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

SAMUEL GROSSI & SONS, INC.	:	September Term 2004
Plaintiff,	:	No. 3590
v.	:	
	:	Commerce Program
UNITED STATES FIDELITY & GUARANTY COMPANY, DRISCOLL/HUNT, A JOINT VENTURE, L.F. DRISCOLL COMPANY, HUNT CONSTRUCTION GROUP, INC., RAMOS/CARSON/DEPAUL, A JOINT VENTURE, RAMOS & ASSOCIATES, INC., CARSON CONCRETE CORPORATION, TONY DEPAUL & SON, and PHILLIES BALLPARK, L.P.,	:	Control No. 041907/050887/ 050751/050721
Defendants.	:	

O R D E R

AND NOW, this 27th day of June 2005, upon consideration of four sets of Preliminary Objections filed by: (1) United States Fidelity & Guaranty Company ("USF&G") (Control No. 050887), (2) Driscoll/Hunt, A Joint Venture, L.F. Driscoll Company, Hunt Construction Group, Inc. ("DHJV") (Control No. 050751), (3) Ramos/ Carson/ DePaul, A Joint Venture, Ramos & Associates, Inc., Carson Concrete Corporation, Tony DePaul & Son ("RCD") (Control No. 041907), and (4) Phillies Ballpark, L.P. ("Owner") (Control No. 050721), all responses in opposition, the respective memoranda and all matters of record, it is **ORDERED** that:

1. The Preliminary Objection of DHJV as to plaintiff's claim as a third party beneficiary is **Sustained** and Count II is dismissed.

2. The Preliminary Objection of RCD as to plaintiff's claim as a third party beneficiary is **Sustained** and Count III is dismissed.

3. The Preliminary Objections of Owner and DHJV as to plaintiff's claim for negligence is **Sustained** and Count V is dismissed.

4. The Preliminary Objections of DHJV and RCD as to plaintiff's claim for negligence is **Sustained** and Count IV is dismissed.

5. The remainder of the Preliminary Objections are **Overruled.**

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

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Defendants.	:	

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ……..…….. June 27, 2005

Presently before the court are Preliminary Objections filed by defendants: (1)United States Fidelity & Guaranty Company ("USF&G") (Control No. 050887), (2) Driscoll/Hunt, A Joint Venture, L.F. Driscoll Company, Hunt Construction Group, Inc. ("DHJV") (Control No. 050751), (3) Ramos/Carson/DePaul, A Joint Venture, Ramos & Associates, Inc., Carson Concrete Corporation, Tony DePaul & Son ("RCD") (Control No. 041907), and (4) Phillies Ballpark, L.P. ("Owner") (Control No. 050721). For the reasons discussed, the court sustains, in part, and overrules, in part, those Preliminary Objections.

BACKGROUND[1]

Owner contracted with various parties to build a baseball stadium. Am. Compl., ¶ 13. L.F. Driscoll Company and Hunt Construction Group, Inc. created DHJV to act as construction manager for the stadium. *Id.* at ¶¶ 4, 13, 14. DHJV subcontracted with Havens Steel Company ("Havens") to fabricate and erect the steel structure of the stadium, and Havens executed two subcontracts with Samuel Grossi & Sons, Inc. ("plaintiff"), one for steel fabrication and one for steel erection. *Id.* at ¶¶ 15-18. To assure payment for its portion of the construction, Havens contracted with USF&G to provide a surety bond in the amount of $26,632,000 ("the Bond"). *Id.* at ¶¶ 20-22. The Bond provided for payment for all labor and materials reasonably necessary to complete the project if Havens failed to pay subcontractors in a timely manner. *Id.* at ¶¶ 20. DHJV subcontracted with RCD to create the concrete structure of the stadium. *Id.* at ¶ 50.

All subcontractors' agreements with DHJV provided that "time [was] of the essence" (Subcontract between Havens and plaintiff, Art. V; Contract between Owner and DHJV, § 4.2; Am. Compl., ¶ 83) and that each subcontractor "shall commence its Work when directed by Construction Manager and . . . shall diligently prosecute, perform and complete its Work so that neither Construction Manager nor any other person or entity will be delayed by any act or omission of Subcontractor . . ." Subcontract between DHJV and Havens, § 9.2.

