

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CROSSING CONSTRUCTION COMPANY, INC.,	:	JULY TERM, 2003
	:	
Plaintiff,	:	No. 2699
v.	:	
DELAWARE RIVER PORT AUTHORITY and MICHAEL BAKER, JR., INC.,	:	Commerce Program
	:	
Defendants.	:	
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DEGUSSA CORPORATION,	:	JUNE TERM, 2004
	:	
Plaintiff,	:	
v.	:	No. 4451
RAMPART HYDRO SERVICES, INC. <i>et al.</i>	:	Commerce Program
	:	
Defendants.	:	
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MICHAEL BAKER, JR., INC.,	:	JULY TERM, 2004
	:	
Plaintiff,	:	
v.	:	No. 2305
DELAWARE RIVER PORT AUTHORITY,	:	Commerce Program
	:	Control Number 041029
Defendant.	:	

ORDER

AND NOW, this 31ST day of August 2005, upon consideration of plaintiff Crossing Construction Company Inc.'s Motion for Leave to File a Second Amended Complaint, the responses in opposition, the respective memoranda, all matters of record and in accord with the contemporaneously filed Opinion, it is **ORDERED** that the Motion is **Denied, in part**, as it pertains to re-instituting a claim against Defendant Michael Baker, Jr. Inc. and is **Granted** in all other respects. Plaintiff may file an Amended Complaint within ten (10) days of the date of this Order consistent with this Order and related Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CROSSING CONSTRUCTION	:	JULY TERM, 2003
COMPANY, INC.,	:	
Plaintiff,	:	No. 2699
v.	:	
DELAWARE RIVER PORT AUTHORITY	:	Commerce Program
and MICHAEL BAKER, JR., INC.,	:	
Defendants.	:	

DEGUSSA CORPORATION,	:	JUNE TERM, 2004
Plaintiff,	:	
v.	:	No. 4451
RAMPART HYDRO SERVICES, INC.	:	
<i>et al.</i>	:	Commerce Program
Defendants.	:	

MICHAEL BAKER, JR., INC.,	:	JULY TERM, 2004
Plaintiff,	:	
v.	:	No. 2305
DELAWARE RIVER PORT AUTHORITY,;	:	
Defendant.	:	Commerce Program
	:	Control Number 041029

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OPINION

Albert W. Sheppard, Jr., J. August 31, 2005

Presently before the court is plaintiff Crossing Construction Company’s (“Crossing”) Motion for Leave to file a Second Amended Complaint. Crossing seeks leave to: (1) add a claim against defendant DRPA for additional compensation for increased costs and time extension, (2) add certain claims for relief against the DRPA for preconstruction design deficiencies, (3) re-institute a direct claim against the Project Engineer, Michael Baker, Jr., Inc. (“Baker”) (on the basis of the Supreme Court of Pennsylvania’s January 19, 2005 decision in Bilt Rite Contractors v. Architectural

Studio), 866 A.2d 270 (Pa. 2005)) and (4) re-state certain joinder claims against the DRPA that Crossing had previously filed in Degussa v. Rampart while that matter was pending in a different county before the actions were coordinated.

Baker opposes the motion urging that the amendment is barred by the statute of limitations. For the reasons discussed, Crossing's Motion is **denied** as it pertains to Baker, and granted as it pertains to the DRPA.¹

BACKGROUND

Crossing filed a Complaint against the DRPA on July 23, 2003. The Complaint set forth a breach of contract claim against the DRPA seeking certain unpaid pay estimates and the release of retainage allegedly wrongfully withheld by the DRPA on the Commodore Barry Bridge Deck Rehabilitation Project.

On August 13, 2003, the DRPA filed Preliminary Objections arguing that the DRPA's obligation to make payment was conditioned upon the Project Engineer, Michael Baker, Jr. Inc.'s certifying that work was done, but that Baker had never submitted an estimate for payment. Then, on August 29, 2003, Crossing filed an Amended Complaint against both the DRPA and Baker. Crossing's Amended Complaint alleged a breach of contract claim against the DRPA and, added in the alternative, a principal and agent cause of action against the DRPA. Additionally, Crossing added a third party beneficiary cause of action against Baker.

On December 26, 2003, the DRPA filed new matter cross claims against Baker. On December 30, 2003, the court sustained Baker's Preliminary Objections and dismissed Crossing's third party beneficiary cause of action against Baker.

¹ The DRPA has **not** filed a response in opposition to the motion. Consequently, the court will grant Crossing's motion to amend as it applies to the DRPA.

DISCUSSION

Pa. R. Civ. P. 1033 permits a party to amend a complaint either with consent of the adverse party or by leave of court. The rule provides that "the amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense" and also allows amendment "to conform the pleading to the evidence offered or admitted." Pa.R.C.P. 1033.

The trial court has broad discretion in determining whether to allow amendment. Capobianchi v. BIC Corp., 666 A.2d 344, 346 (Pa. Super. 1995). "Amendments are to be liberally permitted except where surprise or prejudice to the other party will result or where the amendment is against a positive rule of law." Burger v. Borough of Ingram, 697 A.2d 1037, 1041 (Pa. Commw. 1997). See also, Roach v. Port Authority of Allegheny County, 380 Pa. Super. 28, 30, 550 A.2d 1346, 1347 (1988) ("the right to amend the pleadings should not be withheld where some reasonable possibility exists that the amendment can be accomplished successfully").

