IP 99-1723-C T/F Murdock & Sons v. Goheen
Judge John D. Tinder Signed on 1/14/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, ACTING BY AND THROUGH ITS DEPT OF ADMINISTRATION=,	)	
Plaintiff,	)	
vs.	)	
MURDOCK & SONS CONSTRUCTION, INC=, GOHEEN GENERAL CONSTRUCTION,INC=, AETNA CASUALTY AND SURETY COMPANY=, SMITH, CURRIE & HANCOCK, ATTORNEYS=, UNITED STATES INTERNAL REVENUE SERVICE=, MILLER EADS CO INC., INTERVENING PARTY PUR NOTICE OF 11/30/00,	)	CAUSE NO. IP99-1723-C-T/G
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MURDOCK & SONS CONSTRUCTION, INC.,	)	
Plaintiff,	)	
vs.	)	IP 99-1723-C-T/F
GOHEEN GENERAL CONSTRUCTION, INC.; THE AETNA CASUALTY AND SURETY COMPANY; and THE STATE OF INDIANA, acting by and through its Department of Administration,	)	
Defendants.	)	
---	)	
STATE OF INDIANA, acting by and through its Department of Administration,	)	
Interpleader-Plaintiffs,	)	
vs.	)	
MURDOCK & SONS CONSTRUCTION, INC.; GOHEEN GENERAL CONSTRUCTION, INC.; the AETNA CASUALTY AND SURETY COMPANY; SMITH, CURRIE & HANCOCK attorneys, and the UNITED STATES INTERNAL REVENUE SERVICE,	)	
Interpleader-Defendants.	)	

Entry on Summary Judgment Motions[1]

Plaintiff, Murdock & Sons Construction, Inc. ("Murdock") brought claims for acceleration, breach of contract, unjust enrichment, enforcement of promises made by the State of Indiana, rescission of contract and breach of obligation under payment bond in this action. Defendants Goheen General Construction ("Goheen"), Inc. and Travelers Casualty and Surety Company ("Travelers"), as successor in interest to The Aetna Casualty and Surety Company ("Aetna"), move for summary judgment. Plaintiff opposes both motions. The court rules as follows.

I. Summary Judgment Standard

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[1] Though this Entry is a matter of public record and is being made available to the public on the court's web site, it is not intended for commercial publication either electronically or in paper form. The reason for this caveat is to avoid adding to the research burden faced by litigants and courts. Under the law of the case doctrine, the ruling or rulings in this Entry will govern the case presently before this court. *See*, *e.g.*, *Trs. of Pension, Welfare, & Vacation Fringe Benefit Funds of IBEW Local 701 v. Pyramid Elec.*, 223 F.3d 459, 468 n.4 (7th Cir. 2000); *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). However, a district judge's decision has no precedential authority and, therefore, is not binding on other courts, on other judges in this district, or even on other cases before the same judge. *See*, *e.g.*, *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998) ("a district court's decision does not have precedential authority"); *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 697 (7th Cir. 1998) ("district court opinions are of little or no authoritative value"); *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 571 (7th Cir. 1987) ("A single district court decision . . . has little precedential effect. It is not binding on the circuit, or even on other district judges in the same district."). Consequently, though this Entry correctly disposes of the legal issues addressed, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication of the Entry or the subsequent citation of it in other proceedings.

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. If the movant discharges this burden, then the nonmovant cannot rest on bare allegations but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pugh v. City of Attica, Ind.*, 259 F.3d 619, 625 (7th Cir. 2001). A genuine issue exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue of material fact, the court must construe all facts in a light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Id.* at 255.

II. Background Facts[2]

[2] These facts are not disputed. Additional facts may be set forth in the Discussion section as necessary. That section also will address various disputes about factual submissions proffered by Murdock.

On October 30, 1991, Goheen contracted with the State of Indiana, acting by and through its Department of Administration (the "State") to function as prime contractor on the construction of Level-VI housing for the Wabash Valley Correctional Institution (the "Project"). Goheen's contract with the State (the "Prime Contract") contains provisions regarding delays and extensions of time. Section 8.3.1 of the Prime Contract provided in pertinent part:

> If the Contractor is delayed at any time in the progress of the work . . . by labor disputes . . . or any causes beyond the Contractor's control, . . . or by any other cause which the Designer determines may justify the delay, then the Contract Time[3] shall be extended by Change Order[4] for such reasonable time as the Designer may determine.

(Goheen Aff. ¶ 3 & Ex. 1 at 13.) Section 8.3.2 of the Prime Contract provides that: "Any claim for extension of time shall be made in writing to the Designer not more than twenty days after the commencement of the delay; otherwise it shall be waived." (*Id.*) The Designer for the Project was Woollen, Molzan and Partners ("Woollen, Molzan").

