sup>2</sup> Act of December 20, 1967, P.L. 869, *as amended*, 8 P.S. §§191-202.

<sup>3</sup> 62 Pa. C.S. §§101-4509.

<sup>4</sup> Conestoga also filed a mechanics' lien claim against Penn College. Penn College filed preliminary objections to the mechanics' lien, and after oral argument, the trial court sustained the preliminary objections and struck the mechanics' lien. Conestoga has not appealed the trial court's order striking the mechanics' lien.

for any claims. On May 22, 2012, Conestoga filed preliminary objections to Appellees' new matter, which the trial court sustained in part and overruled in part. It sustained Conestoga's preliminary objections to Appellees' defenses of statute of limitations, justification, laches, and estoppel. R.R. at 281a. The trial court overruled the remaining preliminary objections.

On August 24, 2012, Appellees filed a motion for judgment on the pleadings. Appellees noted that Conestoga had not replied to Appellees' new matter within 20 days of its preliminary objections being overruled. The trial court granted judgment on the pleadings in favor of Appellees.

On Count I, the trial court found that Contractor had made full payment to Subcontractor for all sums due and owing, which discharged Travelers' obligation under the payment bond. On Count II, the trial court found that the joint check agreements provided that there was no contractual relationship between Contractor and Conestoga, which barred Conestoga's breach of contract claim against Contractor. On Count III, the trial court found that Penn College was a government agency and, thus, exempt from the Bond Law. On Count IV, the trial court found that Conestoga's claim under the Procurement Code was barred because Contractor had made full payment to Subcontractor. 62 Pa.C.S. §3939(b). On Count V, the trial court found that Conestoga did not provide a benefit without payment for value because Contractor had made full payment to Subcontractor and, thus, there was no unjust enrichment. Consistent with these findings, the trial court entered judgment on the pleadings in favor of Appellees on all counts.

On appeal,<sup>5</sup> Conestoga presents four issues for our review. First, Conestoga argues that the trial court erred in finding that Contractor made full payment to Subcontractor based on a so-called “deemed” admission to Contractor’s new matter in Counts I, IV and V. Second, the trial court erred in holding that the joint check agreements barred Conestoga’s breach of contract claim against Contractor. Third, the trial court erred in finding that Penn College is a “Commonwealth Agency” or a “Government Agency” and, as such, exempt from the Bond Law. Fourth, the trial court’s order violated public policy and rendered the payment bond illusory.

In its first issue, Conestoga argues that the trial court erred in finding that Conestoga admitted that Contractor made full payment to Subcontractor because it did not timely reply to Appellees’ new matter. Conestoga contends that the pleadings create a dispute that payment was made in full to Subcontractor. Appellees’ new matter was not endorsed with a notice to plead, meaning that no response was required.<sup>6</sup> Further, the new matter did not contain any averments of fact, only conclusions of law, to which a responsive pleading is not required.<sup>7</sup>

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<sup>5</sup> This Court’s scope of review of an order granting a motion for judgment on the pleadings is limited to determining whether the trial court committed an error of law or whether questions of material fact remain outstanding such that the case should have gone to the jury. *Tobias v. Halifax Township*, 28 A.3d 223, 225 n.4 (Pa. Cmwlth. 2011). This Court’s standard of review for an order granting judgment on the pleadings is plenary. *Id.*

<sup>6</sup> This is error. Appellees’ new matter was indeed endorsed with a notice to plead. R.R. 192a.

<sup>7</sup> Conestoga also argues that the trial court erred in applying the decision in *Inpro Corp. v. Travelers Casualty & Surety Co. of America*, No. 11-01, 409, 2011 WL 8003571 (Lycoming C.P., filed April 19, 2012) to this case. In *Inpro*, which also involved the Stage X project, a subcontractor’s claim for payment was dismissed because its complaint acknowledged that Contractor paid Subcontractor in full. This averment precluded the subcontractor’s recovery. Conestoga’s complaint, by contrast, avers that Contractor did not pay Subcontractor in full. The trial court erred in relying on *Inpro*, but it does not affect the outcome of Conestoga’s appeal.

Accordingly, there was a material dispute on the factual question of whether Contractor paid Subcontractor, which precludes judgment on the pleadings. Even assuming *some* payment, Appellees have not produced the contract between Contractor and Subcontractor, without which it remains unknown what amount would have constituted payment *in full* under the contract and the payment bond.

Appellees respond that Conestoga's case is barred by the Final Waiver and Release that it executed. In signing it, Conestoga expressly waived all causes of action against Penn College and Contractor arising from or relating to Conestoga's "labor, materials and/or services" provided to the Stage X project.

Under Pennsylvania law, a release is a contract. *See Evans v. Marks*, 421 Pa. 146, 151-52, 218 A.2d 802, 804-05 (1966) (treating a release as a contract and applying contract principles). Accordingly, the courts apply the rules of contract construction in interpreting releases. *Sparler v. Fireman's Insurance Company of Newark, N.J.*, 521 A.2d 433, 434 (Pa. Super. 1987). "[T]he effect of a release is to be determined by the ordinary meaning of its language." *Taylor v. Solberg*, 566 Pa. 150, 155, 778 A.2d 664, 667 (2001). If the language of the release is clear, the court looks no further, even if the language is broad or general and no matter how "improvident" the agreement may later prove to be for one of the parties. *Republic Insurance Co. v. Paul Davis Systems of Pittsburgh South, Inc.*, 543 Pa. 186, 188-89, 670 A.2d 614, 615 (1995).

