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

| | | |
|---|---|---|
| CARSON/DEPAUL/RAMOS, A Joint Venture<br>RAMOS/CARSON/DEPAUL, A Joint Venture, | : | FEBRUARY TERM 2004 |
| | : | No. 02166 |
| Plaintiffs, | : | |
| | : | COMMERCE PROGRAM |
| v. | : | |
| | : | Control Nos. 091264, 091275, |
| DRISCOLL/HUNT, A Joint Venture, | : | 091285 |
| | : | |
| Defendant, | : | |
| | : | |
| v. | : | |
| | : | |
| RICHARD GOETTLE, INC., | : | |
| | : | |
| Add'l Defendant. | : | |

**ORDER**

**AND NOW**, this 29th day of June, 2006, upon consideration of defendant's ("DH's") Motion for Partial Summary Judgment As To Duty To Defend, plaintiffs' ("RCD's") Motion for Partial Summary Judgment, additional defendant's ("Goettle's") Motion for Summary Judgment, the responses thereto, the briefs in support and opposition, and all other matters of record, and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED** as follows:

1. DH's Motion is **DENIED**;

2. Goettle's Motion is **GRANTED** in part, and Count III of DH's Third Party Complaint for contribution is **DISMISSED**;

2. RCD's Motion is **GRANTED** in part, Count II of DH's Counterclaim for declaratory judgment claim against RCD is **DISMISSED**, and Count I of DH's Counterclaim for breach of contract/indemnification against RCD is limited to those damages that DH has actually incurred/paid to others.

3. The remainder of RCD's Motion and the remainder of Goettle's Motion are **DENIED**.

**BY THE COURT,**

_____

**HOWLAND W. ABRAMSON, J.**

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| Add'l Defendant. | : | |

**OPINION**

This case arises out of the construction of Citizens Bank Park, a baseball stadium (the "Project") built for the Philadelphia Phillies (the "Owner"). The Owner contracted with defendant Driscoll/Hunt, a Joint Venture ("DH") to act as Construction Manager on the Project. In that capacity, DH entered into Subcontract Agreements (the "Subcontract") with the following entities, among others:

1. Additional defendant Richard Goettle Inc ("Goettle") to install steel piles;

2. Plaintiff Ramos/Carson/DePaul, a Joint Venture ("RCD") to install concrete foundations;

3. Non party Havens Steel ("Havens") to erect steel; [1]

[1] Havens sub-sub-contracted some of the steel work to Samuel Grossi, Inc. ("Grossi") and Multiphase, Inc. ("Multiphase"). Havens has apparently filed for bankruptcy. Grossi has asserted claims for payment against DH and others in a separate action. *See* Samuel Grossi & Sons, Inc. v. U. S. Fidelity & Guaranty Co., September Term, 2004, No. 3590 (Phila. Co.). Multiphase has also asserted claims against DH and others in a separate action pending before this court. *See* Multiphase, Inc. v. U.S. Fidelity & Guaranty Co., July Term, 2005, No. 02598 (Phila. Co.).

5. Non party Mark/LePore ("M/L")[2] for masonry work;

6. Non parties Petrocelli Electric Co. ("Petrocelli") and Fischbach & Moore ("F&M")[3] for electrical and audio-video work; and

7. Non party Johnson Controls Inc. ("JCI")[4] for alarm and control systems work.

The Project apparently suffered numerous delays, disruptions and other problems. As a result, several of the parties involved in it have asserted damages claims against DH. The present suit was commenced by RCD to recover damages from DH due to DH's alleged mismanagement of the Project.[5] DH joined Goettle as an additional defendant. DH claims that Goettle caused or contributed to the damages allegedly suffered by RCD, so that Goettle must therefore defend and indemnify DH with respect to RCD's claims.[6] DH also counterclaimed against RCD claiming that RCD caused or contributed to the delay allegedly suffered by various

[2] M/L settled with, and assigned its damages claim to, DH. *See* DH's Response to RCD's Motion, Ex. U.

[3] Petrocelli and F&M settled with, and assigned their damages claims to, DH. *See id.*, Exs. S &T.

[4] JCI asserted claims against DH in a federal court action captioned PRWT/Hylan v. Johnson Controls, No. 04-5496 (E.D. Pa.).

[5] In its Amended Complaint, RCD asserted claims against DH for breach of contract and breach of the duty of good faith and fair dealing for delaying and interfering with RCD's work on the Project.

[6] DH asserted the following claims against Goettle in its Third Party Complaint:

a. Declaratory Judgment that Goettle "is obligated to indemnify, hold harmless and reimburse [DH] for any and all claims, losses, costs and expenses including attorneys fees arising out of or resulting from Goettle's delays and defective work on the Project;"
b. Indemnification pursuant to the terms of the Subcontract for any damages that RCD recovers against DH because of acts or omissions of Goettle's; and
c. Contribution by Goettle "in proportion to its fault, to any award of damages which [RCD] recovers."