Goheen subcontracted the masonry work for the Project to Plaintiff, Murdock, by a three-page letter of acceptance, dated October 31, 1991 (the "Subcontract"). The Subcontract stated in relevant part: "This letter is an acceptance of your proposal to furnish

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[3] "Contract Time" is defined as "the period of time allotted in the Contract Documents for Substantial Completion of the Work. . . ." (Goheen Aff. ¶ 3 & Ex. 1 at 13.)

[4] A "change order" is "a written order to the Contractor composed by the Designer, signed by the State and the Contractor issued after the execution of the Contract, authorizing a change in the Work, as an adjustment in the contract sum and/or the Contract time." (Goheen Aff. ¶ 3 & Ex. 1 at 21.)

and install all masonry work required for a complete project . . . on subject project for the sum of $1,629,825.00." (Goheen Aff. ¶ 3 & Ex. 2 at 1.) The Subcontract refers to page 11 paragraph 7.10.1 of the Prime Contract which requires that subcontractors with subcontract amounts in excess of $100,000 have a Certificate of Qualification issued by the Division of Public Works. (*Id.*) The Subcontract anticipates that Murdock's work would begin "approximately November 25, 1991." (*Id.* at 3.) The Subcontract also provides that:

> Time is of the essence in the performance of this contract, in the event that your failure to procure and/or install any of the materials covered by this order causes the contract completion date to be delayed past October 23, 1992, liquidated damages of $1,300.00 per day for the first through the sixtieth day and $2,600.00 for each day thereafter will be withheld from your final payment.

(*Id.* at 1.)

The parties agree that the Prime Contract applied to both Goheen and Murdock.[5] In its surreply, Murdock submits what it represents to be a provision in the Prime Contract, Section 5.3.1, governing Subcontractual Relations.[6] That provision states in pertinent part:

> By an appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Sub-Contractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and the Designer. Said agreement shall preserve and protect the rights of the Owner and the Designer under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the Contractor-Subcontractor Agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Documents, has against the Owner.

(Murdock Surreply, Ex. AE.)

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[5] The Subcontract does not address whether the Prime Contract applies to Murdock and contains no provision incorporating the Prime Contract, whether in its entirety or in part. Based on the parties' arguments, their positions that the Prime Contract in its entirety does apply to Murdock (*see*, *e.g.*, Murdock Resp. Goheen Statement Material Facts No. 4 ("Murdock was responsible to perform with all construction documents. . . ."), and the lack of any language in the Subcontract to the contrary, however, the court accepts that the Prime Contract in its entirety applied to Murdock.

[6] The single page submitted is not accompanied by any affidavit or other testimony stating that the page is a true and accurate copy of a page of the Prime Contract. None of the other parties to this action, however, have raised any concern that the page submitted as Ex. AE and attached to Murdock's surreply is anything other than that which Murdock claims it to be. The court, therefore, accepts that it is a true and accurate copy of a page of the Prime Contract.

Goheen was required to and did obtain a payment bond, entitled "Contractor's Bond For Construction" (the "Bond") for the Project. Aetna is the surety under the Bond and Goheen is the principal. The Bond provides that Goheen "shall well and faithfully do and perform" its Contract with the State of Indiana. The Bond states that it "shall adhere to the requirements of [Indiana Code §§] 4-13.6-7-6 and . . . 4-13.6-7-7." (Goheen Aff., Ex. 3.) Indiana Code § 4-13.6-7-6 provides in pertinent part:

> The bond shall include at least the following provisions:
>
> (1) The contractor, its successors and assigns, whether by operation of law or otherwise, and all subcontractors, their successors and assigns, whether by operation of law or otherwise, shall pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work.
>
> (2) The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.
>
> (3) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.
>
> (4) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

Pursuant to the terms of the Prime Contract and Subcontract, the Project was to be completed in the fall of 1992. Murdock began working on the Project in January 1992. Murdock soon encountered extremely low masonry production levels. In early January 1992, Murdock advised Goheen of a production problem by the masons on the Project since the masons were not producing at the anticipated production rates. Murdock continued to inform Goheen on a regular basis from January through August and thereafter

about the low level of production by the union masonry workers. Goheen communicated to Murdock its concern with how far Murdock was falling behind in the Project several times a month from January 1992 forward. Goheen, at the State's insistence, instructed that Murdock add more masonry workers and equipment to the Project.

Murdock first notified Goheen in writing of the problems with the low levels of production by the union masonry workers by letter, dated August 5, 1992. (Goheen Aff. ¶ 3 & Ex. 10.) Murdock's letter requested Goheen extend the time for completion of the masonry work and make an adjustment in the Subcontract amount. This was the first such written request made by Murdock. Goheen forwarded Murdock's letter to the Designer, invoking Sections 8.3.1 and 12.2.1 of the Prime Contract and formally requesting an adjustment in the contract amount and schedule period. (Goheen Aff. Ex. 11.)

