

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

CROSSING CONSTRUCTION COMPANY, INC.	: JULY TERM, 2003
Plaintiff,	
	: No. 2699
v.	
	: Commerce Program
DELAWARE RIVER PORT AUTHORITY, and	
MICHAEL BAKER, JR., INC.,	: Control Number 021749
Defendants.	

O R D E R

AND NOW, this 7th day of May 2004, upon consideration of the Preliminary Objections of Michael Baker, Jr., Inc. to the Amended cross claims of the defendant Delaware River Port Authority, the response in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion filed of record, it is **ORDERED** that defendant Michael Baker's Preliminary Objections are **OVERRULED**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. May 7, 2004

Presently before the court are the Preliminary Objections of Michael Baker, Jr., Inc.(“Baker”) to the Amended cross claims of defendant Delaware River Port Authority (“DRPA”). For the reasons discussed, Baker’s Preliminary Objections are **Overruled**.

BACKGROUND

This lawsuit arises from the project to rehabilitate the Commodore Barry Bridge surface deck. (“Project”). In July 2001, Crossing Construction Company (“Crossing”) and the DRPA entered into a contract. The contract provided that Crossing was to furnish necessary labor and material to rehabilitate the surface deck of the Bridge. (Amended Compl. ¶ 6). In return, DRPA agreed to pay Crossing a sum determined by

the units of work performed and material provided by Crossing not to exceed the sum of \$6,797,500.00. (Id. ¶ 8, 10).

The contract designated Baker as the Project Engineer. (Id. ¶ 9). As the engineer, Baker was responsible for approving each payment request submitted by Crossing on the Project. (Id. ¶ 12). Crossing was required to furnish Baker with a pay estimate detailing the amount and value of the work done and materials incorporated for the payment period, subdivided by “the various work scheduled items of Work”. (Id. ¶ 13).

Pursuant to the contract, Crossing forwarded pay estimates numbers 1 through 15 to Baker and Baker recommended that the DRPA pay Crossing the monies requested in those pay estimates. (Id. ¶ 15-17).

By November 24, 2002, the DRPA had paid Crossing only \$4, 483,671.68 of the Contract sum, allegedly without regard to any and all claims for quantity adjustments, extra work, changes to the work and/or delays and time impacts. (Id. ¶ 20).

On November 5, 2002, December 5, 2002, January 5, 2003, Crossing submitted pay estimates numbers 16, 17 and 18 in the amounts of \$191,144.80, \$994,391.15 and \$90, 863.50 to DRPA for payment. (Id. ¶ 21, 29, 37). Crossing submitted these pay estimates to Baker for review. (Id. ¶ 23, 31 39). Crossing alleges that the DRPA has not made any payments pursuant to pay estimates 16, 17 and 18. (Id. 25-26, 34, 42). Additionally, Crossing alleges that additional sums of money are due and owing from DRPA, constituting progress payments and retainage which have not been paid. (Id. ¶ 46-47).

Crossing instituted suit against the DRPA alleging breach of contract (Count I). The DRPA filed preliminary objections and Crossing filed an amended complaint

identifying Baker as an additional defendant. Both DRPA and Baker filed preliminary objections to the amended complaint.

On December 1, 2003, this court entered an order overruling the DRPA's preliminary objections and directing the DRPA to file an answer. The DRPA answered the amended complaint with new matter, a cross claim and a counterclaim.

On December 30, 2003, this court sustained the preliminary objections of Baker to Count II, dismissing all of Crossing's claims against Baker. The cross claims filed by the DRPA are now the only claims against Baker. Baker has now filed these preliminary objections to the DRPA's cross claims.¹

DISCUSSION

A. The DPRA's Counterclaim Has Met the Test of Pa.R.Civ. P. 2256 (a).²

Baker maintains that the DPRA's cross claims are improper and should be dismissed pursuant to Pa.R.Civ. P. 2256 (a). In essence, Baker maintains that since the DRPA's counterclaim is faulty in that it relates to different harms than those asserted in Crossing's complaint, the cross claims against Baker must be stricken. This court disagrees.

Pennsylvania Rule of Civil Procedure 2256 provides that "an original defendant who asserts against the plaintiff a counterclaim not founded upon the transaction,

¹ In addition to the instant preliminary objections, the DRPA and Crossing have each filed a motion to coordinate this action with actions filed in Delaware County and Montgomery County. These motions are addressed in a separate order.

² The court is not convinced that Pa.R.Civ. P. 2256(a) is applicable. Pa.R.Civ. P. 2256(a) states that an original defendant who asserts a counterclaim against a plaintiff not founded upon the transaction or occurrence out of which the original cause of action arose may not join an additional defendant. Here, Baker was named as a defendant in this action by plaintiff Crossing in its amended complaint. Thereafter, the DRPA filed a cross claim against Baker along with its new matter and counterclaim. The DRPA did not join Baker as an additional defendant. Notwithstanding the court's apprehension in this regard, the court will address Baker's objection as a courtesy to the parties.

occurrence or series of transactions or occurrences out of which the original cause of action arose may **not** join an additional defendant.” Id. (emphasis added).

Courts interpret the phrase “same transaction or occurrence” as complaints which involve “a common factual background or common factual or legal question.” Stokes v. Loyal Order of Moose Lodge No., 696, 502 Pa. 460, 466 A.2d 1341 (1983). Where the evidence that would establish one complaint is distinct from the evidence that would establish the other complaint, the complaints do not arise from the same transaction or occurrence. Id.