Goettle asserted the following claims against DH in its Counterclaim:

a. Breach of contract and negligence by DH for failure to manage the Project properly; and
b. Abuse of process for joining Goettle in this action.

other entities, including Goettle, Grossi, Multiphase, M/L, F&M, and JCI, and that RCD must therefore defend and indemnify DH with respect to those entities' claims.[7]

DH has moved for summary judgment on Goettle's duty to defend it in this action, and Goettle has cross-moved to dismiss DH's indemnification and contribution claims against Goettle. RCD has likewise moved to dismiss DH's indemnification and declaratory judgment claims against it.

## I. The Applicable Subcontract Provisions.

The Subcontracts between DH and RCD and between DH and Goettle contain the following language relating to RCD's and Goettle's obligations with respect to claims brought against DH by other subcontractors:[8]

> **3.4 Effect of Contract Documents on Obligations, Liabilities and Claims:** Subcontractor agrees that as to Subcontractor's Work:
> (a) Subcontractor owes to Construction Manager the same obligations that Construction Manager owes to Owner or any third party under the Contract Documents;
> (b) Subcontractor shall be liable to Construction Manager to the same extent that Construction Manager is liable to the Owner or any third party under the Contract Documents;
>
> **21.7 Claims Against Construction Manager Arising Out of Subcontractor's Work:** If the Owner or a third party brings a claim against Construction Manager and such claim arises directly, or indirectly, in whole or in part from Subcontractor's Work or other involvement in the Project, Subcontractor shall:
> (a) cooperate with Construction Manager and its counsel in the defense of such claim;

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[7] DH asserted the following claims against RCD in its First Amended Counterclaim:
a. Breach of contract and indemnification by RCD based on its delay and improper performance of its work on the Project; and
b. Declaratory Judgment that RCD is "obligated to indemnify, hold harmless and reimburse [DH] for any and all claims, losses, costs and expenses including attorneys fees arising out of or resulting from RCD's delays and defective work on the Project."

[8] Goettle's Subcontract is attached as Exhibit 1 to its Motion for Summary Judgment. RCD's Subcontract is attached as Exhibit 5 to its Motion for Partial Summary Judgment.

(b) provide, at Subcontractor's expense, all witnesses, expert testimony, documents or other assistance Construction Manager reasonably believes necessary for such defense; and

(c) indemnify and hold Construction Manager harmless from the cost of any judgment or settlement of such claim, Construction Manager's reasonable costs in responding to the claim, and Construction Manager's reasonable attorneys' fees and disbursements.

**32.1 Delay Damages**: Subcontractor shall be liable to Construction Manager for all damages, including any liquidated damages payable to the Owner for delays caused in whole or in part by Subcontractor or Subcontractor's employees, agents, sub-subcontractors, material suppliers or any other person or entity for whose acts Subcontractor may be liable. In addition to such damages assessed against Construction Manager by Owner, Subcontractor also shall be liable for all other actual damages to Construction Manager caused or contributed to by delays caused in whole or in part by Subcontractor or Subcontractor's employees, agents, sub-subcontractors, material suppliers or any other person or entity for whose acts Subcontractor may be liable. In the event damages incurred by Construction Manager are caused both by Subcontractor and another entity for whose acts Subcontractor is not liable, Construction Manager shall have the right to reasonably apportion said damages among the responsible parties, and such apportionment shall be binding on the Subcontractor.

**33.1 Indemnification for Claims**: Subcontractor shall fully indemnify and hold harmless the Owner, Contractor, and Architect from any and all claims, losses, costs and expenses, including, but not limited to, attorneys fees, arising out of or resulting from performance of the Subcontractor's work, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor or its employees, agents[,] sub-subcontractors, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by a party indemnified hereunder.

**33.5 Obligation of Subcontractor to Defend Construction Manager**: Subcontractor's obligation to indemnify and hold Construction Manager harmless is in addition to Subcontractor's obligation to defend Construction Manager. With respect to any obligation of Subcontractor to indemnify and hold Construction Manager harmless, Construction Manager, at its sole option, also may tender its defense to Subcontractor. If Construction Manager tenders its defense to Subcontractor, then Subcontractor shall defend Construction Manager at Subcontractor's expense. Construction Manager shall have the right to approve any counsel Subcontractor intends to use in such defense, which approval shall not be unreasonably withheld. If Construction Manager chooses to defend itself, then Subcontractor shall pay Construction Manager's costs of defense. If, after tendering its defense to Subcontractor, Construction Manager becomes dissatisfied as to the quality or diligence of the defense provided by Subcontractor

> or if conflicts of interest arise during the course of the defense provided by Subcontractor, then Construction Manager may employ its own counsel to participate in its defense or to resume its own defense and Subcontractor shall pay Construction Manager the costs of such defense.

DH bases its claims for indemnification against both RCD and Goettle on these provisions. Interpretation of the terms of the parties' written Subcontract, including its indemnification provisions, is a question of law for the court. *See* Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999); Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 389 (1986). "Indemnity agreements are to be narrowly interpreted in light of the parties' intentions as evidenced by the entire contract. In interpreting the scope of an indemnification clause, the court must consider the four corners of the document and its surrounding circumstances." Chester Upland School District v. Edward J. Meloney, Inc., 2006 Pa. Super. LEXIS 1471 **7-8 (Jun. 15, 2006). *See also* Consolidated Rail Corp. v. Delaware River Port Auth., 880 A.2d 628, 632 (Pa. Super. 2005) (same).