By letter to Goheen, dated November 18, 1992, Murdock again requested an increase in the contract price and an extension of time to complete the Project. (Goheen Aff. ¶ 3 & Ex. 11.) Goheen submitted Murdock's request to the Designer, by letter dated December 4, 1992, thus requesting on behalf of Murdock an increase in the contract price and extension of time to complete the project. (*Id.*) The request was denied by the State, explaining that "[t]o make a valid claim it must be a claim from Goheen . . . and it must state the amount of the claim in cost and time requested." (Goheen Aff. Ex. 12.)

Murdock submitted payment requests to Goheen as follows:

Invoice #	Date	Amount

1515	9/2/92	$101,857.00
1544	9/30/92	$145,063.00
1557	11/4/92	$184,367.00
1570	12/4/92	$78,460.00
1587	12/31/92	$47,959.00

Goheen was informed by suppliers that Murdock had not timely paid its material suppliers. As a result, Goheen withheld payment from Murdock on the above-mentioned invoices. On or about November 3, 1993, the State issued three party (Goheen, Murdock and Murdock subcontractors or suppliers) checks to Murdock's subcontractors and suppliers for work or supplies included in the invoices mentioned above. The issuance of these three party checks reduced Murdock's Little Miller Act claim against Goheen amount to $334,178.00. (W.H. Calvin Murdock Aff. ¶ 40.)

On December 17, 1992, Murdock stopped work on the Project and left the job site without completing the work. Murdock claims that it stopped work because Goheen had failed to pay it amounts allegedly due and owing in a timely manner.

Goheen issued checks payable solely to Murdock totaling $1,013,482.00. The State issued checks payable jointly to Goheen and Murdock's suppliers and vendors whom Murdock did not pay totaling $221,463.71, which were charged to Goheen as Progress Payments. Murdock did not pay the suppliers because Goheen did not pay Murdock. Goheen paid Architectural Brick and Supply the sum of $53,023.00 for materials

purchased by Murdock and which Murdock did not pay. Murdock did not pay Architectural Brick and Supply because Goheen did not pay Murdock.

The Project was not completed by the date specified in Goheen's Prime Contract with the State. The majority of the work on the Project at the time was masonry work, and scheduled delays were a result of slow masonry progress. The State did not make final payment to Goheen under the Contract for work on the Project, but rather retained a certain sum ("Progress Payment Amount"). The State paid Murdock $871,000 and deposited the Progress Payment Amount of $334,178 with the Clerk of Marion County, Indiana. Murdock contends these funds are the balance of Murdock's Little Miller Claim. The amount deposited with the Clerk of Marion County was subsequently transferred to the Clerk of the United States District Court, Southern District of Indiana.

III. Discussion

Count I of the Complaint claims that Goheen constructively accelerated the work under the Subcontract. Count II alleges Goheen breached the Subcontract with Murdock by refusing to pay Murdock for work performed on the Project during August through December 1992. Count III asserts an unjust enrichment claim against Goheen and the State. Count IV brings a claim based on promises made to Murdock by representatives of the State. Count V seeks to rescind the Subcontract based on mutual mistake. Count VI seeks judgment against Goheen, as principal, and Aetna, as surety, for breach of their obligations under the Bond.

Goheen seeks summary judgment on the Complaint. Travelers seeks summary judgment on all claims asserted against Aetna and Travelers.

In responding to the summary judgment motions, Murdock contends that Counts I, II and VI state claims against Goheen and Travelers and there are genuine issues of material fact precluding summary judgment on these claims. Murdock, however, agrees that consequential damages are unavailable under Count I and dismisses its claim to such damages in that Count.[7] Murdock also agrees to dismiss Counts III, IV and V against Goheen and against Travelers as the surety on the bond. Those claims will be DISMISSED. Thus, this entry discusses only the facts and arguments pertaining to Counts I, II and VI.

A. Goheen's Motion

Goheen seeks summary judgment on the acceleration claim in Count I and the breach of contract claim in Count II.

1. The Acceleration Claim

Goheen contends it should be granted summary judgment on the claim for acceleration in Count I because Murdock had no entitlement to an extension for excusable

[7] In Plaintiff's Final Contentions, filed on October 11, 2001, Murdock reasserts claims for consequential damages. Since Murdock previously agreed to dismiss those claims, the court assumes that the inclusion of claims for consequential damages in Plaintiff's Final Contentions was an error.

delay from Goheen. Goheen further contends that the delay was not excusable. Murdock contends that its delay was excusable and that it had the right under the Prime Contract to pursue its acceleration claim against Goheen.

