IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

MIDDLETOWN CARPENTRY, INC.	: JUNE TERM, 2001
Plaintiff,	: No. 2698
v.	: Commerce Program
C. ARENA & CO., INC.	:
Defendant.	:

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OPINION

Albert W. Sheppard, Jr., J. …….. November 18, 2003

The court conducted a non-jury trial on June 5 and 6, 2003.[1] Based on the facts and conclusions of law set forth here, the court finds in favor of the defendant on the plaintiff's causes of action, and finds in favor of the plaintiff on the defendant's counterclaim causes of action.

Findings of Fact

1. Harry Arena, Charles Arena (known as "Chip") and Edward Arena (known as "Jody") are brothers.[2] Tr. II[3], p. 60.

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[1] The plaintiff and the defendant filed Proposed Findings of Fact and Conclusions of Law, on August 28, 2003, and September 29, 2003, respectively.

[2] This Opinion refers to these individuals by their first and last names to avoid confusion.

[3] In this Opinion, the citation "Tr. I" refers to the notes of testimony of Thursday, June 5, 2003, and the citation "Tr. II" refers to the notes of testimony of Friday, June 6, 2003.

2. Plaintiff Middletown Carpentry, Inc. (“Middletown”) is a construction management firm created in 1990 by its sole owner, Harry Arena. Tr. I, pp. 26-27.

3. Defendant C. Arena & Co., Inc. (“Arena”) is a construction management company owned by Chip Arena. Tr. I, p. 28.

4. Middletown provided union labor for Arena projects. Tr. I, pp. 26, 32.

5. Harry Arena had been an eight percent shareholder of Arena and also worked for Arena. Tr. I, pp. 25, 27; Tr. II, pp. 10-11. However, in the summer of 1998, Harry Arena voluntarily left Arena and worked exclusively for Middletown. Tr. I, p. 27.

6. Jody Arena also previously worked at Arena and resigned. Tr. II, p. 61. In October 1998, he began working as a project manager for Middletown. Tr. II, pp. 60, 62.

7. In early 1998, Arena began preconstruction work on a project for the University of the Arts at the Terra Building, located at 211 South Broad Street, Philadelphia (the “Project”). Tr. I, pp. 29-31.

8. The goal of the Project was to gut and renovate the seventeen-story building at 211 South Broad Street, to perform an “interior fit-out” of the sixteen floors above the retail floor, to install mechanical and electrical infrastructure, and to replace the façade on the first to the fifth floors. Tr. I, pp. 30-31. Each floor of the building measured approximately 12,500 square feet. Tr. I, p. 31. The designs for each of the floors differed. Tr. I, pp. 40-41.

The Agreement Between Middletown and Arena

9. Chip Arena and Harry Arena negotiated and subsequently executed a contract dated August 21, 1998 (the "Agreement"). Tr. I, p. 34; Pltf's Trial Ex. 4.

10. Pursuant to the Agreement, Middletown would provide construction management services to Arena for the Project, for which Arena would pay Middletown according to agreed-upon hourly billing rates. Pltf's Trial Ex. 4; Tr. I, pp. 35-37.

11. The Agreement provided that Middletown would bill Arena on a monthly basis. Pltf's Trial Ex. 4; Tr. I, pp. 42-43.

12. At the time that Middletown and Arena entered into the Agreement, the Project was still being designed. Tr. I, pp. 41-42; Tr. II, pp. 50-51. In fact, even after the construction commenced, there were many major design changes to the Project. Tr. I, pp. 41-42.

13. The University of the Arts was not a party to the Agreement between Middletown and Arena. Pltf's Trial Ex. 4.

14. In fact, the Agreement provided that the "Service Provider [Middletown] may not work for, or contract with, directly or indirectly, the Owner [the University of the Arts] or Owner's agents." Pltf's Trial Ex. 4, p. 3.