## II. Goettle's Motion For Summary Judgment Must Be Denied Because DH Has A Limited Right to Seek Indemnification From Goettle Under the Subcontract.

Goettle argues that DH's indemnification claim must be dismissed because RCD's claims in this action are based on allegations that DH, not Goettle, caused RCD's damages.[9] DH argues that its indemnification claim is proper because RCD's claims against DH are based in part upon the piles Goettle installed, so that such claims may be said to "arise from" Goettle's work as required under Paragraph 21.7 of the Subcontract. DH apparently interprets this provision to impose upon Goettle a duty to indemnify DH for all claims that mention or implicate Goettle's pile installation. DH's interpretation is overbroad.

[9] In essence, RCD claims DH caused RCD's impact damages, and DH claims RCD caused its own damages, as well as damage to other subcontractors, including Goettle. However, DH also claims that, to the extent RCD did not cause its own damages, Goettle caused RCD's damages.

Goettle clearly does not have to indemnify DH for DH's own negligence or fault because Goettle did not expressly agree to assume such extraordinary liability under any of the provisions of the Subcontract. *See* Greer v. City of Philadelphia, 568 Pa. 244, 248-9, 795 A.2d 376, 379 (2002) ("assuming liability for the negligence of an indemnified party is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation."); Ruzzi v. Butler Petroleum, 527 Pa. 1, 7, 588 A.2d 1, 4 (1990) ("if the parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.") Therefore, to the extent that RCD prevails on its claims that its work was delayed or disrupted solely by DH's improper management of the Project, Goettle has no duty to indemnify DH for such damages. On the other hand, if the evidence establishes that RCD's claimed loss is Goettle's fault, but DH is still held liable to RCD,[10] then DH may claim indemnification from Goettle. Lastly, if the evidence establishes that RCD's claimed damages are RCD's own fault, as DH claims, then they cannot reasonably be viewed as "arising out" of Goettle's work, and Goettle need not indemnify DH for the costs of this suit. *See* Chester Upland School District v. Edward J. Meloney, Inc., 2006 Pa. Super. LEXIS 1471 **7-8 (Jun. 15, 2006) (under the terms of their indemnification agreement, contractor was not required to indemnify architect for its costs of suit where claims were made against both, but neither was found liable).

This reading of Paragraph 21.7 of the Subcontract comports with the terms of the delay damage and indemnification provisions set forth later in the Subcontract. *See* Subcontract ¶¶

[10] It is possible that DH could be held liable to RCD as principal for its agent Goettle's wrongdoing.

32.1, 33.1. Under these two sections, Goettle is obligated to reimburse DH for losses DH incurred in connection with a third party's claim, but only to the extent that the third party's claim resulted from: 1) a delay caused by Goettle; or 2) Goettle's negligence. *See id.* Given this fair reading of Goettle's indemnification obligations, in order to survive summary judgment on its indemnification claim against Goettle, DH must point to evidence of record indicating that RCD's claimed damages are Goettle's fault rather than DH's or RCD's own fault.

### A. DH Has Proffered Some Evidence That RCD's Claimed Damages Arose From Goettle's Fault.

Much of the evidence proffered by DH purports to show that RCD is responsible for the delay/disruption of the Project. However, in support of its indemnification claims against Goettle, DH points to RCD's expert report.[11] RCD's expert states that:

> The issues that impeded RCD from working in an efficient and timely manner included, among others:
>
> * * *
>
> Late Pile Installation
> Out of Sequence Pile Installation
> Late Approval of Driven Piles
> Defective Pile Installation

*See* DH's Motion, Ex. E, p.11. RCD's expert does not specifically state that Goettle caused the delays experienced by RCD; instead he claims that "RCD was impacted by the actions and inactions of [DH.]" *Id.* He also claims that RCD's impact damages were caused by "[DH's] mismanagement of [Goettle's] work." *Id*., p. 35. It is, therefore, possible that the factfinder will determine that DH was solely responsible for the all the problems that RCD's expert identifies. However, given that Goettle was responsible for installing the piles, and given that some of the

[11] DH does not offer its own expert report in support of its indemnification/defense claims against Goettle. Instead, Goettle proffers it to show that DH's expert pins the blame for delay and disruption entirely on RCD. However, at one point, DH's expert notes that, with respect to RCD's estimate of additional cost in PCO 141 due to late driven piles, "to the extent these costs can be justified and verified, they are the responsibility of the piling subcontractor, Goettle." *See* Goettle's Response to DH's Motion, Ex.1, p. 42.

problems RCD claims to have encountered had to do with allegedly improperly installed piles, it is also possible that the factfinder will find that Goettle's faulty (or delayed) installation of the piles caused RCD's damages, if any. Because there is some evidence that Goettle's pile work contributed to the damages which RCD seeks from DH, this court cannot dismiss DH's indemnity claim against Goettle at this point.

### B. The Writings That Evidence The Parties' Resolution of Goettle's Claim Against DH Do Not Preclude DH From Bringing An Indemnification Claim Against Goettle.