The parties apparently agree that Indiana law governs this dispute and the court, therefore, will apply Indiana law. No reported Indiana case addresses the elements of an acceleration claim, so the court may consider decisions from other states in attempting to decide the matter as would Indiana's highest court. *See*, *e.g.*, *Stephan v. Rocky Mountain Chocolate Factory, Inc.*, 129 F.3d 414, 417 (7th Cir. 1997). The parties also agree that the court should look to guidance in the decisions of *Sherman R. Smoot Co. v. Ohio Department of Administrative Services*, 736 N.E.2d 69 (Ohio Ct. App. 2000), and *Department of Transportation v. Anjo Construction Co.*, 666 A.2d 753 (Pa. Commw. Ct. 1995). The Ohio court said: "Constructive acceleration occurs when a contractor has a justified claim for an extension of time, but is required to incur additional expenses because the project owner refuses to grant the extension and requires the contractor to complete the project by the original completion date." *Sherman R. Smoot Co.*, 736 N.E.2d at 78; *see also Anjo Constr Co.*, 666 A.2d at 757 ("A constructive acceleration order may exist, when the government unit merely asks the contractor to accelerate or when the government expresses concern about lagging progress.") (citation omitted).

Goheen first maintains that Murdock was not entitled to an extension of time for excusable delay from Goheen because under the Prime Contract, only the Designer, not

Goheen, could grant an extension of time. In its reply brief Goheen takes a slightly different approach and effectively argues that only the project owner can be held liable on an acceleration claim. Murdock, however, argues that as a subcontractor it had no privity of contract with the project owner, the State, so it was entitled to an extension of time from Goheen. Notwithstanding that a general contractor may be held liable to a subcontractor on an acceleration claim, *see*, *e.g.*, *Mobil Chem. Co. v. Blount Bros. Corp.*, 809 F.2d 1175, 1178-79 (5th Cir. 1987) (holding general contractor and project owner equally liable for damages to subcontractors on acceleration claim), Murdock's acceleration claim fails for a wholly different reason.[8]

As Murdock acknowledges, one element a party must prove in order to prevail on a constructive acceleration claim is that the party properly requested an extension of time. *See Sherman R. Smoot*, 736 N.E.2d at 78 (citing *Environtech Corp. v. Tenn. Valley Auth.*, 715 F. Supp. 190, 192 (W.D. Ky. 1988)). Murdock claims that it properly requested a time extension from Goheen, but the record refutes this claim.

Pursuant to Section 5.3.1 of the Prime Contract, Goheen's Subcontract with Murdock was supposed to contain what is known as a flow through or flow down provision. *See*, *e.g.*, *Thor Elec., Inc. v. Oberle & Assocs.*, 741 N.E.2d 373, 378-79 (Ind. Ct. App. 2000); *Indus. Indem. Co. v. Wick Constr. Co.*, 680 P.2d 1100, 1103-04 (Alaska 1984)

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[8] In the cases relied upon by the parties, the general contractors brought acceleration claims against the owner. The decisions do not hold that only project owners can be held liable on an acceleration claim and do not address whether a subcontractor may hold a general contractor liable on such a claim.

(citing R. Cushman, The Construction Industry Formbook, § 5.08 (1979)). Under a flow through provision, the subcontractor agrees to assume toward the general contractor all of the obligations and responsibilities that the general contractor assumes toward the owner and, the subcontractor has the same rights and remedies as against the general contractor that the general contractor has against the owner. *See*, *e.g.*, *United Tunneling Enterp. v. Havens Constr.*, 35 F. Supp. 2d 789, 795 (D. Kan. 1998) (citing *Indus. Indem. Co.*, 680 P.2d at 1104 (quotation omitted)). Thus, pursuant to a flow through provision, "'[t]he parties to the subcontract . . . assume the correlative position of the parties to the prime contract.'" *Havens Constr.*, 35 F. Supp. 2d at 795 (quoting *Indus. Indem. Co.*, 680 P.2d at 1104 (citing A. Dib, Forms and Agreements for Architects, Engineers and Contractors, Chap. 7, § 1[a] (1979))). A flow through provision is intended to incorporate into the subcontract the provisions of the prime contract which relate to the subcontractor's performance. *See*, *e.g.*, *id.* at 794 (quoting *Indus. Indem. Co.*, 680 P.2d at 1104).

Admittedly, the three-page Subcontract between Goheen and Murdock found as Exhibit 2 to the Goheen Affidavit does not contain a flow through provision. However, Goheen and Murdock by taking the position in their briefs and contentions that the Prime Contract applied to Murdock (*See*, *e.g.*, Pl.'s Final Contentions ¶ 9 ("Under the Project manual Article 8.3.2, Murdock was entitled to extensions of time for any delays caused by labor disputes or any causes beyond Murdock's control."); Goheen's Final Contentions ¶¶ 8, 13, 14, 16 (acknowledging that Murdock requested an extension of time pursuant to Section 8.3.1 and invoking Sections 9.5.1 as against Murdock)) act as if the Subcontract

contained such a provision. Furthermore, Section 5.3.1 of the Prime Contract provides that the Subcontract "shall allow to the Subcontractor, unless specifically provided otherwise in the Contractor-Subcontractor Agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Documents, has against the Owner." The Subcontract between Goheen and Murdock does not "specifically provide otherwise."

