

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

POWELL STEEL CORPORATION,	:	DECEMBER TERM, 2007
	:	
Plaintiff,	:	NO. 01839
	:	
v.	:	COMMERCE PROGRAM
	:	
PKF-MARK III, INC.,	:	Control No. 09052403, 09092325
	:	
Defendant.	:	

ORDER

AND NOW, this 16th day of February, 2010, upon consideration of plaintiff's Motion for Summary Judgment on defendant PKF-Mark III, Inc.'s ("PKF") Counterclaim, and the response in opposition, and in accord with the Opinion issued simultaneously, it is **ORDERED** that plaintiff's Motion for Summary Judgment is **GRANTED** as to PKF's Counterclaim, and PKF's Counterclaim is **DISMISSED**.

It is further **ORDERED** that plaintiff's Motion in Limine, concerning PKF's evidence in support of its Counterclaim, is **DISMISSED as moot**.

BY THE COURT,

MARK I. BERNSTEIN, J.

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OPINION

In 2001, defendant PKF-Mark III, Inc. (“PKF”) entered into a construction contract with non-party Southeastern Pennsylvania Transportation Authority (“SEPTA”) for the reconstruction of a portion of the Market Street Elevated railway (the “Project”). PKF subsequently sub-contracted with plaintiff Powell Steel Corporation (“Powell”) to furnish and install all structural steel and metal decking for the Millbourne and 63rd Street stations and platforms (the “Powell Steel Work”).

In October, 2004, PKF sued SEPTA for breach of contract for failure to pay PKF approximately \$44 million (the “SEPTA Litigation”). Shortly thereafter, in December, 2004, SEPTA terminated its contract with PKF. One of the grounds SEPTA gave for terminating PKF’s contract was that the Powell Steel Work was defective. SEPTA filed a counterclaim against PKF in the SEPTA Litigation based on a number of Project delays and defective work, including the Powell Steel Work. SEPTA and PKF ultimately settled their claims against each other with SEPTA paying PKF \$10 Million.

While the SEPTA Litigation was still pending, Powell filed this action against PKF alleging PKF owed it money under the Subcontract. PKF filed a counterclaim against Powell for

breach of the Subcontract, breach of a contractual duty to defend PKF in the SEPTA Litigation, breach of a contractual duty to indemnify PKF in the SEPTA Litigation, and a declaratory judgment regarding contractual indemnification in future actions brought by other subcontractors. Powell moved for summary judgment on all of PKF's counterclaims, which motion is presently before the court.

In support of its Counterclaim in this action, PKF proffers the expert report of Scott Gray. Mr. Gray opines that PKF suffered a total of approximately \$21 million in relevant damages due to its termination from the Project. Of this amount, SEPTA paid \$10 million. Of the remaining approximately \$11 million, he opines that some, but not all, is attributable to Powell's acts or omissions. Mr. Gray notes that SEPTA terminated PKF for seven reasons, so he calculates the total value of all the subcontract work related to those seven issues, which is roughly \$23 million. Mr. Gray then determines that Powell's Subcontract work was 22.9% of the total subcontract work related to the termination issues. Using this allegedly "reasonable basis for distribution that equitably reflects the contribution of [Powell]" to PKF's termination losses, Gray opines that Powell should pay 22.9% of the remaining approximately \$11 million in damages, or \$2,543,378.¹

"In order to recover for damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss."² All of PKF's claims against Powell require a finding that Powell breached the contract and that the breach caused PKF to suffer loss. PKF proffers evidence that Powell breached the Subcontract by not performing its Steel Work

¹ Expert Report of Scott Gray, pp. 33-34.

² Logan v. Mirror Printing Co., 410 Pa. Super. 446, 450, 600 A.2d 225, 226 (1991). *See also* Pugh v. Holmes, 486 Pa. 272, 297, 405 A.2d 897, 910 (1979) ("Mere uncertainty as to the amount of damages will not bar recovery where it is clear that damages were the certain result of the defendant's conduct.")

properly. PKF also proffers evidence of the damages it suffered in connection with the Project and its termination, *i.e.*, in Mr. Gray's report. However, none of PKF's evidence, including Mr. Gray's report, demonstrates that the \$2,543,378 in damages now claimed by PKF was directly caused by Powell's allegedly defective Steel Work.

Mr. Gray's equitable allocation method of calculating damages may be, as he claims, a methodology properly employed in the construction industry for allocating overhead costs when preparing bids.³ His analysis does not, standing alone, speak to the issue of causation of damages, which is a necessary element of PKF's legal claims that must be proved at trial.⁴

CONCLUSION

For all the foregoing reasons, Powell's Motion for Summary Judgment is granted and PKF's Counterclaim against Powell is dismissed.

BY THE COURT,

MARK I. BERNSTEIN, J.

³ See Affidavit of Scott Gray in Support of PKF's Response to Powell's Motion in Limine, p. 3.

⁴ See *Cornell v. PKF*, Phila. C.C.P., September Term, 2007, No. 00721 (June 30, 2009, New, J.) (dismissing similar counterclaim for similar reasons).