Goettle argues that DH is precluded from bringing an indemnification claim against Goettle with respect to RCD's impact damages because DH and Goettle previously entered into a settlement, or an accord and satisfaction, of all claims between them, including the present one. There is no dispute that, on September 5, 2002, while the Project was still ongoing, Goettle submitted a delay/disruption claim for $1,833,199.00 to DH.[12] There is also no dispute that Goettle's claim was settled between the parties on October 11, 2002, for $935,000.00 and that the settlement was memorialized in Change Order No. 12 ("CO 12") to the Goettle Subcontract.[13] However, the parties do dispute whether CO 12 also disposed of all indemnification claims that DH may have had against Goettle for delays/disruptions that RCD experienced as a result of Goettle's work.

As set forth above, the Subcontract grants DH the right to assert claims for indemnification against Goettle in certain instances. The Subcontract also provides as follows:

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[12] Goettle first submitted its delay-disruption claim in June 2002. *See* DH's Response to Goettle's Motion, Ex. E. As the work progressed through the Summer of 2002, Goettle apparently encountered other delays/disruptions that it added to its original claim. Both Goettle and DH agree that the September claim is the final and total amount claimed by Goettle. *See id.*, Ex. F.

[13] CO 12 is attached to Goettle's Motion as Exhibit 8 and to DH's Response to Goettle's Motion as Exhibit G.

> No Oral Modifications: This subcontract may be amended only by a written document signed on behalf of Construction Manager and Subcontractor by authorized persons designated in Section 27.

Goettle's Motion, Ex. 1, ¶ 35.5. As a result, DH may waive or release its right to bring an indemnification claim against Goettle in writing.[14]

CO 12 does not expressly address any claims that DH may have had against Goettle. It simply states as follows:

> This Change Order covers revisions to the Work. Except as added or deleted by the following descriptions, all terms and conditions of the Subcontract Agreement remain unchanged.
> Description: Provide all labor, materials, tools and supervision to complete the work of the following:
> 1. Contract adjustment to reflect:
>  a – Site inaccessibility due to delayed start of excavation;
>  b – Crane downtime between indicator piles and production;
>  c – Extended pile support crew;
>  d – Modification of material handling procedure;
>  e – Includes credits for no mobilization of Rig #3 and no re-mobilization for concourse piles
> 2. This adjustment reflects a revised completion date of 1/19/03 for work under this Subcontract Agreement.
> 3. All other terms and conditions of the Subcontract Agreement for pile length payment remain in effect.
>
> ADD $935,000

*See* Goettle's Motion, Ex. 8. By its terms, the only claims that CO 12 precludes are Goettle's claims for additional compensation arising out of the additional work listed as items 1(a)-(e).[15] CO 12 contains no language that purports to modify or negate Goettle's indemnification

[14] Aside from the above writings, Goettle also offers evidence of oral agreements between it and DH and/or conduct by DH in which DH allegedly renounced its right to seek indemnification for claims arising prior to the execution of CO 12. "An agreement that prohibits non-written modification may be modified by subsequent oral agreement if the parties' conduct clearly shows the intent to waive the requirement that the amendments be in writing." Somerset Community Hospital v. Allan B. Mitchell & Assoc., Inc., 454 Pa. Super. 188, 197, 685 A.2d 141, 146 (1996). However, it is for the finder of fact to determine whether such an oral modification occurred. *See id.* At the summary judgment stage, the court is limited to reviewing the alleged written modifications to determine if they do indeed modify the contract.

[15] Apparently, Goettle was delayed again later in the Project, and, in its Counterclaim, Goettle claims additional impact damages from DH. *See* Counterclaim, ¶¶ 9, 16.

obligations under the Subcontract Agreement. Therefore, the indemnification "terms and conditions of the Subcontract Agreement remain unchanged" by CO 12.

Goettle next points to an email that DH wrote to its claims consultant with respect to CO 12 in which DH stated the following: "Just wanted to let you both know that we settled with Goettle on Friday. A global settlement was reached with all issues incorporated." *See* Goettle's Motion, Ex. 9. However, it is by no means clear from this email that "all issues" included all subsequent claims by DH against Goettle; "all issues" could just as easily mean only the several claims that Goettle had submitted to DH.

In further support of its argument that CO 12 covered RCD's claims for which DH now seeks indemnification, Goettle points to a letter from DH to Goettle dated 4 months prior to the execution of CO 12, in which DH expresses its intention to hold Goettle liable for $61,765 in potential Change Orders ("PCOs") submitted by RCD. *See* Goettle Motion, Ex. 7. Goettle may be correct that this amount allegedly owed by it to DH was included in the compromised amount contained in CO 12, so that DH may not again seek it from Goettle in this action. However, it does not appear that this particular amount is the subject of any of the parties' claims in this action. Instead, the RCD PCOs that were the subject of DH's letter to Goettle were resolved by the issuance of CO 3 between DH and RCD in which DH added $61,765 to RCD's contract price.[16] Since RCD received reimbursement for these PCOs already, it is precluded from seeking reimbursement from DH in this action for the amounts claimed in those PCOs. Since RCD cannot claim the $61,765 from DH again in this action, that amount is not part of the potential damages with respect to which DH is claiming indemnification from Goettle.