Thus, the court will treat the Subcontract as if it contained a flow through provision such as that contemplated in Section 5.3.1 of the Prime Contract. Consequently, the Subcontract is understood as incorporating the provisions of the Prime Contract with respect to the work for which Murdock subcontracted, and Murdock and Goheen assumed the correlative positions of Goheen and the State. Thus, Murdock assumed toward Goheen all of the obligations and responsibilities that Goheen under the Prime Contract assumed toward the State and the Designer and, Murdock has the same rights, remedies and redress against Goheen as Goheen has under the Prime Contract against the State.

Resolution of Murdock's acceleration claim depends on Section 8.3.2 of the Prime Contract, which applies to Murdock, and defines a proper request for an extension of time: "Any claim for extension of time shall be made in writing to the Designer not more than twenty days after the commencement of the delay; otherwise it shall be waived." Under Section 8.3.2, to make a proper request for an extension of time, Murdock would have had to make a claim in writing to Goheen not more than twenty days after the commencement fo the delay. The evidence, however, is uncontradicted that Murdock did not make a

proper request for an extension of time under Section 8.3.2.[9] The parties agree and the uncontradicted evidence establishes that Murdock first made a written request of Goheen for an extension of time by letter dated August 5, 1992.[10] However, the uncontradicted evidence further shows that the cause for the delay began many months before that date, certainly much earlier than twenty days before. And, Murdock was aware of the delay and the reason for the delay for several months. In fact, Murdock acknowledges that before submitting its letter of August 5, it had had numerous discussions with Goheen regarding the masonry union workers' production rates and its efforts and costs to increase production rates. Therefore, Murdock cannot prove that it properly requested an extension of time as required under Section 8.3.2 of the Prime Contract and, any claim for an extension of time was deemed waived under Section 8.3.2. Since Murdock cannot

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[9] Goheen does not move for summary judgment on this basis, but the facts are not in dispute that the delay for which Murdock sought the extension of time, low masonry production rates, was known to Murdock many months before it first made a written request for an extension of time. Thus, the court may resolve Goheen's summary judgment motion on this basis.

It is noted that another provision in the Prime Contract, Section 12.2.1 ("Claims for Additional Cost or Time") could be interpreted as allowing Murdock only fifteen days within which to make a claim for an extension of time due to excusable delay. The conflict between that provision and Section 8.3.1 creates an ambiguity which would be construed against Goheen. Thus, Murdock would be allowed the more generous provision of the two and would have twenty rather than fifteen days within which to give notice to Goheen of a claim for an extension of time.

[10] In addition, the Complaint alleges that "On or about August 5, 1992, October 2, 1992, and November 18, 1992, Murdock gave Goheen and the State formal written notice of the existence of the excusable delay. . . ." (Compl. ¶ 27.)

establish that it properly requested an extension of time, Murdock cannot prove its acceleration claim against Goheen.[11]

Accordingly, Goheen's motion for summary judgment should be granted on the acceleration claim in Count I of the Complaint.

2. Breach of Contract Claim

Goheen contends that if it is not liable on the constructive acceleration claim, then Murdock breached the Subcontract when it suspended work on December 17, 1992, and therefore is not entitled to any damages for its failure to complete the work on the Project. Goheen seems to conflate Murdock's breach of contract claim with its acceleration claim, but they are two separate claims. However, Goheen also argues that Murdock failed to perform its work in a workmanlike manner and failed to cure defective work. The court understands Goheen to allege that these failures were a breach of the Subcontract by Murdock justifying Goheen's refusal to pay Murdock for work performed during the months of August through December 1992.

In its reply brief, Goheen argues that the breach of contract claim has been superseded by the interpleader action. (Summ. J. Reply Br. at 9.) Goheen, however, cites no authority to support this argument. Indeed, funds have been interpleaded in this very

[11] The court therefore need not reach the question of whether the delays were excusable.

action. This action is the vehicle by which the liability of Goheen and Murdock to each other, if any, under the Subcontract will be determined.

A contract for work contains an implied duty to perform the work skillfully, carefully and in a workmanlike manner. *See*, *e.g.*, *Indianapolis Pub. Hous. Agency v. Aegean Constr. Servs., Inc.*, 755 N.E.2d 237, 239-40 (Ind. Ct. App. 2001) (holding genuine issue of material fact regarding whether contractor completed project in timely and workmanlike manner and whether contractor was owed actual and liquidated damages precluded summary judgment for contractor on breach of contract counterclaim); *Homer v. Burman*, 743 N.E.2d 1144, 1147 (Ind. Ct. App. 2001). The negligent failure to do so is a breach of contract. *See*, *e.g.*, *Homer*, 743 N.E.2d at 1147.