15. At the time Harry Arena negotiated the Agreement, he was aware that Arena and the University of the Arts were negotiating a contract with respect to the Project. Tr. II, p. 15.

16. Harry Arena prepared the original draft of the Agreement, and Chip Arena made changes to it. Tr. II, pp. 14-15, 114. Neither Middletown nor Arena were

represented by counsel in the negotiation, drafting or execution of the Agreement. Tr. II, pp. 113-114.

The Prime Contract Between Arena and the University of the Arts

17. In November 1998, Arena and the University of the Arts executed a contract, retroactively effective July 1, 1998, which generally provided that Arena would provide contractor services for the Project, for which the University of the Arts would pay Arena (the "Prime Contract"). Tr. I, p. 125; Pltf's Trial Ex. 1.

18. According to the Prime Contract, Arena would be "compensated for the direct cost of its employees assigned to the Project at the rate of $120 per hour salary for Principals and at two (2.0) times the Direct Personnel Expense (salary and normal employee fringe) for all other permanent employees." Pltf's Trial Ex. 1, §§ 5.1.1, 6.1.2.

19. The Prime Contract further stated that Arena "will be paid a Construction Manager's Fee of two (2.0) percent of the value of all subcontractor agreements related to the Project which it executes in its own name . . . and the value of all other non-salary expenses that [Arena] incurred for the Project." Pltf's Trial Ex. 1, §§ 5.1.1, 6.1.2.

20. Middletown was not a party to the Prime Contract, but Harry Arena had access to a draft of it during its negotiation and received a copy of the Prime Contract in early 1999. Tr. I, p. 50; Tr. II, p. 23.

Construction and Billing for the Project

21. Construction on the Project began in late November of 1998. Tr. I, p. 31.

22. In December 1998, John Trojan, Chief Financial Officer of the University of the Arts, and Chip Arena orally agreed that Arena could bill the University of the Arts for Middletown employees' work as though it had been performed by Arena's employees, or two times the Direct Personnel Expense. Tr. I, pp. 123-128, Tr. II, p. 101.[4]

23. In addition, the University of the Arts prepared a separate contract for construction work to be done on the façade of the Terra Building. Tr. I, p. 146. That contract, however, was never executed by the University of the Arts. Tr. I, p. 146. Mr. Trojan testified that it was probably an oversight that he did not sign the façade contract. Tr. I, p. 146.

24. In March 1999, Joseph Garbarino, Director of Campus Operations for the University of the Arts, and Mr. Trojan contacted Jody Arena of Middletown to discuss the invoices which the University of the Arts had received from Chip Arena. Tr. I, p. 50; Tr. II, pp. 67-68.

25. Mr. Garbarino was concerned about how Middletown's services were being billed by Arena to the University of the Arts. Tr. I, p. 174. Specifically, Mr. Garbarino was concerned why the University of the Arts was being billed two times the Direct Personnel Expense for the work of Middletown employees, as though they were employees of Arena. Tr. I, p. 174. Mr. Garbarino did not know, at the time, that Mr. Trojan had agreed to allow Arena to bill Middletown labor this

[4] According to Section 9.3.2 of the Prime Contract, however, the contract "may be amended only by written instrument signed by both the Owner [University of the Arts] and Construction Manager [Arena]." Pltf's Trial Ex. 1, § 9.3.2.

way. Tr. I, p. 177.

26. In addition, Mr. Garbarino and Jan DeVries, the Director of the Office of the President of the University, did not know until sometime in the spring of 1999 that Middletown employees were not Arena employees. Tr. I, pp. 173-174, 189-190. In contrast, Mr. Trojan recognized that Middletown and Arena were two separate entities before the University of the Arts signed the Prime Contract with Arena. Tr. I, pp. 125-126.

27. In March 1999, Mr. Garbarino and Ms. DeVries met with Harry Arena and Jody Arena to discuss the billing of Middletown labor. Tr. I, p. 174; Tr. II., pp. 68-70.