[16] *See* DH's Response to Goettle's Motion, Ex. J.

As DH correctly points out, RCD is claiming from DH, and DH is claiming indemnification from Goettle for, amounts that RCD first asserted in September 24, 2003, almost a year after CO 12 was executed. The amounts claimed by RCD apparently relate back to delays and disruptions that occurred prior to DH's and Goettle's execution of CO 12. However, in the absence of language in CO 12 (or elsewhere) expressly releasing DH's subsequently asserted indemnification claims against Goettle, this court cannot summarily dismiss DH's claim for indemnification against Goettle.

**C. DH's "Contribution" Claim Against Goettle Must Be Dismissed.**

In addition to its claim against Goettle for contractual indemnification, DH also brings a claim against Goettle which is denominated as one for "Contribution." As Goettle correctly points out, contribution claims are properly asserted between joint tortfeasors. *See* 42 Pa. C.S. § 8321 *et seq.*. Contribution is not a proper claim where the underlying claims sound in contract, as RCD's claims against DH do. DH concedes that contribution may not be appropriate in this context, but argues that its "Contribution" claim should be treated as one for common law indemnification instead. However, where, as here, the parties have established their own indemnification arrangement by contract, any such common law indemnification obligations are necessarily supplanted. In fact, DH admits that its "Contribution" claim is based on the indemnification provisions of the Subcontract. *See* DH's Response to Goettle's Motion, ¶ 24. Therefore, DH's "Contribution" claim must be dismissed as duplicative of its breach of contract/indemnification claims.

## III. DH's Motion For Summary Judgment on Goettle's Duty to Defend Must Be Denied.

DH argues that, because Goettle has a potential duty to indemnify DH for RCD's loss, Goettle has an immediate duty to defend DH in this action.[17] Such a duty to defend is found in most insurance contracts, which usually provide that where "the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover." General Accident Insurance Co of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997). However, the language of the Subcontract is not as broad as that employed in insurance contracts.[18]

In the Subcontract, Goettle did not expressly agree to defend DH in any suit in which Goettle's possible fault is raised by DH or another party. Instead, Goettle agreed to defend DH only where its duty to indemnify is clear. The Duty to Defend section of the Subcontract provides that "[w]ith respect to any obligation of [Goettle] to indemnify and hold [DH] harmless, [DH], at its sole option, also may tender its defense to [Goettle]." *See* DH's Motion, Ex. A, ¶ 33.5. In other words, Goettle's duty to defend DH is contingent upon its first having a duty to indemnify DH.

In this case, Goettle's duty to indemnify is disputed and is contingent upon which party, if any, is found at fault. Therefore, the duty to defend is likewise contingent upon who, if

[17] DH first demanded that Goettle defend DH in this action in October, 2004, approximately eight months after this action was commenced. *See* DH's Motion, ¶ 14. DH now attempts to have the court impose a duty to defend on Goettle on the eve of trial. Since DH had already undertaken its own defense in this action before demanding a defense from Goettle, and since that defense involves pointing the finger at Goettle, the court does not see how Goettle could now step in and assume DH's defense without prejudicing either DH's rights or Goettle's own. Therefore, DH's demand for a defense from Goettle is untimely.

[18] The court does not read the Subcontract as an agreement by each subcontractor to hold DH harmless for all additional costs incurred with respect to the Project. Instead, each subcontractor agreed to reimburse DH only for those damages that flow from that subcontractor's wrongdoing.

anyone, is found to be responsible for RCD's claimed losses. Admittedly, this makes the duty to defend worthless in this case because, at the point when liability is established, there will no longer be a need for a defense. However, if Goettle is found to be at fault for RCD's loss, so that it must indemnify DH, Goettle is obligated under the terms of the Subcontract to reimburse the reasonable defense costs incurred by DH.[19] On the other hand, if Goettle is not found to bear any fault for, and DH is found to be the sole cause of, RCD's loss, then Goettle need not reimburse any of DH's defense costs. Similarly, in the event that RCD is found at fault, and neither DH nor Goettle is found at fault, Goettle will have no obligation to reimburse DH's defense costs.[20]

## IV. RCD's Motion for Summary Judgment With Respect to DH's Indemnification Claims Against RCD Must Be Granted In Part and Denied in Part.

In DH's counterclaim against RCD, DH alleges that RCD failed to provide sufficient manpower to complete its work on time, that RCD failed to sequence and plan its work properly, and that the work of subcontractors who followed RCD was delayed and disrupted. Specifically, DH claims that:

> The impact from RCD's delays rippled throughout the Project, and required many subcontractors to incur overtime and shiftwork, for which DH has paid in accordance with the terms of the individual subcontracts.

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[19] The Subcontract provides that, in the event a third party brings a claim against DH arising out of Goettle's work, Goettle will cooperate in DH's defense of that claim and indemnify DH in the event of judgment or settlement, including for reasonable costs and attorneys fees. *See* DH Motion, Ex. A, ¶ 21.7. *See also* Mace v. Atlantic Refining & Marketing Corp., 567 Pa. 71, 785 A.2d 491 (2001) (Once indemnitee was found by court not to be at fault and indemnitor settled with injured party, indemnitor was found liable for indemnitee's costs in defending claims brought by injured party); McClure v. Deerland Corp., 401 Pa. Super. 226, 233, 585 A.2d 19, 23 (1991) ("Until the underlying actions are resolved and judgments or settlements paid, it is impossible to determine the reasonableness and appropriateness of . . . the payment of counsel fees and costs. Under current law, the mere expenditure of counsel fees does not constitute the accrual of a cause of action for indemnification.")