Genuine issues of material fact necessitate trial regarding whether Murdock performed its work skillfully, carefully and in a workmanlike manner. E.L. Goheen states in his affidavit, though in conclusory fashion, that "[s]ome of the work Murdock performed was not of acceptable quality, and Murdock's workers had caused damage to various materials and supplies which were to be used on the project." (Goheen Aff. ¶ 31.) W.H. Calvin Murdock, on the other hand, states in his affidavit, though also in a conclusory fashion, that "Murdock's work on the Project was done in a workmen like manner" (Murdock Aff. ¶ 50), and he "denies that Murdock left damaged work or work that needed to be repaired." (*Id.*) Mr. Goheen also states in his affidavit that there were problems with Murdock's work including: the first course of blocks were laid in mud and Murdock failed to have a full-time

quality control person on site. (Goheen Aff. ¶ 12.) Mr. Murdock, however, states in his affidavit that "Murdock did not have a mud problem at the footings in January, 1992" (Murdock Aff. ¶ 58), and that the Subcontract did not require Murdock to have a quality control person. (*Id.* ¶ 59.) Given these genuine issues about Murdock's performance of its work, there also are genuine issues of fact as to whether Goheen was entitled to withhold payment from Murdock for the work it performed and for which it sought payment. Therefore, Goheen's motion for summary judgment should be denied with respect to the breach of contract claim in Count II.

In its reply brief, Goheen raises for the first time the argument that damages on the breach of contract claim in Count II are limited by the contract price and are limited to the $334,178.00 interpleaded by the State plus the $1,039.12 Murdock claims it is owed by Goheen for additional services performed. Murdock filed a surreply brief, but the brief does not address this new argument. The court is unable to determine whether Murdock concedes this point or simply chose not to address it because it was not raised in Goheen's opening brief as it should have been. Thus, it would be unfair to address this issue, though interesting, at this stage, where Goheen failed to discharge its duty to inform the court at the outset that it was a basis for its summary judgment motion. The court will discuss with the parties during the next pretrial conference whether a further round of briefing on this question would be appropriate.

3. Breach of Obligation on Payment Bond

Goheen seeks summary judgment on Count VI the claim that Goheen and Aetna have breached their obligations under the Bond. Goheen's argument in full is as follows: "By the terms of the bond, Goheen has no obligation to Murdock. (Contractor's Bond for Construction, attached as Exhibit 3 to Affidavit of E.L. Goheen.) Murdock's claims in Count VI against Goheen must be dismissed as a matter of law." (Br. Supp. Mot. Summ. J. at 17.)

Goheen cites no authority to support its contention. This lack of citation to authority is not surprising. Goheen is wrong.[12] Under the Bond's terms, Goheen assumed an obligation to "pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work [the Project]." And, under its terms, the Bond "shall directly inure to the benefit of subcontractors" performing labor, material, or service in relation to the Project. Murdock was a subcontractor to whose benefit the Bond inures. Murdock has made a claim to Goheen for unpaid monies due and owing on the Project. Neither Goheen nor Travelers has satisfied

[12] It is noted that Goheen argues that "Murdock has provided no argument and raised no genuine issue of material fact disputing Goheen's right to summary judgment on Count VI. Murdock states only that 'Travelers Motion for Summary Judgment should be denied.'" (Summ. J. Reply Br. at 13.) Goheen must have overlooked all but the very last sentence in Section C. Count VI: Breach of Obligation Under Payment Bond of Murdock's Brief in Opposition to Defendants' Goheen General Construction, Inc. and Traveler's Casualty and Surety Company's Motion for Summary Judgment.

that claim. Therefore, Goheen's motion for summary judgment must be denied as to Count VI.

B. Travelers' Motion

Travelers first contends that Murdock has no greater claims against Travelers, as surety on the bond, than it has against Goheen as principal so that it is entitled to summary judgment on Murdock's claims for the same reasons urged by Goheen in its motion for summary judgment. Travelers also argues that even if Murdock has a claim against Goheen, the statutory bond under which it is surety does not cover the consequential damages, lost profits or damages for unjust enrichment that Murdock seeks.

Murdock agrees that Travelers, as surety on the bond, is obligated to Murdock as subcontractor under Indiana Code § 4-13.6-7-6 only to the extent that Goheen, as principal, is liable to Murdock. "Generally, a surety's liability is no greater than the principal's." *Goeke v. Merchants Nat'l Bank & Trust Co.*, 467 N.E.2d 760, 768 (Ind. Ct. App. 1984). Murdock also agrees that Travelers is not liable for any consequential damages that might be assessed against Goheen under the breach of contract claim.