28. The University of the Arts later determined (with the aid of Frances McElhill, Esquire) that pursuant to the Prime Contract, Arena could properly charge two times the Direct Personnel Expense for the work of Middletown employees. Tr. I, pp. 175, 181-182.

29. Harry Arena became concerned that Arena's bills to the University of the Arts would impact the Project as a whole because the University of the Arts might experience a financial shortfall. Tr. I, pp. 53-55.

Deceleration of Project Construction

30. In July 1999, the University of the Arts decided to slow the pace of the Project because of limited funding. Tr. I, p. 136.

31. Harry Arena received a letter from Mr. Trojan dated July 20, 1999, stating that the construction schedule for the Project would be decelerated to "allow the University ample time to properly settle into its new space and assure a source of

funding to complete the remaining phases." Pltf's Trial Ex. 9; Tr. I, pp. 58-59.

32. In the Spring of 2000, Mr. Trojan recommended to Peter Solmssen, the President of the University of the Arts at the time, that the Project be terminated for lack of funding. Tr. I, pp. 136-137, 144-145. Mr. Trojan recognized that expected gifts from donors did not "materialize," and at the same time, the costs of the Project were much higher than originally anticipated when the University of the Arts bought the Terra Building in 1997. Tr. I, pp. 137-138. According to Mr. Trojan, the costs of the Project were higher than originally anticipated because the University of the Arts had changed its specifications based on evolving ideas of what it wanted built, and because of site conditions. Tr. I, pp. 137-138.

33. By letter dated April 27, 2000, Arena advised Middletown that the University of the Arts was requesting cost information relating to future construction on the Project for the purpose of determining whether the construction was "financially feasible." Pltf's Trial Ex. 10.

34. On May 12, 2000, a meeting took place at the University of the Arts regarding the Project. Peter Solmssen, Virginia Red (the Provost), Jan DeVries, Joseph Garbarino, Harry Arena, Jody Arena and Steve Mooney (from Arena) attended the meeting. Tr. I, pp. 65, 75, 79.

35. Mr. Trojan had prepared a memorandum to Peter Solmssen, Virginia Red, Jan DeVries and Joseph Garbarino for the meeting, entitled "Funds Available to Complete Terra Phase I, II & Façade." Pltf's Trial Ex. 12; Tr. I, p. 66, 141-143. Harry Arena also received a copy of Mr. Trojan's memorandum. Tr. I, p. 64.

36. Mr. Trojan's memorandum reflects the costs paid by the University of the Arts for the Project through April 2000, the costs to complete the Project and the funding necessary to do so. Pltf's Trial Ex. 12. According to Mr. Trojan's analysis, the University of the Arts was experiencing a "cash shortfall" of $5,126,000 or, at least $2,598,000, based on a delayed construction schedule. Pltf's Trial Ex. 12; Tr. I, pp. 142-143.

37. In advance of the May 12, 2000 meeting, Harry Arena had prepared a memorandum, entitled "Arena & Co. Apparent Overbilling By Phase." Tr. I, pp. 71-72; Pltf's Trial Ex. 13.

38. Harry Arena's May 12, 2000 memorandum shows his calculations of the differential between rates charged by Middletown to Arena for Middletown labor, and rates charged by Arena to the University of the Arts for Middletown labor. Tr. I, pp. 73-74; Pltf's Trial Ex. 13. Harry Arena's memorandum shows the rates charged by Arena to the University of the Arts as twice the Direct Personnel Expense. Tr. I, pp. 73-74; Pltf's Trial Ex. 13.

39. Harry Arena's memorandum states that the amount of "apparent overbilling" by Arena was $906,816. Pltf's Trial Ex. 13.

40. In preparing the memorandum, Harry Arena had reviewed some, but not all, of the bills which Arena had sent to the University of the Arts. Tr. I, p. 75.