[20] It is with respect to this last fact pattern that the Subcontract differs most significantly from an insurance contract. In an insurance situation, the insurer usually must pay the costs of defense even where the insured is not found liable. However, under the terms of the Subcontract, DH cannot reasonably expect Goettle to bear DH's defense costs if RCD's claim that DH delayed RCD's work proves to be specious.

> These impacts also required DH to incur additional general conditions costs and have given rise to claims from other subcontractors.

DH's First Amended Counterclaim, ¶¶ 196-7. DH lists numerous subcontractors who made claims for and/or were paid for delay/disruption damages as a result of RCD's shoddy work. and DH notes that "additional claims not yet known to DH may also be submitted to it." *Id*. ¶¶ 231, 234. As relief, DH demands both damages for RCD's breach of contract and a declaratory judgment that RCD is "obligated to indemnify, hold harmless and reimburse [DH] for any and all claims, losses, costs and expenses including attorneys fees arising out of or resulting from RCD's delays and defective work on the Project." *Id*., p. 44.

RCD moved for partial summary judgment to limit the claims for which DH could assert indemnification and to dismiss DH's declaratory judgment claim. In support of its Motion, RCD points to certain Counterclaim Logs that DH produced in discovery in which DH lists approximately $30 million in delay/disruption damages. RCD argues that most of these damages are not recoverable by DH. However, RCD did not, at the time that it filed its Motion, have the benefit of DH's expert report on damages, upon which DH relies in its response. Based on that expert report,[21] DH now claims that RCD must indemnify DH for $8,346,323.59[22] in delay/disruption damages as follows:

1. $6,420,791.53 - Subcontractor's Change Orders paid by DH[23]

[21] The court has not been provided with a copy of this report, but the court has been provided with DH's letter to RCD incorporating the expert's findings with respect to indemnification damages. *See* DH's Response to RCD's Motion, Ex. J. DH argues that its adoption of its expert's allocation of the damages due from RCD is sufficient to satisfy the Subcontract's requirement that DH "shall have the right to reasonably apportion [delay] damages among the responsible parties, and such apportionment shall be binding on [RCD]." *See* RCD's Motion, Ex. 5, ¶ 32.1

[22] In its brief in opposition to RCD's Motion, DH claims that the damages attributable to RCD's breach of contract are $8,402,441.54. *See* DH's Memorandum of Law in support of its Response to RCD's Motion, p. 18.

[23] Apparently, Goettle is one of the subcontractors whose CO was paid by DH. DH claims that of the $935,000 it paid to Goettle on CO 12, $800,000 was reimbursed by the Owner in the form of an increase in the price of DH's contract with the Owner, and $135,000 is attributable to RCD. *See id.*

2. $ 282,167.79 – Havens' Subcontractors' Potential Change Orders not yet paid
3. $1,643,364.27 – Petrocelli, F&M, and M/L claims assigned to DH
4. $ 6,700.00 – OCIP costs[24]

*See* DH's Response to RCD's Motion, Ex. J. In addition. DH claims that it "reserves the right to seek reimbursement for delay costs attributable to pending claims by Grossi, Multiphase, and JCI, and hereby apportions those claims to RCD in the amount of $5,856,945.78." *Id.* Based on DH's representations, these are the counterclaim damages that DH presently demands from RCD. The question raised by RCD's Motion is whether DH may recover any of these claimed damages (assuming DH can prove that RCD caused them.)

"It is well settled that before any right of indemnification arises, the [party seeking indemnification] must in fact pay damages to a third party." National Liberty Life Ins. Co. v. Kling Partnership, 350 Pa. Super. 524, 533, 504 A.2d 1273, 1278 (1986). *See also* McClure v. Deerland Corp., 401 Pa. Super. 226, 585 A.2d 19 (1991); Beary v. Container General Corp., 390 Pa. Super. 53, 568 A.2d 190 (1989); F. Schindler Equipment Co. v. Raymond Co., 274 Pa. Super. 530, 418 A.2d 533 (1980). In other words, DH must have suffered some loss, either personally, or by making payment to others, for which it claims indemnification from RCD. Any indemnification action premised on an anticipated future loss is premature and must be dismissed. Therefore, the court must determine if the damages for which DH claims indemnification from RCD have already been suffered by DH or not.