In United Nat. Ins. Co. v. M. London, Inc., 337 Pa. Super. 526, 487 A.2d 385 (1985), the court adopted the following definition of transaction within the meaning of 2256 (b):

A “transaction” within the statutes as to counterclaims is defined as the act of transacting or conducting any business, negotiation, management, or proceeding. The word, as used in counterclaim statutes is broad and comprehensive, and is construed liberally and according to its natural and ordinary signification. In other words, the term is not a technical one and must be construed according to the context and approved usage... It means any act as affecting legal rights or obligations, and properly embraces an entire occurrence out of which a legal obligation is predicated... Id.

Examining the factual underpinnings of Crossing’s amended complaint and the DRPA’s amended counterclaim, the court finds that the complaints at issue are founded upon the same transaction and occurrence. Crossing’s amended complaint arises from the DRPA’s non payment for Crossing’s work performed on the Project and asserts a claim for Breach of Contract against the DRPA as well as a vicarious liability claim against the DRPA for the actions of Baker. The DRPA’s counterclaim also arises from its failure to pay Crossing for work performed on the project and asserts a breach of contract claim against Crossing for failing to perform the questioned work in a timely

manner. Specifically, the counterclaim alleges a breach of contract against Crossing for failing to perform the work within the time table provided within the contract. The remaining claims asserted within the DRPA's counterclaim also arise from the transaction or occurrence at issue, namely the failure to pay for work performed on the Project. The claims seek indemnification from Crossing for any liability the DRPA may have to Baker for additional expenses incurred because of Crossing's delay in completing the project. As such, the court finds that Crossing's claims and the DRPA's counterclaim arise from the same transaction or occurrence. Accordingly, Baker's preliminary objections pursuant to Pa.R.Civ. P. 2256 are overruled.

B. The DRPA's Amended Cross Claim Satisfies the Requirements of the Pennsylvania Rule of Civil Procedure 2252.

Rule 2252 sets forth the conditions under which a defendant may join an additional party or to file a cross claim against an additional defendant. The rule states in relevant part:

- (a) Except as provided by Rule 1706.1, any defendant may join as an additional defendant any person, whether or not a party to the action, who may be
 - (1) solely liable on the plaintiff's cause of action , or
 - (2) liable over to the joining party on the plaintiff's cause of action, or
 - (3) jointly or severally liable with the joining party on the plaintiff's cause of action, or
 - (4) liable to the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the plaintiff's cause of action is based...

(d) If the person sought to be joined is a party, the joining party shall, without moving for severance or the filing of a praecipe for a writ or a complaint, assert in the answer as new matter that such a party is alone liable to the plaintiff or liable over to the joining party or joining party or jointly or severally liable to the plaintiff or liable to the joining party directly setting forth the ground therefor. The case shall proceed thereafter as if such party had been joined by a writ or complaint. Pa.R.Civ. P. 2252

In determining if joinder is permitted, Rule 2252 “is broadly construed to effectuate the purpose of avoiding multiple lawsuits by settling, in one action, all claims arising from transactions or occurrences which gave rise to the plaintiff’s complaint.” United States Fire Insurance Company v. American National Fire Insurance Company, 53 Pa. D. & C. 4th 474 (2001 (Sheppard, J.) (quoting Goodman v. Kotzen, 436 Pa. Super. 71, 78, 647 A.2d 247, 250 (1994)). Our courts have construed the phrase “cause of action”, as used in Rule 2252 to mean that the additional defendant’s liability [be] related to the original claim which plaintiff asserts against the original defendant. Somers v. Gross, 393 Pa. Super. 509, 574 A.2d 1056, 1058 (1990). Rule 2252 (a) does not permit joinder where the allegations of the original complaint and the allegations of the joinder complaint “relate to different harms to be proven with different evidence as to different occurrences happening at different times.” Id. The same rule would apply to cross claims because they fall under subsection (d) of Rule 2252.

Here, it is clear that the DPRA’s cross claim against Baker arises from the same transaction or occurrence as described in the amended complaint. Crossing’s claim arises from the DRPA’s failure to pay for work performed on the project. According to the amended complaint, Crossing was under contract to refurbish the Commordore Barry Bridge within a certain period of time. Payment for the work performed was to be made in installments after receiving approval from Baker. Crossing alleges that it performed the work according to the contract and submitted its payment request to Baker. Crossing instituted suit against DRPA claiming breach of contract as well as asserting claims for vicarious liability against Baker.

In the counterclaim filed by the DRPA, in addition to the claims for indemnification, the DRPA alleges that the work performed by Crossing was not performed in a timely fashion and therefore Crossing should not be paid the full amount of the contract. The DRPA also alleges that Crossing's delays in rehabilitating the bridge were also caused by Baker.

In the cross claim filed against Baker, the DRPA alleges a breach of contract claim for Baker's failure to perform its duties and obligations under the contract to insure that the rehabilitation was performed in a timely fashion. The cross claim also seeks indemnification against Baker in the event the DRPA should be found liable to Crossing.

Here, the transaction or occurrence at issue is not the result of separate and distinct incidents but rather the result of one claim. The claims arise from the same factual nuclei, the rehabilitation of the bridge, the failure to pay pursuant to the terms of the contract and the responsibility for the delay in completing the project. Accordingly, Baker's preliminary objection in this regard is overruled.

C. Baker's Motion for a More Specific Pleading is Overruled.

Baker maintains that Paragraphs 10, 14, 21 and 25 of the DRPA's amended cross claim are insufficiently specific pursuant to Pa.R.Civ. P. 1019. To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the allegations are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991). After reviewing the paragraphs identified by Baker, the court finds that the allegations within

the complaint are more than sufficient to allow Baker to prepare a defense. Accordingly, Baker's motion for a more specific pleading is overruled.³

CONCLUSION

Based on the foregoing, Baker's Preliminary Objections to the DRPA's cross claims are **Overruled**. A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

³ Baker's preliminary objection to Count VII of the DRPA's cross claim is **Overruled**.