41. The memorandum states that its "accuracy should be verified." Pltf's Trial Ex. 13.

42. Harry Arena distributed copies of his memorandum to those people who attended the meeting on May 12, 2000. Tr. I., p. 78.

43. Harry Arena had not distributed the memorandum to anyone prior to the May 12, 2000 meeting. Tr. I, p. 78.

Termination of the Prime Contract

44. By letter dated May 19, 2000, the University of the Arts notified Arena that all work on the façade of the Terra Building was suspended indefinitely. Pltf's Trial Ex. 14.

45. By letter dated May 25, 2000, the University of the Arts instructed Arena to stop all work on the Project. Pltf's Trial Ex. 1, § 10.1.1; Ex. 16. The University of the Arts notified Arena that all work on floors eight and nine of the Terra Building was to cease. Pltf's Trial Ex. 16. The letter stated that "[t]he decision to cease activities is primarily the result of the timing of expected construction funds." Pltf's Trial Ex. 16. The letter further stated that work on the eighth and ninth floors might resume in the Spring of 2001, and the work on the façade might resume in the Fall of 2001. Pltf's Trial Ex. 16.

46. On May 26, 2000, Arena sent a letter to Harry Arena stating that the University of the Arts stopped all construction on the façade and floors eight and nine due to the timing of when the University of the Arts expected to receive funds for the Project. Tr. I, pp. 80-82; Pltf's Trial Ex. 17.

47. Mr. Trojan testified that the University of the Arts' decision to "shut down" the Project had nothing to do with Harry Arena's memorandum dated May 12, 2000 which was distributed at the meeting on that date, or any allegations that Arena overbilled the University of the Arts. Tr. I, pp. 145, 163, 168.

48. In July 2000, Miguel-Angel Corzo became the President of the University of the Arts. Tr. I, p. 167.

49. According to a memorandum from Mr. Trojan to President Corzo, the Project was stopped to wait for additional funding, and in addition, the University of the Arts did not want to become further involved in the disagreement between Arena and Middletown. Def's Trial Ex. D133, pp. 5-6; Tr. I, pp. 160-161.

50. In August 2000, the University of the Arts consulted an attorney outside the University and confirmed that it had not been improperly billed by Arena for Middletown labor. Tr. I, pp. 157-158.

51. Chip Arena discussed with Mr. Garbarino and Mr. Trojan the possibility of Arena completing the Project. Tr. II, pp. 97-98.

52. Meanwhile, attorneys representing Arena and the University of the Arts corresponded about and exchanged drafts of a Termination Agreement to terminate the Prime Contract. Pltf's Exs. 23 and 24; Tr. II, pp. 105-106.

53. Chip Arena never signed a Termination Agreement, however, because he wanted to resume work on the Project. Tr. II, pp. 106-107.

54. In January 2001, Chip Arena discovered that the University of the Arts had received funding for the Project. Tr. II, p. 97.

55. By letter dated January 29, 2001, Chip Arena proposed to the University of the Arts that Arena and Middletown complete the Project. Def's Trial Ex. D167. This proposal anticipated that Harry Arena and Jody Arena would each work twenty hours per week on the Project. Def's Trial Ex. D167; Tr. II, pp. 93-94. Chip Arena testified that he included his brothers in the proposal because

they “had done a very good job at managing the project . . . and they were my brothers.” Tr. II, p. 95.

56. By letter dated February 8, 2001, John Trojan notified Harry Arena and Chip Arena that the University of the Arts had terminated the Prime Contract with Arena effective May 25, 2000. Pltf’s Trial Ex. 27; Tr. II, p. 82.

57. In the Spring of 2001, the University of the Arts hired other construction companies and used Mr. Garbarino as the construction manager. Tr. I, pp. 167, 183, 200. A company named Associated finished construction on the eighth and ninth floors of the Terra Building. Tr. I, pp. 148-149. In January or February of 2002, a company named Masonry Preservation Group, finished the construction on the façade of the Terra Building. Tr. I, pp. 148-149.

