

May 13, 2020

Rosemary Chiavetta, Secretary
Pa Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

EXCEPTIONS

Re: C-2019-3011595

Dear Secretary Chiavetta,

Attached for electronic filing please find the following Exceptions for the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

No transcript is necessary to rule on Exceptions.

Respectfully submitted,

Kelly Marian

Complainant

cc: Certificate of Service

IN THE COURT OF PENNSYLVANIA UTILITY COMMISSION OF ALLEGHENY
COUNTY, PENNSYLVANIA

KELLY MARIAN

Plaintiff,

v.

Case No. C-2019-3011595

Pennsylvania American Water Company

Defendant

BRIEF STATEMENT OF THE CASE

1. Pennsylvania American Water Company replaced water lines on Cress Street as a result their project which entailed hiring a contractor ultimately paved leaders of Cress Street closed. PAWC water line replacement caused structural damage to Plaintiff's house.
2. PAWC is responsible for repairing the Plaintiff's foundation walls, cellar door, water drainage issues, and leaders.
3. PAWC negligence claiming no knowledge of engineer authorizing the rising of the elevation of Cress Street.
4. PAWC negligence claiming no knowledge of elevation of the street.
5. Workorder (PAWC, CCSI, Scott Twp.) negligence omitting level of street prior to and completion of work.
6. PAWC ambiguity regarding Inspections of completed work on Cress Street even after sending contractor back to do repairs.
7. Not all documentation pertaining to the work completed by PAWC and CCSE on Cress Street were submitted in SRTK inquiry.

STATEMENT OF THE ISSUES INVOLVED

Breach of Contract

In Pennsylvania, as elsewhere, agreements for the construction of a home, **public utilities**, private commercial structures, excavation, sewers, roadways and the like are typically memorialized in a contract between the purchaser and the builder. Pennsylvania contract law encompasses general, basic rules of contract construction. **(1)**

Ordinarily, the specifications of a construction contract will clearly denote the “kinds, quality, and quantity of work to be done, the details, time and manner of construction, without which the contract would be incomplete and ineffective.” **(2)**

A violation of one of these numerous provisions could give rise to a breach of contract action against the builder because when performance under a contract is due, any nonperformance is a breach. **(3)** The likelihood that the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

(1) *Cober v Corle*, 610 A.2d 1036 (PA. Super. 1992).

(2) *Z & L Lumber Co of Atlasburg v. Nordquist*, 502 A.2d 697, 701 (PA Super. 1985); *see also Knelly v. Horwath*, 57 A 957 (PA. 1904).

(3) *Widemer Eng’g, Inc. v. Dufalla*, 837 A.2d 459, 468 (Pa. Super. 2003); See also Restatement (Second) of Contracts §235(2) (1981)

NEGLIGENCE

1. Duty - The defendant owes a legal duty to the plaintiff under the circumstances;
2. Breach - The defendant breached that legal duty by acting or failing to act in a certain way;
3. Causation - It was the defendant's actions (or inaction) are what actually caused the plaintiff's damage to house and
4. Damages - The plaintiff was structurally damaged as a result of the defendant's actions.

Defective construction cases include negligence claims. Such cases include allegations that, the builder breached the duties of reasonable care, reasonable workmanship and/or violated any of the various obligations imposed by law. (4)

To establish a cause of action in common law negligence under Pennsylvania law, a plaintiff must demonstrate that the defendant owed the plaintiff a duty, that the duty was breached, that the breach caused the plaintiff's injury, and that the plaintiff suffered damages. (5)

Previously, the Pennsylvania Superior Court has articulated the following factors in determining the existence of a duty: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences **of imposing a duty upon the actor.** and (5) the overall public interest in the proposed solution.

BREACH OF EXPRESS AND IMPLIED WARRANTY CLAIMS

Under the implied warranty of workmanship, a person working on a construction project under a construction contract or subcontract impliedly warrants that: 1) **he will do his work in a good and workmanlike manner according to existing standards of construction in the area** in which the building is erected. (6) A basement continually leaks. (7)

STANDARD FORM CONSTRUCTION CONTRACTS

“Common law” indemnity is derived from a special relationship between the parties. This special relationship dictates that indemnity will be available to a person, who, without active fault, has been legally compelled to pay damages actually caused by another’s negligence. (8) **a property owner could recover from a contractor who failed to perform specified duties** and thereby caused an injury to another; or a municipality with a duty to ensure that property owners maintain sidewalks may be indemnified by a property owner who failed to maintain a sidewalk that caused an injury to a passerby. (9)

(5) Harris v. Merchant, 2010 U.S. Dist. LEXIS 100776, 2010 WL 3734107, at *21 (E.D.Pa. Sept. 23, 2010) (citing Merlini ex rel. Merlini v. Gallitzin Water Auth., 602 Pa. 346, 980 A.2d 502, 506 (2009)); also see S72 *642 McCandless v. Edwards, 908 A.2d 900, 903 (Pa.Super.2006).

