

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

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BANACOL MARKETING CORPORATION	:	
	:	November Term, 2004
Plaintiff,	:	No. 01257
v.	:	
	:	Commerce Program
PENN WAREHOUSING & DISTRIBUTION. INC., et al.	:	
	:	Control No. 030398
Defendants	:	

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**ORDER and MEMORANDUM**

**AND NOW**, this 25<sup>th</sup> day of May 2005, upon consideration of the Preliminary Objections of Defendant Philadelphia Regional Port Authority (“PRPA”), all responses in opposition, the respective memoranda, all matters of record and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that PRPA’s Preliminary Objections are **SUSTAINED** and all claims against it are **DISMISSED**.

**BY THE COURT:**

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**C. DARNELL JONES, J.**

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**MEMORANDUM OPINION**

***C. DARNELL JONES, J.***

Currently before the court are the Preliminary Objections of Defendant Philadelphia Regional Port Authority (“PRPA”). For the reasons fully set forth below, PRPA’s Preliminary Objections are **sustained**.

**BACKGROUND**

Defendant PRPA is the owner of Pier 82 South, which it leases to Defendant Penn Warehousing & Distribution, Inc. (“PWD). Horizon Stevedoring, Inc. (“Horizon”) provides stevedoring and warehousing services at Pier 82 pursuant to a services agreement with PWD. In May 2001, Plaintiff BMC Marketing Corp. (“BMC”) and Horizon entered into a multi-year terminal services agreement pursuant to which Horizon performed stevedoring and warehousing services for BMC (the “TSA”).<sup>1</sup> Before its expiration, BMC terminated the TSA. As a result, Horizon commenced an action against BMC in AAA arbitration, seeking

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<sup>1</sup> Prior to the execution of the TSA, BMC had an agreement with Horizon’s predecessor, Horizon Stevedoring Company since approximately 1995.

liquidated damages or a termination fee in the approximate amount of \$1,000,000.00 for breach of the TSA.

In November 2004, BMC brought the instant action against PRPA and PWD for breach of contract, dangerous condition of real property and misrepresentation (the “Complaint”). However, despite its creative drafting, BMC’s claims against PRPA are nothing more than a claim for indemnification against a party with whom it has no direct relationship. BMC’s claim centers around the August 30, 2000 report of Urban Engineers, Inc., which was hired by PRPA to inspect Pier 82 (the “UE Report”). The UE Report, which is attached to BMC’s Complaint as Exhibit 4, evaluated the structural integrity and condition of the pier and recommended certain repairs. In its Complaint, BMC asserts that the UE Report demonstrates that Pier 82 was in a “dangerously deteriorated condition” and was structurally unsound. BMC contends that, had it been aware of the UE Report, it would not have entered into the TSA with Horizon. Compl. ¶¶ 27-29. From this claim, BMC leaps to the illogical conclusion that PRPA must provide indemnity for any amounts for which it is found liable at the AAA arbitration.

### **DISCUSSION**

PRPA filed preliminary objections to BMC’s Complaint on several grounds. First, PRPA argues that the Court of Common Pleas lacks jurisdiction over this matter because PRPA is a “Commonwealth Agency,” thus rendering it within the exclusive jurisdiction of the Commonwealth Court. Although PRPA’s argument is compelling, this court defers to the expertise of the Commonwealth Court concerning its own jurisdiction, which has recently held that PRPA is not a Commonwealth Agency. Nat’l Const. Svs., Inc. v. Phila. Reg. Port.

Auth., 2001 Pa. Commw. LEXIS 868 at \*3, 789 A.2d 306 at 307 (2001). Accordingly, PRPA's preliminary objection as to lack of jurisdiction is overruled.

PRPA also demurred to each of the counts against it. Counts I and II of the Complaint purport to state claims against PRPA for breach of contract. To sustain a claim for breach of contract, the plaintiff must demonstrate: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 1999 Pa. Super. 14, 723 A.2d 1053 (1999). In order to recover damages for breach of contract, the plaintiff must also show a causal connection between the breach and the claimed loss. Exton Drive-In, Inc. v. Home Indemnity Co., 436 Pa. 480, 261 A.2d 219 (1969); Logan v. Mirror Printing Co. of Altoona, Pa., 410 Pa. Super. 446, 600 A.2d 225 (1991).