Here, the Final Waiver and Release states, in its entirety, as follows:

The undersigned Lower Tier Vendor ("Vendor") [Conestoga], for and in consideration of \$ 1.00, does hereby release and waive all mechanics' lien rights, and all equitable lien rights against IMC [Contractor], Subcontractor, and Owner [Penn College], their respective agents, employees, representatives, sureties and lenders, the real property upon which the project is

located, all buildings, improvements, and the lots of ground appurtenant thereto (the “Project”), for all labor, materials and equipment, furnished in and for the erection, construction, alteration, repair, and improvement of the Project. This Final Release and Waiver of Liens and Claims is an express warrant and representation from Vendor [Conestoga] that there are no other costs, expenses, fees, charges, changes, change orders, or change order requests arising out of or relating to Vendor’s Work performed on the project. *Vendor [Conestoga] forever releases and discharges IMC [Contractor], Subcontractor, and Owner [Penn College] from all claims, demands and causes of action, arising from or relating to [Conestoga’s] labor, materials and/or services provided to the Project.* Vendor [Conestoga] expressly represents that all of its subcontractors, materials suppliers, and employees have been paid in full for all work performed on the Project. Vendor [Conestoga] shall indemnify and hold harmless IMC [Contractor], Subcontractor, and Owner [Penn College] from any claims, liens or damages claimed by its subcontractors, sub-subcontractors, materials suppliers and/or employees and shall pay all expenses incurred in defending such claims, including but not limited to reasonable attorneys’ fees. Should any of Vendor’s [Conestoga’s] subcontractors, sub-subcontractors, materials suppliers or employees file a Mechanic’s Lien, upon notice from IMC [Contractor], Vendor [Conestoga] shall immediately cause the lien to be discharged by either paying the lien claimant, posting a bond of 110% of the lien amount, a letter of credit or other suitable collateral security to discharge the lien. Vendor [Conestoga] expressly represents that this Final Release and Waiver of Liens is for the benefit of, and may be relied upon by IMC [Contractor], Subcontractor, Owner [Penn College], their sureties and lenders and that IMC [Contractor], Subcontractor, and the Owner [Penn College] have fully and completely satisfied all, if any, of their respective duties and obligations to the Vendor [Conestoga], for Vendor’s Work on the Project.

R.R. 218a (emphasis added). This language is clear. Conestoga waived “all claims, demands and causes of action” against Contractor, Subcontractor and Penn



College. *Id.* Therefore, it does not matter whether Contractor paid Subcontractor in full.<sup>8</sup>

This leaves the claim against Travelers. Conestoga's claim is governed by the principles of a surety relationship.

The Pennsylvania Supreme Court has explained that “[w]here there is a surety relationship, an obligee . . . is entitled to performance of a contractual duty by the principal or alternatively, if the principal defaults, by the principal’s surety.” *Kiskis Area School District v. Mid-State Surety Corp.*, 600 Pa. 444, 450, 967 A.2d 368, 371 (2008). The surety stands in the shoes of the principal and must complete any obligation due to the obligee at the time of the default. *Id.*, 967 A.2d at 372. If the principal has performed, the obligee cannot look to the surety. Stated otherwise, if the principal has no liability, neither does the surety. *Id.* at 451, 967 A.2d at 372. A release from the obligee releases the surety except where the surety consents to ongoing liability or the obligee has expressly reserved its rights against

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<sup>8</sup> Conestoga also signed two Partial Waiver and Releases in connection with the joint checks issued by Contractor. The Partial Waiver and Releases state:

[Conestoga] accepts and acknowledges partial payment . . . and waives all claims and releases all actions, liens, causes of action, mechanic lien rights against IMC Construction [Contractor], sureties, and Penn College of Technology (“Indemnities”) with regards to Partial Payment and for any sum over the total amount due.

R.R. 215a-216a. These Partial Waiver and Releases, along with the contractual disclaimer of the joint check agreements, appear to have been drafted to avoid the result in *Diener Brick Co. v. Mastro Masonry Contractor*, 885 A.2d 1034 (Pa. Super. 2005). In *Diener Brick*, the Superior Court held that a joint check agreement between the general contractor, the subcontractor, and the materials supplier created a separate and direct duty in the general contractor to pay the materials supplier. *Id.* at 1039. Contractor’s insistence on the contract disclaimer language in the joint check agreement and accompanying Partial Waiver and Releases nullified the possibility that the joint check agreement created a new and separate contractual duty owing to Conestoga by Contractor.

the surety. *Keystone Bank v. Flooring Specialists, Inc.*, 513 Pa. 103, 113, 518 A.2d 1179, 1184 (1986).

In this case, Travelers, as surety, issued a payment bond to Contractor to pay for “labor, materials and equipment furnished for use” in Stage X. R.R. 17a. Under the Final Waiver and Release, Contractor has no liability to Conestoga. It necessarily follows that Travelers, as surety for Contractor, has no liability to Conestoga. Conestoga did not reserve any rights against Travelers, and Travelers did not consent to any ongoing liability above and beyond that of Contractor. Accordingly, the Final Waiver and Release releases Travelers from any cause of action brought by Conestoga.

Because Conestoga cannot recover from any of Appellees under the express terms of the Final Waiver and Release, the trial court did not err in granting judgment on the pleadings.<sup>9</sup> Accordingly, we affirm on the basis of the Final Waiver and Release.

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MARY HANNAH LEAVITT, Judge

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<sup>9</sup> Because the Final Waiver and Release bars all causes of action against Contractor, Penn College and Travelers, we need not address Conestoga’s other issues.