. 926 F. Supp. 2d 634 (W.D. Pa. 2013).

(6) F.D.P. ex re Pontiere v. James Dinert, Inc, 627 A.2d 1204 (Pa. Super. 1993). I. S.M.P. v. Ferrara, 804 A.2d 1221, 1231 (Pa.Super.2002).

(7) Ecksel v. Orleans Const. Co., 519 A.2d 1021 (Pa. Super. 1987) Sirianni v. Nugent Bros., Inc., 506 A.2d 868, 870-871 (Pa. 1986).

(8) Walton v. Avco Corp., 610 A.2d 454, 460 (Pa. 1992).

(9) Builders Supply Co. v. McCabe, 77 A.2d 368 (Pa. 1951).

RECOVERABLE DAMAGES

Direct Damages The measure of damages for injury to real property is "the cost of repairs where that injury is reparable unless such cost is equal to or exceeds the value of the injured property."

(10) If the cost of repair exceeds the value of the property, "the cost of damages becomes the value of the property." Kirkbride, 560 A.2d at 812. If the injury to the property is permanent,

"the measure of the damages becomes the decrease in the fair market value of the property." (11) The measure of damages for total loss of personal property is its reasonable

value at the time of loss, giving due consideration to the purchase price, the condition of the property at the time of loss, an appropriate depreciation factor and the salvage value of the

property. (12) The measure of damages for repairable damage to personal property is, at the

election of plaintiff, the difference between the 21 Revised 2015 pre-injury and post-injury value of the property, or the reasonable cost of repair, with allowance for the difference between the

pre-injury and post-injury value, and the loss of use. (13) Loss of Use Compensation for loss of use sustained due to the repairable damage to real property is appropriate.

(10) *Kirkbride v. Lisbon Contractors, Inc.*, 560 A.2d 809, 812 (Pa. Super. 1989). See also *Matakitis v. Woodmansee*, 667 A.2d 228 (Pa. Super. 1995)

(11) *Matakitis*, supra; *Gloviak v. Tucci Const. Co., Inc.*, 608 A.2d 557 (Pa. Super. 1992).

(12) *Denby v. North Side Carpet Cleaning Co.*, 390 A.2d 252, 259 (Pa. Super. 1978). See also *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. 1988), alloc. denied, 553 A.2d 967.

(13) *Kintner v. Claverack Rural Electric Co-operative, Inc.*, 478 A.2d 858 (Pa.1984)

Kincade v. Laurel Courts, Inc., 644 A.2d 1268 (Pa. Super. 1994).

INSURANCE COVERAGE FOR CONSTRUCTION CONTRACTS

It is well settled that the interpretation of an insurance contract is a matter of law for the court to decide. **The Pennsylvania Supreme Court has held that where a first party property policy provision covers “damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building,” the policy provides coverage for the imminent collapse of a building. 401 Fourth Street v. Investors Ins. Group, 879 A.2d 166 (Pa. 2005). The Court declined to define the precise meaning of “collapse,” but stated that the entire phrase must be considered, and the policy language covering the “risks” “involving” collapse is ambiguous and as such provides broader coverage, covering either the actual collapse or imminent falling down of a building or part of a building. Id. at 174.** The modern trend around the U.S. is to look at the particular facts of a case, examining whether property damage is present, and whether there was indeed an “occurrence.” (14)

Pennsylvania trial courts seem to have rejected a “black and white” analysis of coverage for contract-based claims, choosing instead to focus on whether the facts show property damage

(injury to or loss of use of tangible property) caused by an “occurrence” (accidental or unintended). (15)

(14) Vandenberg v. Superior Court, 982 A.2d 229 (Cal. 1999) (commercial liability insurance policy can provide coverage for liability arising out of a contractual relationship).