58. According to Mr. Garbarino, the University of the Arts did not continue to use Arena or Middletown, or both, because it was not “cost advantageous” to do so, and the University had a limited budget despite the grants it had received for the Project. Tr. I, pp. 187-188.

59. Ms. DeVries also testified that the University of the Arts had a limited budget and could finish the Project less expensively by not rehiring Arena or Middletown. Tr. I, pp. 199-200.

60. In November 2001, Harry Arena closed Middletown and began working for another general contractor. Tr. I, pp. 112-113.

61. Overall, Middletown had billed over two million dollars for work it performed on the Project. Tr. II, p. 26.

Discussion

Middletown has brought the following causes of action against Arena: breach of contract (Count I), promissory estoppel (Count II) and breach of good faith and fair dealing (Count V).[5] By counterclaim, Arena filed causes of action of tortious interference with contractual relations and defamation against Middletown.[6]

Middletown's Claim of Breach of Contract

In Count I, Middletown maintains that Arena breached the Agreement by terminating it for convenience and that Arena owes Middletown damages for lost profit for work which was ultimately performed by other contractors, and damages for lost profit for work which was never performed. Pltf's Proposed Conclusions of Law, ¶ 16.

To support a claim for breach of contract, a plaintiff must show "1) the existence of a contract, including its essential terms, 2) a breach of a duty imposed by the contract, and 3) resultant damage." Pittsburgh Construction Co. v. Griffith, 2003 WL 22284672, *4 (Pa. Super. Oct. 6, 2003), citing CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). "Courts do not assume that a contract's language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed." Murphy v. Duquesne University of the Holy Ghost, 565 Pa. 571, 591, 777 A.2d 418, 429 (2001) (citation omitted). In addition, "[w]hen a writing is clear and

[5] Middletown withdrew its cause of action under the Contractor/Subcontractor Payment Act (Count III). Tr. II, pp. 89, 91. Upon Arena's motion for nonsuit at trial, the court dismissed Middletown's cause of action for fraud (Count IV). Tr. II, pp. 90-91.

[6] Arena's claim of breach of implied duty of good faith and fair dealing was previously dismissed on preliminary objections.

unequivocal, its meaning must be determined by its contents alone." Id. (citations omitted).

Here, the existence of a contract and its essential terms are undisputed. Harry Arena prepared the original draft of the Agreement on behalf of Middletown, and Chip Arena made changes to the draft on behalf of Arena. Tr. II, pp. 14-15, 114. The Agreement provides: "Scope of Services: The Contractor [Arena] and the Service Provider [Middletown] agree that the Service Provider [Middletown] will perform all of the following work and services for the above referenced project from August 31, 1998 through the completion and closeout of the project." Pltf's Trial Ex. 4, p. 1. The only project referenced in the Agreement is described as "The University of the Arts – 211 S. Broad St., 211 South Broad Street, Philadelphia, PA 19102." Pltf's Trial Ex. 4, p. 1. The Agreement further provides: "Payment of Services: 1. The Contractor [Arena] shall pay the Service Provider [Middletown] for every hour the Service Provider [Middletown] spends in the performance of the services in accordance to the Scope of Services stated above. Services shall be billed in accordance with the following hourly rates . . . . 2. The Contractor [Arena] shall pay the Service Provider [Middletown] for all direct reimbursable expenses incurred on the project and in execution of service for the project." Pltf's Trial Ex. 4, p. 2.

The Agreement fails to include any provision which would guarantee Middletown a certain amount of work or a certain number of billable hours. Tr. II, pp. 19-20. The Agreement merely specifies that Middletown would provide services from "August 31, 1998 through the completion and closeout of the

project." Pltf's Trial Ex. 4, p. 1. The Agreement also fails to include any provision which would guarantee Middletown a certain amount of revenue, and instead indicates that Middletown would bill Arena for work according to agreed-upon hourly rates, as well as for direct reimbursable expenses incurred for the Project. Pltf's Trial Ex. 4, p. 2; Tr. II, pp. 19-21. Pursuant to these terms, Arena is not obliged to pay Middletown for hours which Middletown employees did not work.