Plaintiff's sub-subcontract with Havens provided dates when fabrication drawings by the structural engineer would be delivered to plaintiff, and corresponding dates when the steel pieces were due. Purchase Order No. 13214 between Havens and plaintiff; Am. Compl., ¶ 61. The sub-subcontract also provided that Havens had the right to make changes to plaintiff's work orders, and that Havens would not be liable to plaintiff for any delay to plaintiff's work that was

[1] The facts set forth are taken directly from plaintiff's Amended Complaint. All material facts set forth in plaintiff's Amended Complaint are considered to be true only for purposes of ruling on demurrers. *Jackson v. Garland*, 424 Pa. Super. 378, 381, 622 A.2d 969, 970 (1993).

outside Havens' control. Subcontract between Havens and plaintiff, Art. III, §§ A, B.

Due to the nature of the construction, erection of the steel structure of the stadium could not commence before the concrete foundation had been finished, and plaintiff had to wait to begin its work until RCD had completed the concrete. Am. Compl., ¶ 49. RCD was delayed in finishing the concrete foundation, and plaintiff began steel erection for construction of the stadium's outbuildings three and a half months later than originally anticipated. *Id.* at ¶¶ 52, 53. Further delays occurred due to equipment shutdowns and erection work done out of sequence. *Id.* at ¶ 54. Plaintiff fabricated steel relying on designs approved by DHJV, which DHJV, the stadium's structural engineer, and Owner changed repeatedly. *Id.* at ¶¶ 64-66. These redesigns caused delays, as did failure to review or clarify steel fabrication drawings, leading to plaintiff's reduction in producing steel for construction. *Id.* at ¶¶ 64-68. Plaintiff also performed extra work for the project, authorized employees to work overtime and premium time, and rented trailers to store already-fabricated steel. *Id.* at ¶¶ 35-37. Some of these changes were approved by Havens and some were approved by DHJV. *Id.* at ¶¶ 36, 37, 39, 41.

Plaintiff submitted a delay claim to Havens to show accrual of extra costs and other losses due to the delays. Am. Compl., ¶¶ 70. Havens submitted the claim to DHJV, which denied the claim. *Id.* at ¶¶ 71, 72.

Subsequently, Havens filed for bankruptcy in Western Missouri. *Id.* at ¶¶73-74. That bankruptcy action is still pending, thus, plaintiff has not named Havens as a defendant in this matter. *Id.*

On or about October 1, 2004, plaintiff commenced this action by filing a Complaint. Preliminary Objections of DHJV to the Am. Compl., ¶ 1. Plaintiff claimed that it was owed $401,255 under the erection subcontract, $179,531 under the fabrication subcontract, $453,257

for extra fabrication work for which change orders were not issued, and $4,452,455 for extra costs incurred as a result to delays to plaintiff's work. Compl., ¶¶ 24, 28, 34, 54. On or about February 11, 2005, the court issued an order sustaining defendants' preliminary objections to plaintiff's claims against USF&G for penalties and delay damages. Order of Feb. 11, 2005, No. 3590, Control No. 112620.

Plaintiff filed an Amended Complaint on or about March 18, 2005. Am. Compl., p. 26. In its Amended Complaint, plaintiff includes the original claims for amounts owed in the erection and fabrication subcontracts, plus a charge of $2,530,553 for extra work. *Id.* at ¶¶ 30, 34, 42, 46. Plaintiff also asserts eight counts against the various defendants: 1) that USF&G breached its payment bond (Count I); 2) that plaintiff is a third-party contract beneficiary to the contracts made between DHJV and the subcontractors (Count II); 3) that plaintiff is a third-party contract beneficiary to the contracts made between RCD and its subcontractors (Count III); 4) that DHJV and RCD behaved negligently as to plaintiff (Count IV); 5) that Owner and DHJV behaved negligently as to plaintiff (Count V); 6) that DHJV breached its contract with plaintiff (Count VI); 7) that Owner sustains agency liability for plaintiff's damages (Count VII); and 8) that Owner and DHJV have been unjustly enriched by plaintiff's efforts on their behalf (Count VIII).

All defendants have filed preliminary objections to the Amended Complaint.