The court has found that Goheen is entitled to summary judgment in its favor on the acceleration claim against it asserted in Count I. Therefore, the court finds that Travelers cannot be held liable under the bond for the acceleration claim in Count I. But since the court has found that genuine issues of material fact preclude summary judgment in favor of Goheen on the breach of contract claim in Count II, the court must conclude that Travelers

may still be held liable under the Bond for the claim in Count II, though, as Murdock acknowledges, not for any consequential damages. Travelers' liability on that claim, like that of Goheen, must be determined by the trier of fact. Consequently, Travelers' liability on Count VI also must be determined by the trier of fact.

It appears, though, that Murdock still seeks to recover lost profits as against the Bond. Paragraph 60 of Murdock's Statement of Material Facts states that "Murdock's actual out of pocket costs expended in order to meet the original project schedule is $3,991,385.00, inclusive of profit." Paragraph 29 of Plaintiff's Final Contentions urges that Murdock is entitled to "lost profits on the uncompleted work." In addition, in its brief in opposition to the summary judgment motions of Goheen and Travelers, in the section entitled, "C. COUNT VI: Breach of Obligation Under Payment Bond," Murdock cites to Indiana Code § 5-16-5-2 and *Ideal Heating Co. v. Falls & Noonan, Inc.*, 378 N.E.2d 946 (Ind. Ct. App. 1978), for support for its claim that it may recover for general overhead and profit as well as for labor and materials. Travelers contends lost profits are not recoverable in an action on the Bond. The court agrees.

Murdock relies on the wrong statute in asserting an entitlement to lost profits under the Bond. The payment bond at issue in the instant case was issued pursuant to and thus covered under Article 13.6 of Title 4 of the Indiana Code, specifically §§ 4-13.6-7-6 and 4-13.6-7-7. By operation of Indiana Code § 4-13.6-2-5, the statute relied upon by Murdock does not apply to the Prime Contract or Subcontract. *See* Ind. Code § 4-13.6-2-5 ("The following statutes do not apply to public works, public works contracts, or professional

service contracts covered under this article: . . . (3) IC 5-16-5."). Similarly, *Ideal Heating* construed Indiana Code § 5-16-5-1 and § 5-16-5-2. It is therefore inapposite. Murdock cites no other authority to support its claim for lost profits in Count VI.

Travelers, on the other hand, has cited to extensive authority to support is argument that lost profits are not recoverable against the surety in an action for payment against the Bond. State payment bond statutes are commonly referred to as "Little Miller Acts," *see*, *e.g.*, *Hasse Contr. Co. v. KBK Fin., Inc.*, 980 P.2d 641, 644 (N.M. 1999); *Syro Steel Co. v. Eagle Const. Co.*, 460 S.E.2d 371, 373 (S.C. 1995); *McClure Estimating Co. v. H.G. Reynolds Co.*, 523 S.E.2d 144, 149 (N.C. Ct. App. 1999), in reference to the Miller Act, 40 U.S.C. § 270a-270d, after which they are patterned. Thus, absent state legislative intent to the contrary, case law interpreting the Miller Act should be accorded weight in interpreting a state's Little Miller Act. *Syro Steel*, 460 S.E.2d at 373.

Indiana courts have looked to cases interpreting the Miller Act when interpreting state statutory payment bonds. *See Ind. Carpenters Central & W. Ind. Pension Fund v. Seaboard Sur. Co.*, 601 N.E.2d 352, 354-55 (Ind. Ct. App. 1992) (considering claim for unpaid fringe benefits by pension and benefit plan against surety on bond issued pursuant to Ind. Code § 36-1-12-13.1). *Indiana Carpenters* is a good indication that the Indiana courts would look to cases interpreting the Miller Act when interpreting § 4-13.6-7-6. The language of § 4-13.6-7-6(a)(1)-(2) regarding the contractor's obligations and intended beneficiaries is very similar to language regarding the contractor's obligations and

intended beneficiaries in § 36-1-12-13.1 at issue in *Indiana Carpenters*. *Compare* Ind. Code § 4-13.6-7-6(a)(1)-(2) ("The contractor, its successors and assigns, . . . shall pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work. . . . The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.") *with* Ind. Code § 36-1-12-13.1(b) ("The payment bond is binding on the contractor, the subcontractor, and their successors and assigns for the payment of all indebtedness to a person for labor and service performed, material furnished, or services rendered. The payment bond must state that it is for the benefit of the subcontractors, laborers, material suppliers, and those performing services."). Just as in *Indiana Carpenters*, the purpose of the payment bond in the instant case is the same as the purpose of a bond under the Miller Act–"to protect the otherwise unprotected [subcontractors,] materialmen (sic) and laborers on public projects" for whom mechanic's liens are unavailable. *Ind. Carpenters*, 601 N.E.2d at 355; *United States v. Carter*, 353 U.S. 210, 217 (1957); *cf. Dow-Par, Inc. v. Lee Corp.*, 644 N.E.2d 150, 153 (Ind. Ct. App. 1994) (considering claim against payment bond issued under Ind. Code § 36-1-12-13.1 and stating "the primary purpose of the statutory payment bond is to protect suppliers of labor or materials"). And, as in *Indiana Carpenters*, the intended beneficiaries of the payment bond in the instant case are the same as under the Miller Act–those who have performed, furnished or supplied labor, service or materials in relation to the public work. *See Ind. Carpenters*, 601 N.E.2d at

355; Ind. Code § 4-13.6-7-6(a)(1)-(2); 40 U.S.C. § 270b(a). The court concludes that cases interpreting the Miller Act are instructive as to the appropriate interpretation of payment bonds issued under Indiana Code §§ 4-13.6-7-6.

