IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

ACADEMY ELECTRICAL CONTRACTORS, INC.,	:	JULY TERM, 2001
Plaintiff,	:	No.: 3252
v.	:	COMMERCE PROGRAM
NASON AND CULLEN GROUP, INC., NASON AND CULLEN, INC., CROZER KEYSTONE HEALTH SYSTEMS, CROZER CHESTER MEDICAL CENTER, DREXEL UNIVERSITY and LIPPINCOTT WILLIAMS & WILKINS, INC.,	:	Control No.: 090054
Defendants.	:	

O R D E R

AND NOW, this 14TH day of January 2004, upon consideration of the Motion for Summary Judgment filed by Nason and Cullen Group, Inc., Nason and Cullen, Inc., Crozer Keystone Health Systems, Crozer Chester Medical Center, Drexel University and Lippincott Williams & Wilkins, Inc. (collectively the "Defendants"), the response in opposition filed by Academy Electrical Contractors, Inc. ("Academy"), the respective memoranda, all matters of record and in accord with the contemporaneous Opinion in support of this Order, it is **ORDERED** that:

(a) The Defendants' Motion for Summary Judgment is **GRANTED,** in part and **DENIED,** in part;

(b) Counts IV and V of the Amended Complaint are **DISMISSED;**

(c) All claims in Count I of Academy's Amended Complaint relating to the Drexel University project are **DISMSSED**. The remaining claims in Count I regarding the Crozer Chester Medical Center and Lippincott Williams & Wilkins, Inc. projects shall remain;

(d) Drexel University and Nason and Cullen Group, Inc. are **DISMISSED** from this action.

(e) This case will proceed to trial on Counts I (except as modified above), II and III of Academy's Amended Complaint and on the counterclaim asserted by Nason and Cullen, Inc.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ……..January 14, 2004

Before the court is the Motion for Summary Judgment of Nason and Cullen Group, Inc., Nason and Cullen, Inc., Crozer Keystone Health Systems, Crozer Chester Medical Center, Drexel University and Lippincott Williams & Wilkins, Inc. (collectively the "Defendants"). For the reasons discussed, the Motion is **granted,** in part and **denied,** in part.

I. BACKGROUND

In 1998 and 1999, Nason and Cullen, Inc. ("NCI") entered into separate construction contracts with each of the following entities: Drexel University ("Drexel"), Crozer-Chester Medical Center (Crozer Chester) and Lippincott Williams & Wilson, Inc. ("Lippincott").[1] For each project, NCI entered into a separate subcontract (the "Subcontracts") with Academy Electrical Contractors, Inc. ("Academy"), under which Academy agreed to perform work for NCI.[2] Academy claims that it has not been paid for certain work it performed under and outside of the Subcontracts.

In July of 2002, Academy commenced suit against NCI, Drexel, Crozer Chester and Lippincott. In addition to suing NCI and the three entities, Academy sued Nason and Cullen Group, Inc. ("NCG") and Crozer Keystone Health Systems. After Academy filed an amended complaint on September 20, 2002, the Defendants filed answers denying any liability. Upon the conclusion of extensive discovery, the Defendants filed the present Motion for Summary Judgment seeking a full dismissal of Academy's suit.

II. SUMMARY JUDGMENT

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a *prima facie* cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). To succeed, a defendant moving for summary judgment must make a showing that the plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa.

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[1] See Defendants' Motion for Summary Judgment, Exhibits "D", "G" and "K".

[2] See Defendants' Motion for Summary Judgment, Exhibits "E", "H" and "L".

Super. Ct. 2001).

To avoid summary judgment, the plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the plaintiff. McCarthy, 724 A.2d at 940. In addressing the issue, this court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The plaintiff must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

III. DISCUSSION

Academy contends that NCI breached the Subcontracts by failing to pay for certain work Academy performed on all three of projects. In the alternative, Academy asserts unjust enrichment claims against the Defendants arguing that it would be inequitable for the Defendants to retain the benefits Academy conferred without paying compensation. In addition to these claims, Academy asserts that the NCG should be held liable for NCI's debts under a piercing the corporate veil theory.

In response, the Defendants assert the following arguments:

1. If Academy is owed money, it waived any right to payment by failing to provide timely and proper notice pursuant the notice provisions of the Subcontracts.

2. Academy accepted full and final payment on the Drexel project and in return Academy provided a complete release of all claims.

3. Academy is not entitled to delay damages pursuant to the terms of the Subcontracts.

4. Academy has not met its burden to justify using the Total Cost Method of damage calculation.

5. Certain of Academy's claims were settled through accord and satisfaction.

6. Academy failed to state a claim under Pennsylvania's Prompt Payment Act.

7. Academy has failed to meet its burden to pierce the corporate veil of NCG.

The court finds that Defendants' arguments concerning notice, delay damages, the total cost method, accord and satisfaction and the Prompt Payment Act require the resolution of material facts which are in dispute. As to those issues, summary judgment is not proper.