In addition, at trial, Harry Arena admitted that the Agreement provides that Middletown would be paid only for the services it actually worked and for reimbursement expenses. Tr. II, pp. 20-21. At the time when Middletown and Arena entered into the Agreement, the Project was still being designed, and the number of hours Middletown would work on the Project was uncertain. Tr. I, pp. 41-42; Tr. II, pp. 50-51. Therefore, at the time the Agreement was executed, Middletown could not have had a reasonable expectation that it would work for a defined number of hours on the Project.

Furthermore, the Agreement was dissolved based on the doctrine of impossibility. See Olbum v. Old Home Manor, Inc., 313 Pa. Super. 99, 108-09, 459 A.2d 757, 761-62 (1983); See also Ellwood City Forge Corp. v. Fort Worth Heat Treating Co., Inc., 431 Pa. Super. 240, 247, 636 A.2d 219, 222 (1994). Section 261 of the Restatement (Second) of Contracts provides: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."

Restatement (Second) of Contracts, § 261 (1981).

The Agreement assumed, and the parties expected, that Arena and Middletown would work on the Project until its completion and that both companies would be enabled to do so because the Prime Contract between the University of the Arts and Arena would not be terminated prior to the Project's full completion. Harry Arena admitted that Middletown's services pursuant to the Agreement were "dependent" on the Prime Contract. Tr. II, p. 19. The University of the Arts, however, terminated the Prime Contract prior to the Project's full completion, making it impossible for Arena or Middletown to finish work on the Project. Pltf's Trial Exs. 14, 16, 27. The Terra Building is not the property of Arena, and thus, once the University of the Arts refused to permit Arena to resume work on the building, it was not possible for Arena to allow Middletown to work on the Project. Chip Arena attempted to persuade the University of the Arts to rehire Arena and Middletown to complete the Project but such attempts were unsuccessful. Def's Trial Ex. D167; Tr. II, pp. 97-98.

The evidence shows that the University of the Arts terminated the Prime Contract with Arena because the University had a limited budget and it could complete the Project less expensively with contractors other than Arena and Middletown. Tr. I, pp. 187-188, 199-200. Middletown contends that the way in which Arena billed the University of the Arts for Middletown labor caused the University of the Arts to terminate the Prime Contract. However, the University of the Arts examined Arena's bills and determined that it was not improper for Arena to bill Middletown labor at two times the Direct Personnel Expense. Tr. I,

pp. 157-158, 175, 181-182. For purposes of this analysis, the court finds that it was not Arena's fault that the University of the Arts terminated the Prime Contract.

Pursuant to the terms of the Agreement, Middletown (and Harry Arena) assumed the risk that the Prime Contract would be terminated prior to the Project's full completion and that consequently, Middletown would not be able to work on the Project until its completion. Middletown failed to include a provision in the contract which would guarantee that Arena would pay Middletown for a certain number of billable hours or a minimum amount of revenue, even if Arena discontinued work on the Project prior to its completion. Absent a provision insulating Middletown from the risk of impossibility, Arena is not liable to pay Middletown for work which could not be performed, nor is Arena liable to Middletown for resulting damages or lost profits.

Middletown's Claim of Promissory Estoppel

Middletown next claims damages for promissory estoppel. To maintain a claim for promissory estoppel, Middletown must show that (1) Arena made a promise that it reasonably should have expected to induce action or forbearance on the part of Middletown, (2) Middletown took action or refrained from taking action in reliance on the promise, and (3) injustice can be avoided only by enforcing the promise. Crouse v. Cyclops Industries, 560 Pa. 394, 403, 745 A.2d 606, 610 (2000).