DISCUSSION

I. USF&G'S PRELIMINARY OBJECTION TO PLAINTIFF'S "RE-CHARACTERIZATION" OF PLAINTIFF'S OUTSTANDING BILLS IS OVERRULED.

Count I alleges that USF&G breached its payment bond with Havens (Am. Compl., ¶¶ 76-80). Defendant USF&G maintains that Count I of plaintiff's Amended Complaint should be

dismissed, arguing that plaintiff has re-characterized moneys originally dismissed in the Complaint as "delay damages," as "extra work" (USF&G's Preliminary Objections to Am. Compl., ¶¶ 2, 3, 10, 15, 16, 24-28). USF&G alleges that this court's February 11, 2005 dismissal of plaintiff's delay claims constituted a judicial admission (USF&G's Preliminary Objections to Am. Compl., ¶¶ 24-27). USF&G further alleges that plaintiff must submit a second amended complaint to elucidate which damages have been re-characterized so that the court may dismiss those claims under the theory of judicial admissions (*Id.* at ¶ 29).

The bond between Havens and USF&G provided for USF&G to guarantee "all labor and material used or *reasonably required* for use in the performance of the subcontract . . ." (USF&G Bond No. 4008P1933) (emphasis added). Plaintiff's Amended Complaint alleges that Havens and USF&G executed the Bond as surety for plaintiff's payment (Am. Compl., ¶¶ 20, 76) and that plaintiff has not been paid in full for the work done within the scope of its written contracts with Havens (*Id.* at ¶ 24, 30). Plaintiff further alleges that extra work was approved informally during the project by Havens (*Id.* at ¶¶ 36, 39), and that the cost of performing the extra work was $2,530,553 (*Id.* at ¶¶ 42, 46). Plaintiff's Change Order Request lists items of extra work and delay (Plaintiff's Change Order Request, Items 044, 045, 060, 062-071, 078, 084, 092, 102-104, 106-119, 121, 124, 126, 127, 131-139, 144, 145, 148, 151-165, 167-169, 172-174, 176-179, 181-191, 193-205, 207-208).

This court previously held that plaintiff may not collect delay damages. *See* Order of Feb. 11, 2005 ("The Order"). There remains an issue whether the expenses claimed by plaintiff for "extra work" were dismissed by the Order, or whether they constitute labor or materials "reasonably required" in the performance of the contract. This is an issue to be explored during discovery. The Complaint and the Amended Complaint allege different amounts for "extra

work" and "delay damages" (*Cf.* Compl., ¶ 54, *with* Am. Compl., ¶ 46). Thus, at this preliminary stage, plaintiff's Amended Complaint has been pled sufficiently to withstand USF&G's demurrer. Accordingly, for present purposes UF&G's demurrer to Count I is overruled.

II. DEFENDANTS DHJV AND RCD'S DEMURRERS TO PLAINTIFF'S CLAIMS FOR THIRD PARTY CONTRACT BENEFICIARY STATUS ARE SUSTAINED, IN PART, AND OVERRULED, IN PART.

DHJV and RCD filed preliminary objections to Count II (claiming plaintiff's third party beneficiary status in the contract between Owner and DHJV) and Count III (claiming plaintiff's third party beneficiary to the contracts made between RCD and its subcontractors). The standard for establishing third party beneficiary status is difficult to meet. To be a third party beneficiary with the ability to recover on a contract, both parties to the contract must intend that the third party will benefit and that intention must be *specifically stated* in the contract. *Spires v. Hanover*, 364 Pa. 52, 56-57, 70 A.2d 828, 830 (1950). The intended third party beneficiary obligation must appear in the contract itself. *Id*. To determine whether one is an intended third party beneficiary, there is a two-part test: 1) the beneficiary's right must be appropriate to effectuate the parties' intention, and 2) either the performance must satisfy the promisee's obligation to pay money to the beneficiary, or the circumstances must indicate that the promisee intends to give the beneficiary the benefit of the promisee's performance. *Scarpitti v. Weborg*, 530 Pa. 366, 371, 609 A.2d 147, 150 (1992); *Guy v. Liederbach*, 501 Pa. 47, 60, 459 A.2d 744, 751 (1983).

Intended third party beneficiary status cannot be established where the contract merely contains a general contemplation of a possible future relationship giving rise to a third party's benefit. *See generally, Scarpitti*, 530 Pa. at 372, 609 A.2d at 150. If a beneficiary is not

intended by both parties to benefit, he is an incidental beneficiary. Restatement (Second) of Contracts § 302 (1979). An incidental beneficiary acquires no rights against the parties to the contract. Restatement (Second) of Contracts § 315 (1981). Awareness that a third party will benefit from a contract provision is not an intention to specifically confer a third party right. *Pa. Liquor Control Bd. v. Rapistan, Inc.*, 472 Pa. 36, 46, 371 A.2d 178, 183 (1976).