A few courts have held that lost profits are recoverable under the Miller Act, *see*, *e.g.*, *Hensel Phelps Constr. v. United States*, 413 F.2d 701, 702 (10th Cir. 1969), but the majority view is that lost profits are not recoverable from a surety in an action on a Miller Act payment bond. *Consol. Elec. & Mechs., Inc. v. Biggs Gen. Contracting, Inc.*, 167 F.3d 432, 435-36 (8th Cir. 1999); *Mai Steel Serv., Inc. v. Blake constr. Co.*, 981 F.2d 414, 418 (9th Cir. 1992); *United States, for Use & Benefit of T.M.S. Mech. Contractors, Inc. v. Millers Mut. Fire Ins. Co.*, 942 F.2d 946, 952-53 (5th Cir. 1991); *United States for Use & Benefit of Pertun Constr. Co. v. Harvesters Group, Inc.*, 918 F.2d 915, 919 (11th Cir. 1990); *United States for Use & Benefit of Skip Kirchdorfer, Inc. v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387, 394 (E.D. Va. 1994); *see also Lite-Air Prods., Inc. v. Fid. & Deposit Co.*, 437 F. Supp. 801, 803 (E.D. Pa. 1977) (holding lost profits not recoverable against surety in action on payment bond under Little Miller Act). The court believes that Indiana would follow the majority for the reasons stated in *Biggs General Contracting*:

> The Miller Act was not meant to replace subcontractors' state law contract remedies, which allow for recovery of lost profits. Rather, it provides subcontractors an additional remedy to recover costs expended in furnishing labor or material in the prosecution of the work provided for in [a public construction] contract. A claim for profit does not involve actual outlay and thus falls outside both the letter and the spirit of the [Miller] Act.

167 F.3d at 436 (citations and quotations omitted); *cf*. *United States v. Pickus Constr. & Equip. Co.*, No. 98 C 3261, 2000 WL 190574, at *8 (N.D. Ill. Feb. 9, 2001) ("Plaintiffs who file Miller Act claims can also file pendant state contract claims. The Miller Act was not meant to replace subcontractors' state law contract remedies, which allow for recovery of lost profits.") (quotation omitted). Like a payment bond under the Miller Act, the Bond issued under Indiana Code § 4-13.6-7-6 in this case allows subcontractors recovery for "all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work." Ind. Code § 4-13.6-7-6(a)(1). The court concludes that even if Goheen is ultimately found liable to Murdock, damages for lost profits (whether on other work Murdock was unable to obtain or on uncompleted work under the Subcontract) are not recoverable from Aetna or Travelers on Murdock's claim for payment against the Bond in Count VI.[13]

Accordingly, Traveler's motion for summary judgment will be GRANTED IN PART and DENIED IN PART.

IV. Conclusion

Goheen's motion for summary judgment will be GRANTED with respect to the acceleration claim in Count I and DENIED with respect to the breach of contract claim in

[13] The same holds true for any claims for other consequential damages, damages for loss of bonding capacity, and damages for unjust enrichment, to the extent, if any, Murdock still seeks to recover such items under Count VI.

Count II and the claim for payment on the bond in Count VI as there are genuine issues of fact necessitating trial on the latter claims.

Travelers' motion for summary judgment will be GRANTED IN PART and DENIED IN PART. Travelers has no liability under the Bond for the acceleration claim asserted against Goheen in Count I. Because there are genuine issues of fact on the breach of contract claim asserted against Goheen in Count II, however, Travelers ultimately may be held liable under the Bond on Murdock's claim for unpaid monies allegedly due and owing for work performed under the Subcontract. Thus, Travelers' Travelers may be held liable at trial on Count VI, but Murdock's claims for consequential damages, lost profits, loss of bonding capacity, and unjust enrichment under Count VI are not recoverable.

Counts III, IV and V as well as the claim for consequential damages in Count I will be DISMISSED.

Because of the pendency of the remaining related claims, no final judgment under Rule 54(b) or 58 will be issued at this time.

This cause will be set for a pretrial conference by separate order.

ALL OF WHICH IS ORDERED this 14th day of January 2002.

John Daniel Tinder, Judge
United States District Court

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