**A. Claims Based On Paid Subcontractor's Change Orders.**

DH argues that RCD must indemnify DH for amounts that DH paid to other sub-contractors for delay/disruption of their work, which claims were resolved through COs issued to those subcontractors by DH. RCD argues that it need not indemnify DH for any amounts DH

[24] This amount is not included in the total claimed by DH in the letter.

paid to subcontractors, but for which DH was subsequently reimbursed by the Owner. The court cannot determine based on the record before it if any of the CO amounts claimed by DH were in fact reimbursed by the Owner, i.e., added on to the contract price.[25] If the Owner did pay the subcontractor COs in addition to the other amounts that the Owner was contractually obligated to pay DH, the paid COs would not be a loss to DH for which DH could claim indemnification from RCD.[26] In other words, if DH has already been indemnified by the Owner for the COs, then DH cannot claim the right to be indemnified a second time. However, DH may be able to make out claim against RCD for indemnification for the CO amounts if they were paid to the subcontractors, but the price the Owner was obligated to pay DH under the prime contract was not increased accordingly.

**B. Claims by Petrocelli, F&M and L/M Assigned to DH.**

DH claims that RCD must indemnify it for delay/disruption damages incurred by Petrocelli, F&M and M/L as a result of the settlements DH entered into with those entities. The Settlement Agreement between DH and F&M[27] states as follows:

> WHEREAS, Subcontractor alleges that it has claims against DH for additional compensation due in the amount of $4,973,251[28] as a consequence of delays, impacts, and disruption of its work caused by predecessor activities on the Project;[29]

[25] The claims for which DH now seeks reimbursement based on its expert's report are somewhat different than those upon which RCD based its Motion for Summary Judgment, so the court cannot determine which of RCD's arguments regarding reimbursement still apply to the subcontractor COs' for which DH now claims reimbursement.

[26] The resolution of this issue is complicated by the fact that the Owner, not DH, made the payments to the subcontractors under their various Subcontracts, so as to avoid the Philadelphia business privilege tax, which would have been due if DH made the payments to the subcontractors. *See* DH's Response to RCD's Motion, Ex. C, ¶ 7.

[27] DH's settlement agreements with Petrocelli and M/L are substantially similar. *See* DH's Response to RCD's Motion, Exs. S, T, & U.

[28] Petrocelli claims $5 million, M/L claims $145,674. *See id.*, Exs. T & U.

[29] Both the Petrocelli and M/L Settlement Agreements state that RCD is the predecessor trades entity responsible for the delay damages claimed. *See id.*

> WHEREAS, DH has outstanding claims against other subcontractors on the project, including RCD, for delay and disruption of work on the Project;
>
> * * *
>
> Upon execution of this Agreement, Subcontractor does hereby assign and convey to DH any and all claims it has with respect to the Project.
>
> * * *
>
> If DH pursues Subcontractor's claims and obtains a cash recovery against a third party on a claim assigned to it by Subcontractor, then that recovery shall be allocated in the following order of priority.
>
> (i) To reimburse DH for all legal fees, expert fees, and other out-of-pocket costs incurred pursuing the recovery from RCD with respect to the assigned claim;
> (ii) Evenly between DH and Subcontractor on the difference between the amount recovered and the sums deducted from such recovery under sub-paragraph (i) of this paragraph 5(b).[30]

DH's Response to RCD's Motion, Ex. S, pp. 1-3.

The parties' arrangement is problematic for several reasons. The first problem is that F&M, Petrocelli and M/L had no claims against RCD that they could assign to DH. *See* Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 525, 539 A.2d 357, 358 (1988) ("The first matter that a court must consider when ruling upon the viability of an assigned cause of action is whether the assignor has a cause of action against the defendant in the case.") F&M, Petrocelli and M/L had no direct contractual (or other) relationship with RCD that would enable them to bring claims against RCD.[31] The only party with whom they had a contract was DH, so DH is

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[30] Under the Petrocelli Agreement, DH gets the first $500,000 recovered after costs, Petrocelli gets the next $500,000, and DH gets any remaining monies recovered. *See* DH's Response to RCD's Motion, Ex. T, p. 3. Under M/L's Settlement Agreement, M/L is entitled to all funds recovered by DH from RCD, less the costs of recovery. *See id.*, Ex. U, p. 3.

[31] F&M, Petrocelli, and M/L could not bring a negligence claim against RCD since their only claimed loss is economic and RCD is not a design professional. *See* Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 480-2, 866 A.2d 270, 286-7 (2005); Duquesne Light Co. v. Pa. Am. Water Co., 850 A.2d 701, 703 (Pa. Super. 2004). *See also* E.J. DeSeta v. Goldner/Accord Ballpark, L.P., 2006 Phila. Ct. Com. Pl. LEXIS 4 (Jan. 10, 2006) (Goldner's claim for negligence against RCD dismissed); Samuel Grossi & Sons, Inc. v. U.S. Fidelity & Guaranty Co., 2005 Phila. Ct. Com. Pl. LEXIS 283 (Jun. 27, 2005) (Grossi's claim for negligence against RCD dismissed).

the only party against whom they could assert their claims for delay/disruption. As a result, all that the subcontractors have done is assign their claims against DH to DH, which assignment is meaningless.