A. DHJV's Demurrer to Plaintiff's Claim for Third Party Contract Beneficiary Status is Sustained.

Count II of plaintiff's Amended Complaint purports to state a claim that plaintiff is a third party beneficiary to the contract between DHJV and Owner. The Amended Complaint alleges that:

- The contract between DJHV and Owner stated that "TIME IS OF THE ESSENCE FOR COMPLETION OF THE WORK IN ACCORDANCE WITH THE CONTRACT . . ." (Am. Compl., ¶¶ 48, 83, 89; Agreement between Owner and DHJV, § 4.2 (emphasis in the original));

- DHJV agreed in its contract with Owner to supervise, direct and coordinate the subcontractors' work (Am. Compl., ¶ 86; Agreement between Owner and DHJV, § 4.3.1) so as to avoid delay to the construction project's general progress (Am. Compl., ¶ 87; Agreement between Owner and DHJV, § 5.2.3);

- In order for the project to proceed in a timely manner as provided in the contract between Owner and DHJV, all subcontractors had to fulfill their obligations to work without delay (Am. Compl., ¶ 89); and

- When DHJV failed to coordinate RCD's concrete work, it also failed the contract provisions of the Owner-DHJV contract and significantly delayed plaintiff's work, resulting in a breach of contract (*Id.* at ¶¶ 95-97).

The facts alleged in the Amended Complaint do not support plaintiff's contention that it was an intended third party beneficiary specifically contemplated by the Owner-DHJV contract. Plaintiff was not named in the Owner-DHJV contract, and there was no specific provision pertinent to steel erection or fabrication. The Owner-DHJV contract simply contemplates

possible future subcontracts between DHJV and subcontractors for unspecified work to be performed on the stadium. The allegations alone are insufficient to sustain a claim for third party beneficiary status. Accordingly, DHJV's demurrer to Count II is sustained.

B. RCD's Demurrer to Plaintiff's Claim for Third Party Contract Beneficiary Status is Sustained.

Count III of the Amended Complaint purports to state a claim that plaintiff is a third party contract beneficiary to the contracts between RCD and its subcontractors. The Amended Complaint alleges that the subcontract between DHJV and RCD provided that RCD "shall diligently and continuously prosecute, perform and complete its Work so that . . . [no] person or entity will be delayed by any act or omission of [RCD] in completing its Work on the Project in accordance with . . . the Project Schedule" (Am. Compl., ¶ 101, quoting Subcontract between DHJV and RCD, § 9.2); that this contractual language gives a third party benefit to plaintiff (Am. Compl., ¶¶ 104-106); and that DHJV and RCD intended for other contractors to benefit from their contract (*Id.* at ¶ 104).

Plaintiff is an incidental beneficiary to the contract between RCD and DHJV. Plaintiff is not named in the contract, nor is the steel work performed by plaintiff specified in the contract. The contract clause stating that RCD would diligently complete its work so that no entity would be delayed (Am. Compl., ¶ 101) did not create plaintiff's third party beneficiary status, because plaintiff and plaintiff's work were not contemplated by both parties. Plaintiff's "right" not to be delayed was not appropriate to effectuate the intention of DHJV and RCD in creating their contract (*see Scarpitti*, 530 Pa. at 371, 609 A.2d at 150. Accordingly, RCD's demurrer to Count III is sustained.

III. DEFENDANTS DHJV, RCD, AND OWNER'S DEMURRERS TO PLAINTIFF'S CLAIMS FOR NEGLIGENCE ARE SUSTAINED.

DHJV, RCD, and Owner filed preliminary objections to plaintiff's claims for negligence. Count IV purported to state a claim for negligence as against DHJV and RCD. Count V purports to state a claim for negligence as against Owner and DHJV.

A. Defendants' Demurrers as to Plaintiff's Claims for Negligence are Sustained Due To the Gist of the Action Doctrine.

Counts IV and V are barred due to the gist of the action doctrine. Where a plaintiff sues on a contract and brings a tort action for the same claim, the two claims rest on the same "essential ground" and the tort claim is barred under the "gist of the action" doctrine. *eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 15 (2002), *quoting Am. Guar. and Liab. Ins. Co. v. Fojanini*, 90 F. Supp. 2d 615, 622-23 (E.D. Pa. 2000). It is possible that breach of contract will give rise to an actionable tort, but for the breach of contract to be construed in tort, the wrong ascribed to the defendant must be the gist of the action, and the contract must be collateral to the claim. *Bash v. Bell*, 411 Pa. Super. 347, 355-56, 601 A.2d 825, 829 (1992). "A claim *ex contractu* cannot be converted to one in tort simply by alleging that the conduct in question was wantonly done." *Id.*; *Closed Circuit Corp. v. Jerrold Elecs. Corp.*, 426 F. Supp. 361, 364 (D.C. Pa. 1977) (emphasis omitted).