However, the court finds in favor of the Defendants on the claims relating to the Drexel project and Academy's piercing the corporate veil Count. Therefore, for the reasons discussed, the court grants Summary Judgment to the Defendants on Counts IV and V and said Counts are dismissed. The court also grants partial Summary Judgment in favor of the Defendants on Count I.[3]

A. <u>Academy Released All Claims Concerning The Drexel Project.</u>

The court finds that Academy is barred from asserting any claims it may have based upon the Drexel project by virtue of its execution of a complete release in exchange for full and final payment. Academy does not dispute that it executed a "Release of Lien" (the "Release") in exchange for a payment of $95,757.40. Academy also does not dispute that the language of the Release covers the claims relating to Drexel that are raised in this proceeding. Instead, Academy argues that it executed the Release under economic duress caused by NCI and, as a result, the

[3] In Count I, Academy asserts breaches of all three Subcontracts. The court dismisses only the portion of Count I pertaining to the Drexel project. The remaining breach of contract claims concerning the Crozer Chester and Lippincott projects remain extant.

Release is unenforceable.

A release is valid unless it was obtained through fraud, duress or mutual mistake. Strickland v. University of Scranton, 700 A.2d 979, 986 (Pa.Super. 1997). "Duress has been defined as 'that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness.'". Id. at 986 (quoting Carrier v. William Penn Broadcasting Co., 426 Pa. 427, 431, 233 A.2d 519, 521 (1967)). However, "there can be no duress where the contracting party is free to consult with counsel." Id.

Economic duress, also known as business compulsion, is a variant of the duress theory recognized by the Pennsylvania courts. See National Auto Brokers Corporation v. Aleeda Dev. Corp., 243 Pa.Super. 101, 364 A.2d 470 (1976). The important elements of economic duress are (1) there exists such pressure of circumstances which compels the injured party to involuntarily or against his will execute an agreement which results in economic loss, and (2) the injured party does not have an immediate legal remedy. Litten v. Jonathan Logan, Inc., 220 Pa.Super, 274, 282, 286 A.2d 913, 917 (1972). [4] Of course, another essential element is that the party against whom the defense of duress is asserted must have placed the contracting party in the position which eliminated the party's exercise of free will. See National Auto, 243 Pa.Super at 110-113,

[4] Although the Superior Court's decision in Litten is oft cited for its discussion of economic duress, it does not address the issue of counsel. The Court believes, after reviewing the Pennsylvania Supreme Court's decision in Degenhardt v. Dillon Company, that the opportunity to consult counsel is also a bar to claims of economic duress. 543 Pa. 146, 155-157, 669 A.2d 946, 951-952 (1996). The Court in Degenhardt designates this principle as the "Carrier principle", referring to the case of Carrier v. William Penn Broadcasting Co., 426 Pa. 427, 233 A.2d 519 (1967)). Id. The Carrier principle provides that when a party has an *opportunity* to consult legal counsel no claim of duress can be sustained. Id.

Neither party addresses this issue in their pleadings; however, it would appear to the Court from a review of the record that Academy had an opportunity to consult with counsel before signing the Release. Nevertheless, the Court finds that even assuming Academy did not have the opportunity to consult counsel; Academy has failed to adduce sufficient evidence of economic duress.

364 A.2d 474-475.

With this standard in mind, the court turns to Academy's claim of economic duress. A review of the record reveals two instances where Academy mentions its economic duress claim. First, Academy submits an affidavit from William J. Galbraith, Jr., the President and owner of Academy. In a single paragraph, Mr. Galbraith states:

> With respect to Academy's execution of an alleged final waiver of liens to obtain "final" payment on the Crozer (sic) Project, it must be noted that Academy did so only under circumstances constituting significant distress and business compulsion. At that time, Academy's line of credit for its business was fully extended to $500,000.00 and additional credit could not be obtained. This financial problem was directly caused by NCI's slow pay to Academy on the Crozer, Lippincott and Drexel Projects. If Academy did not obtain payment from NCI on the Drexel Project in or around January of 2000, it would not have been able to pay its employees and continue to operate as a business.