Since DH is not asserting F&M's, Petrocelli's or M/L's claims against RCD, DH must have grounds to assert its own claim against RCD based on RCD's delay/disruption of F&M's, Petrocelli's and M/L's work. The cause of action that DH has asserted against RCD is for breach of contract/indemnification. However, in order to bring such a claim against RCD in its own right, DH must have suffered a loss for which its seeks damages from RCD. F&M, Petrocelli and M/L released their rights to bring their additional delay/disruption claims against DH without DH's payment of the damages they claimed.[32] Since DH has not paid anything to F&M, Petrocelli or M/L on their assigned delay/disruption claims, DH has not suffered a loss for which it can claim indemnification from RCD. Since DH has paid nothing, it can recover nothing from RCD (which leaves F&M, Petrocelli and M/L with nothing either.)[33] As a result, DH's claims for indemnification by RCD based on damages suffered by third parties who assigned their claims to DH without receiving payment on those claims from DH, must be dismissed.

**C. Havens' Subcontractor's Claims.**

DH claims to have approved certain delay/disruption damages asserted by Havens' subcontractors, including Grossi and Multiphase, but apparently it has not yet made any payment

[32] It appears that DH did pay some additional CO amounts to Petrocelli, F&M, and M/L under the Settlement Agreements. *See* DH's Response to RCD's Motion, Exs. S, T, & U. To the extent that DH paid those COs and was not indemnified for them by anyone else, it may claim those amounts from RCD in this action.

[33] In addition, since DH has paid nothing to F&M and Petrocelli, if it were to prevail against RCD with respect to F&M's and Petrocelli's claimed losses, DH would receive a windfall in the form of a substantial portion of the net amount of damages awarded for F&M's and Petrocelli's losses. These award sharing arrangements between F&M/Petrocelli and DH skirt the edge of champerty. *See* Belfonte v. Miller, 212 Pa. Super. 508, 512, 243 A.2d 150, 152 (1968) ("A champertous agreement is one in which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his own expense in consideration of receiving a share of what is recovered.")

on them. For the reasons set forth above, to the extent that DH has not made payment to Haven's subcontractors, it may not claim indemnification from RCD.

**D. Claims By Grossi, Multiphase, and JCI.**

Some of the delay/disruption claims asserted by Grossi, Multiphase and JCI are currently the subject of litigation in which DH disputes Grossi's, Multiphase's and JCI's right to delay/disruption damages. Since DH has not paid out on such claims, it cannot assert a claim for indemnification against RCD based on those claims.

DH admits "that the claims of Grossi, Multiphase, and JCI are not an element of [DH's] Count I breach of contract claim because [DH] has not alleged that [DH] is liable for them or that it has sustained damages as a result of their assertion. Those claims are, however, part of [DH's] claim for declaratory relief." *See* DH's Response to RCD's Motion, ¶ 81. RCD disputes whether such claims may even be the subject of a declaratory judgment.

This court does not see how it can enter any meaningful declaratory judgment with respect to contested claims that are being litigated separately. In its First Amended Counterclaim, DH requests that this court enter a judgment basically reiterating the indemnification obligations set forth in the Subcontract. However, the parties do not dispute that RCD has indemnification obligations to DH under the Subcontract. Instead, the parties dispute whether those obligations are triggered by the facts that have yet to be adjudicated in the Grossi, Multiphase, and JCI litigation.[34] *See* Gulnac v. South Butler County School Dist., 526 Pa. 483,

[34] This case differs from the usual insurance declaratory judgment action in which the court is asked to review the policy language and the allegations of the complaint in the underlying action to determine if there is coverage. *See* General Accident Insurance Co of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997). In this case, a comparison of the Subcontract's language with the claims asserted by Grossi, Multiphase and JCI does not resolve the indemnification issue. Instead, a court must first find that RCD is responsible for Grossi's, Multiphase's and JCI's claimed damages before this court can declare that RCD must indemnify DH. In insurance cases, the insurer's duty to indemnify is not usually contingent on its being found liable for the plaintiff's claimed injuries in the underlying action, so the court need not make this additional factual finding regarding the apportionment of fault.

488, 587 A.2d 699, 701 (1991)("A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur."); McClure v. Deerland Corp., 401 Pa. Super. 226, 234, 585 A.2d 19, 23 (1991) ("If and when appellants' cause of action [for indemnification] accrues, their remedy is an action at law for damages, rather than an action in equity" for specific performance of the indemnification agreement.)

"In the instant case the underlying actions are not resolved or settled, and therefore, it is impossible to determine the basis of the claims, and whether they are within the scope of the indemnity clause." McClure v. Deerland Corp., 401 Pa. Super. 226, 233, 585 A.2d 19, 23 (1991). The court cannot determine whether RCD has a duty to indemnify DH with respect to the claims that are being litigated because RCD's duty is contingent upon a finding that 1) Grossi, Multiphase and JCI incurred the damages they claim; and 2) RCD caused those damages. It is not for this court to determine who is at fault for damages claimed in actions pending before other courts. Instead, each of the courts hearing such claims must make its determination regarding liability, and then it or a subsequent court shall determine if any indemnification duty is owing from RCD to DH with respect to any damages awarded against DH in those actions. DH's demand for declaratory judgment with respect to claims that are currently being litigated and on which DH has not made payment, must be dismissed.

## CONCLUSION

For all the foregoing reasons, Goettle's Motion for Summary Judgment is granted in part and denied in part, DH's Motion for Partial Summary Judgment As To Duty To Defend is denied, and RCD's Motion for Partial Summary Judgment is granted in part and denied in part.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**