1. Owner's Demurrer to Plaintiff's Claims for Negligence is Sustained Due To the Gist of the Action Doctrine.

Plaintiff's Amended Complaint alleges that Owner consented to and approved subcontracts between Havens and plaintiff (Am. Compl., ¶ 19); that Owner repeatedly changed fabrication drawings, which slowed the production process (*Id.* at 65); that Owner failed to respond to numerous memoranda asking for clarification of the design drawings (*Id.* at ¶ 67); that

Owner owed plaintiff a "duty of care" in managing the work of the structural engineer, DHJV, and other contractors, ensuring that DHJV and the engineer timely reviewed and responded to questions about the design drawings, and ensuring that the engineer, DHJV, or others did not delay the progress of plaintiff's work (*Id.* at ¶¶ 118, 120); and that in failing to adhere to its contractual obligations Owner breached its "duty of care" to plaintiff (*Id.* at ¶¶ 121, 122). Because plaintiff's claims rely on contracts between Owner and others, the contracts, and not negligence or another tort, provide the "gist of the action." Accordingly, Owner's demurrer to Count IV is sustained.

2. DHJV's Demurrer to Plaintiff's Claims for Negligence is Sustained Due To the Gist of the Action Doctrine.

Plaintiff's Amended Complaint alleges that DHJV knew about and agreed to Havens' subcontract with plaintiff (Am. Compl., ¶ 19); that the steel erection subcontract provided that time was of the essence (*Id.* at ¶ 48) but RCD caused the steel erection to be delayed (*Id.* at ¶ 52); that the steel fabrication subcontract provided certain dates by which approved drawings would be supplied to plaintiff (*Id.* at ¶ 61) and in reliance on that subcontract plaintiff bought many tons of steel and reserved production time (*Id.* at ¶ 64); that the project was delayed and plaintiff's steel production waned (*Id.* at ¶ 68); that DHJV caused plaintiff to breach its contracts with Havens by failing to manage RCD's work and assure their timely completion of the concrete portion of construction (*Id.* at ¶ 112-114); and that DHJV caused plaintiff to breach its contracts by failing to approve and review the fabrication drawings in a timely manner (*Id.* at 117-122). The "gist of the action," therefore, is based in a breach of contract claim. Accordingly, DHJV's demurrers to Counts IV and V are sustained.

B. Defendants' Demurrers as to Plaintiff's Claims for Negligence are Sustained Due To the Economic Loss Doctrine.

Counts IV and V are also barred by the economic loss doctrine. The economic loss doctrine, which has been adopted as Pennsylvania law, states that

> One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently
> (a) causing a third person not to perform a contract with the other, or
> (b) interfering with the other's performance of his contract or making the performance more expensive or burdensome, or
> (c) interfering with the other's acquiring a contractual relation with a third person.

Restatement of Torts Second § 766C (1979). Economic losses may not be recovered in negligence actions absent physical injury or damage to property. *Spivack v. Berks Ridge Corp., Inc.*, 402 Pa. Super. 73, 78, 586 A.2d 402, 405 (1990); *Aikens v. Baltimore & Ohio R. Co.*, 348 Pa. Super. 17, 21, 501 A.2d 277, 278 (1985). A plaintiff may recover for purely economic loss arising from negligent misrepresentation, even where there is no express contract between the parties, *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 288 (Pa. 2005), but only where there is more than just economic loss alleged. *David Pflumm Paving & Excavating, Inc. v. Found. Svcs. Co.*, 816 A.2d 1164, 1168 (2003).[2]

1. Owner's Demurrer to Plaintiff's Claims for Negligence is Sustained Due to the Economic Loss Doctrine.

Count V of plaintiff's Amended Complaint alleges that Owner consented to and approved the Havens-plaintiff subcontract (Am. Compl., ¶ 19); that Owner caused steel production to take