BMC's purported claims against PRPA fail on many levels. First, BMC has failed to establish the breach of a duty owed to it by PRPA. BMC has not demonstrated that PRPA had any express or implied obligation to disclose the UE Report to BMC, as there is no privity between them. Nor has there been any allegation that PRPA concealed the report from Horizon or PWD, the parties to whom it would arguably owe a duty to disclose. BMC can not be deemed a third-party beneficiary of the lease agreement between PRPA and PWD; its purported connection is far too attenuated.<sup>2</sup>

BMC has also failed to plead any actual damages.. As pled, BMC's claimed damages are contingent on whether BMC was found to be liable to Horizon at the AAA arbitration,

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<sup>2</sup> PRPA has a contract with PWD, which has an agreement with Horizon, a contractor of PWD. BMC's contract is with Horizon. Thus, as counsel for PRPA points out, BMC is attempting to create liability on the basis of a "mythical fourth party beneficiary theory" or "third party beneficiary once-removed." Such a claim is both illogical and unsupported by Pennsylvania law. BMC's unsupported allegation that Horizon and PWD are "alter egos" is insufficient to resuscitate BMC's weak position.

which had not yet concluded at the time the Complaint was filed. BMC's *ad damnum* clauses to Counts I, II and III state, "...*if* BMC becomes liable for any liquidated damages or termination fee in the Arbitration, then PRPA should be found liable to BMC for the same amount..." Compl. at 8, 10 and 11 (emphasis added). Thus, as of the filing of the Complaint, BMC suffered no damages, rendering BMC's claims unripe for disposition,<sup>3</sup> as well as legally insufficient.

However, even assuming that the arbitration has concluded and that BMC was found liable to Horizon for breach of the TSA, its claims against PRPA can still not succeed because BMC has failed to demonstrate the necessary causal link between PRPA's alleged conduct and its injury. In the Complaint, BMC argues that, had it been aware of the UE Report, it would not have entered into the TSA with Horizon. However, even if true, this alleged concealment is not what caused BMC's injury. BMC's injury was caused by its premature termination of the TSA. In fact, BMC admits that "...if BMC had not already terminated the TSA, its discovery on August 20, 2004, of the information contained in the United Engineers Report would have justified its immediate termination or recession of the TSA..." Compl. at ¶ 28. Thus, BMC appears to take the position that, had it been aware of the UE Report, it would have possessed a valid defense for breaching the TSA, even though the report was admittedly not the reason it prematurely terminated the TSA in the first place. The causal link proffered by BMC, if it can be called that, does not support a cause of action

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<sup>3</sup> Before the right of indemnification arises, the indemnitor must in fact pay damages to a third party. Any action for indemnification before such payment, as in the present case, is premature." *See McClure v. Deerland Corp.*, 401 Pa. Super. 226, 585 A.2d 19 (1991).

for breach of contract, fraudulent inducement, “failure to disclosure a material fact” or any other cause of action for that matter.

Finally, Count III, which purports to state a claim for “dangerous condition of real property,” likewise fails. Count III is purports to invoke 42 Pa.C.S. § 8522 (b), which sets forth certain exceptions to sovereign immunity. The court finds that BMC has misapplied the application of § 8522 to the instant matter and that it has failed to state a valid claim in Count III upon which relief may be granted. The basis of Count III is not entirely clear, as BMC has not alleged that anyone has been injured on the premises due to the allegedly deteriorated condition of Pier 82. Accordingly, PRPA’s Preliminary Objection to Count III is sustained and Count III is dismissed as to PRPA.

### **CONCLUSION**

For the reasons fully set forth above, PRPA’s Preliminary Objections are sustained and all claims against it dismissed.

**BY THE COURT:**

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**C. DARNELL JONES, J.**