Notwithstanding this liberal amendment policy, "a court is not required to allow amendment of a pleading if a party will be unable to state a claim on which relief could be granted." Werner v. Zazyczny, 681 A.2d 1331, 1338 (Pa. 1996). "Leave to amend will be withheld where the initial pleadings reveal that the prima facie elements of the claim cannot be established and that the complaint's defects are so substantial that amendment is not likely to cure them." Roach, supra at 30, 550 A.2d at 1348. See also, Behrend v. Yellow Cab Co., 441 Pa. 105, 110, 271 A.2d 241, 243 (1970).

Further, amendment to add a new cause of action is not permitted after the statute of limitations has run. Conversely, a proposed amendment should be permitted if it does not change the cause of action but merely amplifies that which has already been averred. *See, e.g., Shenandoah Borough v. Philadelphia*, 367 Pa. 180, 189-92, 79 A.2d 433, 437 (1951) (denying leave to add a negligence cause of action after expiration of the statute of limitations); *Burger*, 697 A.2d at 1041-42 (denying leave to amend to bring claims for civil rights violations under 42 U.S.C. § 1983); *New York State Electric & Gas Corp. v. Westinghouse Electric Corp.*, 387 Pa. Super. 537, 555, 564 A.2d 919, 928 (1989) (denying leave to add a fraud cause of action and new facts to support it after the statute of limitations had expired).

Here, Crossing seeks to re-institute a direct claim against Baker for negligent misrepresentation. The rationale for Crossing's application is the Supreme Court's decision in *Bilt-Rite Contractors, Inc. v. Architectural Studio*, *supra.*, which recognized a cause of action by a construction contractor against an architect or other design or engineering professional for negligent misrepresentation, citing the Restatement Second of Torts § 552.

In *Bilt-Rite*, a school district entered into a contract with an architectural firm, pursuant to which the firm designed a new school. The school district solicited bids from contractors for all aspects of the project and included the firm's plans, drawings, and specifications in the bid documents supplied to the contractors. Based upon this information, the contractor submitted a bid which was accepted. During construction, the contractor discovered that the firm's specifications were wrong and caused large cost overruns. The contractor instituted suit against the architect for negligent

misrepresentation. The lower court finding no privity existed between the architect and the contractor dismissed the claim.

On appeal, the Supreme Court decided that the tort of negligent misrepresentation did not require privity and reversed the lower court. The Court found that the tort of negligent misrepresentation extended to specifications provided by an architect to a contractor if the contractor's harm as a result of the architect's specifications was foreseeable. Privity between the contractor and architect was not required, and the economic loss doctrine did not bar a recovery for negligent misrepresentation.

A claim for negligent misrepresentation is a tort claim and is governed by the two year statute of limitations. Toy v. Metropolitan Life Ins. Co., 863 A.2d 1 (Pa. Super. 2004). A review of the pleadings establishes that Crossing has been aware since at least February 27, 2002 of the facts upon which it now bases its claim for negligent misrepresentation against Baker. A "Claim Summary" submitted by Crossing demonstrates that Crossing knew at that time that the project, work and conditions depicted in the plans and documents prepared by Baker were not those actually being experienced. (Exhibit "D-1" to Baker's Motion in opposition). Specifically, Crossing knew as early as February 2002 that: (a) the plans did not accurately reflect the physical conditions being encountered, (b) deficient and inadequate directions were given by the Baker site inspectors, (c) Crossings' costs had increased, (d) delays were encountered, and (e) it was entitled to an extension of time. (*Id.*). Despite this knowledge, Crossing did not bring a claim against Baker based on the design specifications in its initial filing in 2003 or within two years from the date of the Claim Summary, submitted in February 2002. The court finds that claim is now barred.

In an attempt to avoid application of the statute of limitations, Crossing contends that the claim it now seeks to add against Baker became cognizable under Pennsylvania law only as a result of the Supreme Court's decision on January 19, 2005 in Bilt-Rite and, therefore, should not be barred by the statute of limitations. This court disagrees.

As a general rule, an appellate decision announcing a rule of law will apply to the case in which it is announced and to all pending cases. Davis v. Gov't Emples Ins. Co., 775 A.2d 871, 874-75 (Pa. Super. 2001). The retroactive application of a decision announcing a new rule of law is a matter of judicial discretion. "A new rule of law is established where an abrupt and fundamental shift from prior precedent, upon which litigants may have relied has occurred." District Office of Disciplinary Council v. Surrick, 749 A.2d 441, 444 (Pa. 2000). When a new rule of law is established, the decision whether to apply the new rule retroactively or prospectively is a function of three considerations: (1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect on the administration of justice by the retroactive application of the new rule. Blackwell v. State Ethics Comm'n, 527 Pa. 172, 589 A.2d 1094, 1099 (1991).

Here, although Bilt Rite announced a new rule of law, its application should not be retroactive. It is undisputed that the Complaint and Amended Complaint sought only payment for certain unpaid pay estimates and a release of retainage withheld on the Project. (Crossing's Motion to Amend ¶7). Crossing could have raised this claim of Baker's alleged design defect within the appropriate statute of limitations, but chose not to do so. Consequently, the claim for Baker's alleged design defect was not properly preserved. More importantly, applying Bilt-Rite retroactively to this case would unfairly

affect those persons who have justifiably relied upon prior judicial decisions. This court believes this result should not be permitted to obtain.

CONCLUSION

For the reasons discussed, Crossing Construction's Motion for Leave to Amend is **denied** as it pertains to Defendant Michael Baker, Jr. Inc. Plaintiff's Motion is granted in all other respects. Plaintiff is directed to file the Amended Complaint within ten (10) days from the date of the order. The court will issue an Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.