Academy's Brief in Opposition to the Defendant's Motion for Summary Judgment, Exhibit "A", ¶72, Affidavit of William J. Galbraith. Although not cited by Academy in its brief, Dennis C. Link, Academy's expert, opines in his report the following:

> Academy executed a release of liens on this project although damages existed that were not resolved at the time of the release. All three projects were completed in the period from May 1999 through December 31, 2000. N&C's failure to manage payments for the base contracts and the voluminous extras on these three projects, *although perhaps not orchestrated to create financial failure and the inability of Academy to pursue their damages*, understandably created a significant financial hardship on Academy. At the time the release was signed in February 2000, Academy's bank line of credit of $500,000 was completely consumed. This hardship cannot be typically remedied short term by the entity, and *could* have lead to Academy's inability to meet payroll, payroll taxes and union benefit payments, as well as bid other projects that might be expected to start during this period or shortly after. Academy and many subcontractors of Academy's capitalization must do whatever is necessary to generate the cash flow needed to prevent serious damage to their reputation with

> owners and general contractors, continue to support other projects, obtain additional work and even remain in existence.

Academy's Memorandum of Law in Response to the Defendants' Motion for Summary Judgment, Exhibit "E", Expert Report of Dennis C. Link, (emphasis added).

The court finds that Academy's affidavit and expert report are insufficient to sustain Academy's requisite burden to show economic duress in defending against summary judgment.

> Under Rule 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. Correspondingly, the non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party.

Rauch v. Mike-Mayer, 783 A.2d 815, 824 (Pa.Super. 2001). The record before the court is devoid of evidence that would support a claim of economic duress.

Initially, the court notes that Academy fails to present evidence of: (1) its alleged serious financial condition at the relevant times, (2) its debt under the $500,000 line of credit and the reasons therefore, and (3) its worsening financial condition because of NCI's actions. Academy proffers no balance sheets, financial statements, financial reports or even a rudimentary analysis of Academy's cash flow during this crucial time period.[5] Even more critical, no attempt is made by Academy to present evidence showing the alleged causal link between NCI's actions and Academy's dire financial conditions, thus demonstrating grounds upon which Academy was allegedly deprived of its free will.

[5] While Mr. Link refers to numerous documents he reviewed in preparation of his opinion, no reference is made to a review of any financial documents regarding Academy's financial health. Academy clearly had enough time to develop and gather evidence regarding this issue. The Release was attached to the answers of Drexel and NCI, both filed in or around October of 2002. Academy was on notice of this defense and had over a year of discovery to buttress its economic duress argument.

The assertions made by Messrs. Galbraith and Link are nothing more than conclusory allegations asserted without any evidentiary support. Moreover, the report of Academy's own expert does not support Mr. Galbraith's conclusions. While Mr. Galbraith states with certainty that Academy would have not made its payroll and other expenses unless it executed the Release, Mr. Link only opines that Academy's financial hardship at that time *could* have led to such consequences. Therefore, the court finds in favor of the Defendants.[6]

B. Academy Fails To Sustain Its Burden In Support of Its Piercing the Corporate Veil Claim.

Academy argues in Count V that the corporate veil of NCG should be pierced so it can be held liable for NCI's debts. The Defendants assert that NCG merged with NCI on or about March 31, 2002 and all of NCG's assets and liabilities were transferred to NCI as a result. Defendants assert, and this court agrees that Academy has not proffered or discovered any evidence to support its claim to pierce NCG's corporate veil. Although Academy makes the perfunctory form objections to the Defendants' assertions, it appears that Academy is satisfied with the Defendants' proffer because it makes no argument in its brief and presents no evidence

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[6] Even if the court were presented with evidence of economic duress, the actions of Academy subsequent to signing the Release clearly support ratification. "Ratification results if a party who executed a contract under duress accepts the benefits flowing from it, or remains silent, or acquiesces in the contract for any considerable length of time after the party has the opportunity to annul or avoid the contract." National Auto, 243 Pa.Super. at 476, 364 A.2d at 476.

The Release was executed by Academy on December 3, 1999. It was not until July, 2002, over two years later, that Academy chose to bring suit against NCI and the Defendants for claims relating to the Drexel project. Moreover, the Court notes that the amended complaint filed by Academy did not seek to rescind, void or otherwise challenge the Release; and, in fact, the Court can find no mention of the Release at all in the amended complaint. Not until Drexel and NCI cited to the document in their respective answers did the Release come to light at all.

to support its claim.[7] Therefore, the court finds in favor of the Defendants and against Academy on Count V.

IV. CONCLUSION

For the reasons set forth, the court grants Summary Judgment in favor of the Defendants on Counts IV and V and said Counts are dismissed. The court grants partial Summary Judgment in favor of the Defendants regarding the Drexel project in Count I. The court dismisses Drexel and NCG as defendants in this action. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[7] The Court previously requested that NCI provide Academy with documentation regarding the merger of NCI and NCG. NCI states that said documentation was provided and Academy does not refute this assertion.