(15) Nitterhouse Concrete Products v. PMA Ins. Co., 67 Pa. D.&C.4th 225 (Franklin County 2004)

UNIFORM CONSTRUCTION CODE

Pennsylvania has adopted a Uniform Construction Code (UCC), found at 34 Pa. Code §§ 401-405. The UCC’s provisions provide permit and inspection procedures that apply to commercial and residential construction projects. The UCC requirements for commercial structures, including industrial structures, are found at §§ 403.21 through 403.48. The UCC requirements for residential structures are located in §§ 403.61 to 403.66. The requirements of the UCC pertaining to elevators and other lifting devices are in §§ 405.1 to 405.42.

EXCEPTIONS

Page 4 (Number 6) PAWC used contractor, Casper, Colosimo and Sons, Inc. (CCSI), to remove the road surface, replace the main pipeline and repave the road surface after the new water main pipeline and repave the road surface after new water main pipeline was installed.

A. PAWC nor CCSI cannot provide check off sheets that work was completed correctly. As of 5/13/2020 there has been no testing or sampling to determine the rise in the elevation of the street. CCSI did not testify at the hearing.

B. Tom Kelly, Director of Scott Twp. has proof that the elevation of the street was raised when the water lines were replaced by PAWC.

Page 4 (Number 7) Before performing the main pipeline replacement project, PAWC's contractor submitted the appropriate permit to Scott Twp. requesting to dig up Cress Street in order to replace the main pipeline and then repave Cress Street using the original elevation of pavement of the street.

A. There are no check off sheets to prove this statement. Evidence proves that elevation of the street was raised as it was not milled properly.

Page 5 (Number 8) In addition to the requirements of the local municipality, PAWC requires its contractors to overlay the exact amount of pavement as is milled (i.e. Removed) originally so the road surface has the same height, or elevation, as existed prior to the start of the main replacement project.

A. This statement proves that PAWC is responsible for the actions of their contractor. The road is not the same height prior to the main replacement project.

Page 5 (Number 9) Scott Township determined the specifications of the road surface on Cress Street, including elevation, when it granted PAWC's permit, but it is the responsibility of the contractor, CCSI, to make sure the elevation is brought up to the original elevation of the street.

A. CCSI was never called to testify. The witness for Scott Twp, Randy Lubin testified under oath the method used to determine the elevation of the street as, "The Eye Ball" test. This is not code, this is not sampling. Tom Kelley, Director of Public Services for Scott Township verified that the elevation of the street was indeed raised.

Page 5 (Number 10) The main pipeline replacement project on Cress Street called for CCSI to mill 1.5 inches of road surface on one half of Cress Street, replace the pipeline and then overlay a new asphalt surface totaling 1.5 inches to fill in the road surface up to the pre-existing elevation.

A. A phone call from PAWC to CCSI directing an Engineer to visit 511 Cress Street to determine if the road work was completed correctly by their road crew. The engineer determined it was done incorrectly and that the leaders of 511 Cress Street were blocked

caused by not being milled properly. Engineer also determined the wall and door needed replaced as a result of leader blockage. PAWC hired this contractor. Never did PAWC send out an engineer to see if the work was done or fixed correctly.

Page 5 (Number 11) After the repaving of Cress Street was complete, the new asphalt had the same elevation at the centerline and at the curb as the other side of Cress Street, obtained the municipal street opening permit and completed the replacement project officially on May 22, 2013.

A. This is a false statement; the road work was not completed at this time. 'Completed' would have included check off which was not done.

Page 5 (Number 13) Scott Township was responsible to inspect the paving project after completion to ensure it met the township's requirements and the township would have communicated with the contractor, not PAWC, if any specifications were not met.

- A. Witness Randy Lubin of Scott Twp. testified that the 'Eyeball' method was used to determine the elevation of the street. Any person with clear eyesight that would have been cleared to do such a prosperous determination would clearly see that the elevation was raised.**
- B. PAWC called their contractor, CCSI after receiving my complaint, they did not call Scott Twp.**
- C. Scott Township repeatedly claimed it was negligence of the PAWC as it was their project.**

Page 6 (Number 22) Mr. Lubin observed the Right Downspout extended towards Cress Street through terracotta pipe which was close but not connected into the plastic pipe. Water flowing through the terracotta pipe from the house would not have flowed into the plastic pipe towards Cress Street.

- A. Mr. Lubin did not provide any evidence of this. Picture enclosed shows the pipe and the terracotta pipe were in fact connected. CCSI Engineer also confirmed by lifting the sidewalk that the piping was connected but blocked by the raised elevation of the street not being milled properly.**



Page 7 (Number 23) PAWC has not received any complaints or concerns from Scott Twp. or any other local authority about the paving completed by CCSI on Cress Street.