[2] Throughout its pleadings, plaintiff relies on *Bilt-Rite*, 866 A.2d 270, to show that it can recover in tort although its loss is only economic. In that case, the court held that a plaintiff contractor could recover for purely economic loss where the contractor proved negligent misrepresentation against an architect, despite the fact that the architect and contractor had no explicit contract. *Id.* at 288. This court finds plaintiff's interpretation of *Bilt-Rite* to exceed the intended scope of that case. *Bilt-Rite* limited its holding to address only the tort of negligent misrepresentation, and was not intended to extend to all tort claims where there are purely economic losses. *Id.* To extend *Bilt-Rite* into the larger realm of tort claims would invalidate the economic loss doctrine to some degree, which the Pennsylvania Supreme Court did not do in its *Bilt-Rite* holding.

place later than anticipated due to its edits to the fabrication drawings (*Id.* at 65); that Owner failed to respond to numerous memoranda asking for clarification of the designs (*Id.* at ¶ 67); that Owner and others breached their "duty of care" and caused plaintiff to sustain damages (*Id.* at ¶¶ 120-22) by failing to manage the work of DHJV and the structural engineer, ensure that DHJV and the structural engineer reviewed the fabrication drawings and responded to questions about the drawings, and ensure that the engineer, DHJV or others did not delay plaintiff's work (*Id.* at ¶¶ 118, 120); and that plaintiff is still owed a total of $3,111,339 on original contracts plus extra work it performed (*Id.* at ¶¶ 30, 34, 46). The losses alleged are purely economic in nature. Accordingly, Owner's demurrer to Count V is sustained.

2. DHJV's Demurrer to Plaintiff's Claims for Negligence is Sustained Due to the Economic Loss Doctrine.

Counts IV and V of plaintiff's Amended Complaint allege that DHJV authorized plaintiff to perform extra work despite delays outside of the subcontract agreement with Havens (Am. Compl., ¶¶ 39, 41, 53, 54, 125-132); that DHJV failed to adequately manage RCD's work, leading to significant delay (*Id.* at ¶¶ 52-54, 111) and DHJV had a duty to not delay plaintiff's work (*Id.* at ¶¶ 112-114); that DHJV itself contributed to the delay by allowing the structural engineer to delay submission of design drawings and by failing to approve the drawings in a timely manner (*Id.* at ¶¶ 63-68, 117) though DHJV had a duty to not delay plaintiff's work (*Id.* at ¶¶ 118-122); that as a result of the delays to the project, plaintiff suffered losses of $2,530,553 (*Id.* at ¶¶ 42, 46), debts from contracted-for work in the amount of $179,531 for the fabrication subcontract (*Id.* at ¶ 34), and $401,255 for the erection subcontract (*Id.* at ¶ 28). The losses claimed are thus purely economic in nature, and purport to arise from a claim for negligence. Accordingly, DHJV's demurrers to Counts IV and V are sustained.

3. RCD's Demurrer to Plaintiff's Claims for Negligence is Sustained Due to the Economic Loss Doctrine.

Count IV of plaintiff's Amended Complaint alleges that RCD failed to diligently complete its concrete work so that plaintiff could begin its steel erection and fabrication in a timely manner (Am. Compl., ¶¶ 50-54, 112) and consequentially plaintiff had to use overtime labor to perform the work quickly (*Id.* at ¶¶ 35-37, 42) for which it is still owed money (*Id.* at ¶ 46); and that RCD breached its duty to continuously and diligently prosecute its work to avoid delay, and therefore RCD is negligent (*Id.* at ¶¶ 111-114; Subcontract between DHJV and RCD, § 9.2). The losses plaintiff alleges due to the alleged breaches by RCD are economic losses. Accordingly, RCD's demurrer to Count IV is sustained.

C. Defendants' Demurrers as to Plaintiff's Claims for Negligence are Sustained Due To a Lack of a Legal Duty of Care.

Counts IV and V are also barred because plaintiff fails to allege a legal duty of care. Count IV purports to demonstrate a duty of care arising from the DJHV-RCD subcontract. Count V purports to show the same duty with respect to the Owner-DHJV contract. The elements of negligence are defendant's duty of care toward plaintiff, defendant's breach of that duty, and harm sustained by plaintiff. *Martin v. Evans*, 551 Pa. 496, 502, 711 A.2d 458, 461 (1998). The existence of, and breach of, a legal duty is a condition precedent to a finding of negligence. *Shaw v. Kirschbaum*, 439 Pa. Super. 24, 30, 653 A.2d 12, 15 (1994). Pennsylvania does not recognize negligent breach of contract as a cause of action. *Harbor Hosp. Svcs., Inc. v. Gem Laundry Svcs., L.L.C.*, 2001 WL 1808556, *4 (Pa. Com. Pl. July 18, 2001).