A. 511 Cress Street is level, the property does not grade. All other residents on Cress Street where the water line was replaced were forced to cut the curb, re-route, or add a rain barrel to deter water away from their house.

B. Randy Lubin and Ms. Fitzgerald of Scott Twp. came to residence, other neighbors shared their leader blockage problems due to the raise in the street elevation with him.

C. It is the scope of the work of this particular water line replacement project, not all of Scott Twp.

D. You only need one.

E. Commissioner Bill Wells of Scott Township forced CCSI to clean out the leaders of his ward as CCSI lay asphalt blocking rain leaders.

Page 7 (Number 29) CCSI installed a new leader pipe from the house to the street, made repairs to walk way and stairs including installing a new sidewalk. CCSI was unable to install a new door at the service address due to the shifting foundation.

A. Under the direction of PAWC, CCSI sent a construction crew of three men with a replacement door, which is still sitting in my basement.

B. CCSI admitted the damage to the foundation wall a result of the rain leaders being blocked. The men from CCSI came with a steel door that is currently still sitting in my basement. They stated they could not fix it because they did not know how to fix it.

Page 7 (Number 30) In June 2018, CCSI indicated to Complainant it would not make any additional repairs at the service address.

A. Legal doctrine, Tolling should be applied as it allows for the pausing or delaying of the running of the period of time set forth by a statute of limitations, such that a lawsuit may potentially be filed even after the statute of limitations has run. This common ground being: The parties were engaged in good-faith negotiations to resolve a dispute without litigation when the statute of limitations expired.

42 PA Cons Stat § 5554 (2014)

- B. No check offs or sign off of work completed was ever done by PAWC, CCSI, or Scott Twp.**

Page 8 (34) After receiving the formal complaint in 2019, PAWC sent some employees to visit the service address on 2 or 3 occasions to review the work of CCSI but did not measure the elevation of Cress Street after the repaving project was completed.

- A. This violates the Public Utility Code: *Maps, plans and records*. A public utility shall keep complete maps, plans or records of its entire distribution and other system showing the size, character and location of each main, street valve and each company service line together with other information that may be necessary. The maps, plans and records required by the provisions of this section shall be kept current so that the utility may furnish promptly and accurately copies of its maps or any information regarding its facilities upon request by the Commission.**

52 Pa. Code § 65.4

Page 8 (Number 36)

Currently, the foundation wall at the service address is bowed and the exterior door will not stay in place which allows cold air to seep into the structure.

- A. Bowing walls occur most often due to the force of hydrostatic pressure. Hydrostatic pressure occurs when water presses against the basement walls, causing the weight against the walls to exceed their capacity. Walls can also bow and fail when expansive clays or frost cause expansion of the soils to fatigue and damage the wall.**
- B. Discovery**

Pa.C.S.A. §5536

PAWC failed to provide reasonable and adequate customer service at 511 Cress Street, Carnegie, PA 15106.

- A. Attorney Michael Gruin did not file Preliminary Objections on damages or statute of limitation.
- B. Paid testimony from Jason Costa of PAWC not relevant. Mr. Costa was never on site at 511 Cress Street. In his testimony he stated at the time this line replacement took place, he was a Meter Reader for PAWC.
- C. Attorney Michael Gruin, Randy Lubin, or Jason Costa CANNOT testify for CCSI. There was no one from CCSI involved in the hearing.
- D. Randy Lubin representing Scott Twp. withheld evidence from Scott Twp and Complainant.
- E. Attorney Gruin approved a Right to Know request and a delay in the hearing. Attorney Gruin knew that Randy Lubin would be a paid witness testifying on behalf of the PAWC and was withholding important evidence and information, information that fulfilled the Right to Know paperwork.

Conclusion

The res ipsa loquitur doctrine states that if a defendant acted negligently, even without other proof of misconduct. In order for this doctrine to apply, the plaintiff must prove that the event that occurred usually does not happen in the absence of negligence and that the defendant had exclusive control of the instrument that caused injury.

If the work was done correctly, my home, which has been family owned for over a hundred years would not have been affected.

C-2019-3011595

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated:

VIA EMAIL OR FIRST-CLASS MAIL

Secretary

PA. Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105

Secretary

PA. Public Utility Commission

400 North Street

Commonwealth Keystone Building, 2nd floor

Harrisburg, PA 17120

Attorney Michael Gruin

Stevens & Lee

Lawyers and Consultants

17 North Second Street

16th floor

Harrisburg, PA 17101

May 13, 2020

Respectfully submitted,

Kelly Marian