1. Owner's Demurrer to Plaintiff's Claim for Negligence is Sustained for Lack of a Legal Duty of Care.

Count V of plaintiff's Amended Complaint alleges that Owner contracted with the structural engineer (Am. Compl., ¶ 62); that Owner repeatedly changed the fabrication drawings (*Id.* at ¶ 65); that Owner's contract with DHJV, and all subcontracts, provided that time was of the essence (*Id.* at ¶ 90); that Owner owed plaintiff a "duty of care" in managing and coordinating all the contractors, ensuring that DHJV reviewed the fabrication drawings and answered any questions in a timely manner, and ensuring that all contractors did not interfere with plaintiff's work (*Id.* at ¶ 118); and that Owner's failure to do so delayed plaintiff's work (*Id.* at ¶ 120), breaching the duty of care (*Id.* at ¶¶ 121, 122). Plaintiff has not pled sufficient facts to show that Owner had an affirmative legal duty towards plaintiff to manage the work of contractors and subcontractors. Accordingly, Owner's demurrer to Count V is sustained.

2. RCD's Demurrer to Plaintiff's Claims for Negligence is Sustained for Lack of a Legal Duty of Care.

Count IV of plaintiff's Amended Complaint alleges that RCD failed to work in a manner enabling plaintiff to meet its production dates (Am. Compl., ¶ 51); that RCD's actual work diverged markedly from the contracted-for production schedule, causing plaintiff to begin work three and a half months later than it had anticipated and causing further delays (*Id.* at ¶¶ 52-54); that there is presently a dispute between DHJV and RCD as to which party was responsible for the delays in completing the concrete work (*Id.* at ¶¶ 55-59); and that RCD owed plaintiff a duty of care to diligently and continuously prosecute its work so as not to delay plaintiff (*Id.* at ¶ 101; Subcontract between DHJV and RCD, § 9.2). The duty of care cited by plaintiff derives directly from the DHJV-RCD subcontract (*Id.*), and the claim is therefore barred by the gist of the action doctrine (*see supra* Section III(A)). Accordingly, RCD's demurrer to Count IV is sustained.

IV. OWNER'S DEMURRER TO PLAINTIFF'S CLAIM THAT OWNER SUSTAINS AGENCY LIABILITY FOR PLAINTIFF'S DAMAGES IS OVERRULED.

Count VII of the Amended Complaint purports to state a claim for Owner's liability due to theories of agency. A principal is liable for the contracts made by its agent within the scope of the agent's authority. *Toll v. Pioneer Sample Book Co.*, 373 Pa. 127, 130, 94 A.2d 764, 765 (1953). Where the principal is disclosed to the party contracting with the agent, the disclosed principal is not a grantor in the contract unless he appears upon the instrument as the principal. *Id.* at 130-31, *citing* Restatement of Agency § 151 (1933).

Plaintiff's Amended Complaint alleges that Owner and DHJV entered into an agency relationship and agreed that DHJV would act on Owner's behalf (Am. Compl., ¶ 136, 138, Agreement between Owner and DHJV, §12.10); that in its capacity as construction manager, DHJV contracted with Havens to fabricate and erect structural steel for the stadium (Am. Compl., ¶ 14); that Owner and DHJV knew of and approved the subcontract Havens then made with plaintiff (*Id.* at ¶ 19); and that the DHJV-Havens agreement provided that Owner and DHJV agreed that DHJV was Owner's agent and Owner pledged its credit and "agree[d] to be liable in the first instance to the materialmen, suppliers, laborers, subcontractors and trade contractors . . ." (*Id.* at ¶ 137, Subcontract between DHJV and Havens, Supplementary Conditions, § 4.2(c) (emphasis added)). Plaintiff's agency claim has been pled sufficiently to withstand this instant demurrer. Accordingly, Owner's demurrer Count VII is overruled.

V. DEFENDANTS' DEMURRERS TO PLAINTIFF'S CLAIMS FOR UNJUST ENRICHMENT ARE OVERRULED.

Owner and DHJV each filed demurrers as to Count VIII, plaintiff's claim for unjust enrichment. Unjust enrichment is shown by "(1) benefits conferred on the defendant by the plaintiff; (2) appreciation of such benefits by the defendant; and (3) acceptance and retention of

such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment for its value." *Twin County Constr. Co. v. Signet Bank*, 1995 U.S. Dist. LEXIS 18910 *13-14 (E.D. Pa. Dec. 20, 1995), *quoting Wolf v. Wolf*, 356 Pa. Super. 365, 374, 514 A.2d 901, 905-06 (1986), *rev'd on other grounds, Van Buskirk v. Van Buskirk*, 527 Pa. 219, 590 A.2d 4 (1991). "A third party is not *unjustly* enriched when it receives a benefit from a contract between two other parties where the party benefited has not requested the benefit or misled the parties." *D.A. Hill Co. v. Clevetrust Realty Investors*, 524 Pa. 425, 434, 573 A.2d 1005, 1010 (1990) (emphasis in the original).

Only where a plaintiff has a quasi-contract, and not an explicit, written contract, may he recover under the theory of unjust enrichment. *Birchwood Lakes Cmty. Ass'n v. Comis*, 296 Pa. Super. 77, 85-86, 442 A.2d 304, 308 (1982). Once a plaintiff attempts to prove a cause of action under contract theory, he is barred from attempting to prove his case in quasi-contract, unless his complaint sets forth a cause of action in quasi-contract. *Id.*; *Zawada v. Pa. Sys. Bd. Of Adjustment*, 392 Pa. 207, 140 A.2d 335 (1958).

A. Owner's Demurrer to Plaintiff's Claims for Unjust Enrichment is Overruled.

Count VIII of plaintiff's Amended Complaint purports to state a claim against Owner for unjust enrichment by retaining the value of plaintiff's efforts on Owner's behalf. The Amended Complaint alleges that Owner had an express written contract with DHJV which created DHJV an agent of Owner (Am. Compl., ¶¶ 13, 136, 138); that DHJV then entered into express written contracts with subcontractors, including Havens (*Id.* at ¶¶ 14, 39, 50, 63); that occasionally DHJV directly authorized plaintiff to do structural work (*Id.* at ¶¶ 41, 63, 65); that plaintiff fulfilled its contractual obligations for the stadium project but has not been fully compensated (*Id.* at ¶¶ 141-144); and that no entity has been paid for plaintiff's work on the

stadium (*Id.* at ¶ 145). Based on the facts alleged, plaintiff's claim for unjust enrichment against Owner has been pled sufficiently to withstand this demurrer. Accordingly, Owner's demurrer to Count VIII is overruled.

B. DHJV's Demurrer to Plaintiff's Claim for Unjust Enrichment is Overruled.

Count VIII of plaintiff's Amended Complaint purports to state a claim against DHJV for unjust enrichment by retaining the value of plaintiff's efforts on DHJV's behalf. The Amended Complaint alleges that plaintiff is owed $401,255 under the erection subcontract (Am. Compl., ¶ 30) and $179,531 under the fabrication subcontract (*Id.* at ¶ 34); that plaintiff completed extra work as directed by Havens and authorized by DHJV (*Id.* at ¶ 35-40); that at times DHJV directly authorized plaintiff to do extra work (*Id.* at ¶¶ 41, 63, 65); that plaintiff is owed $2,530,553 for extra work authorized by Havens or DHJV for which formal orders were not issued (*Id.* at ¶¶ 42, 46); that DHJV has denied the delay claim submitted by plaintiff (*Id.* at ¶¶ 72); that Havens failed to pay plaintiff because it has filed for bankruptcy (*Id.* at ¶ 73, 74); and that plaintiff fulfilled its contractual obligations for the stadium project but has not been fully compensated (*Id.* at ¶¶ 141-144) and no other entity has been paid for plaintiff's work on the stadium (*Id.* at 145). Based on the facts alleged, plaintiff's claim for unjust enrichment against DHJV has been pled sufficiently to withstand this demurrer. Accordingly, DHJV's demurrer to Count VIII is overruled.

CONCLUSION

For these reasons, the court sustains, in part, and overrules, in part, defendants' Preliminary Objections as follows:

1. The Preliminary Objection of DHJV as to plaintiff's claim as a third party beneficiary is **Sustained** and Count II is dismissed.

2. The Preliminary Objection of RCD as to plaintiff's claim as a third party beneficiary is **Sustained** and Count III is dismissed.

3. The Preliminary Objections of DHJV and RCD as to plaintiff's claim for negligence is **Sustained** and Count IV is dismissed.

4. The Preliminary Objections of Owner and DHJV as to plaintiff's claim for negligence is **Sustained** and Count V is dismissed.

5. The remaining Preliminary Objections are **Overruled.**

The court will enter an Order consistent with this Opinion.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.