Middletown claims that Arena promised that the Prime Contract with the University of the Arts would not be terminated for convenience, but that if it was

terminated for convenience, "Arena would compensate Middletown for any unearned profit on . . . work it would not be allowed to perform." Compl., ¶ 17.

Upon review of the record, there is no evidence that Arena promised Middletown that the Prime Contract would contain a provision stating that it could not be terminated for convenience. There is also no evidence that Arena promised Middletown that if the Prime Contract was terminated for convenience, then Arena would pay Middletown for unearned profit for work which Middletown could not perform. The Agreement, drafted by Harry Arena, reflects that Middletown agreed to be paid on an hourly basis only for work which it actually performed, as well as reimbursement expenses. Pltf's Trial Ex. 4.

In addition, Harry Arena testified that Middletown agreed it would be paid only for the services it actually worked and for reimbursement expenses. Tr. II, pp. 20-21. Arena did not make a promise to Middletown that it reasonably should have expected to induce action or forbearance on the part of Middletown. Therefore, Arena is not liable to Middletown for promissory estoppel.

Middletown's Claim of Breach of Good Faith and Fair Dealing

Middletown's last claim is for breach of good faith and fair dealing. To maintain such a claim, Middletown must show that Arena failed to act in good faith in the performance of its contractual duties. John B. Conomis, Inc. v. Sun Company, Inc., 831 A.2d 696, 706 (Pa. Super. 2003). A duty of good faith is "tied specifically to and is not separate from the [express] duties a contract imposes on the parties" and therefore, "cannot imply a term not explicitly contemplated by the contract." Id. at 706-07.

Middletown claims that Arena "knew for a substantial period of time that it was the intention of the University of the Arts to terminate the Prime Contract" and that Arena failed "to disclose facts and consult with Middletown concerning the termination of the Prime Contract." Compl., ¶¶ 32, 35. Middletown asserts that Arena's failure to notify it of the University of the Arts' intention was a breach of Arena's duty of good faith and fair dealing. Compl., ¶¶ 32-36.

The terms of the Agreement, however, do not oblige Arena to notify Middletown of the intentions of the University of the Arts. Notification of this nature is simply not discussed or implied in the Agreement. Imposing a duty on Arena to notify Middletown of the University of the Arts' intentions, would create an obligation not contemplated by the Agreement, and would be contrary to the standard for a claim of breach of good faith and fair dealing. John B. Conomis, Inc., 831 A.2d at 706-07. In addition, imposing such an obligation would force Arena to surmise the University of the Arts' plans which were subject to change and subject to the direction of a hierarchy of decision-makers.

Pursuant to the Agreement, Arena was implicitly obliged to notify Middletown of the official termination of the Prime Contract, and Arena satisfied this obligation. Pltf's Trial Exs. 16, 17. By letter dated May 25, 2000, the University of the Arts instructed Arena to stop all construction on the façade and floors eight and nine. Pltf's Trial Ex. 16. By letter dated the next day, May 26, 2000, Chip Arena notified Harry Arena that the University of the Arts stopped all construction on the façade and floors eight and nine. Tr. I, pp. 80-82; Pltf's Trial

Ex. 17.[7]

In addition, the evidence reveals that as early as July 1999, Middletown was fully aware that the viability of the Project was at stake due to a lack of funding. In July 1999, Harry Arena received a letter from Mr. Trojan of the University of the Arts, stating that the construction schedule for the Project would be decelerated to "allow the University ample time to properly settle into its new space and assure a source of funding to complete the remaining phases." Pltf's Trial Ex. 9; Tr. 1, pp. 58-59. In April 2000, Middletown knew that the University of the Arts was concerned about the cost of the Project. By letter dated April 27, 2000, Arena advised Middletown that the University of the Arts was requesting cost information for future construction on the Project, and the purpose of the request was to determine whether the construction was "financially feasible." Pltf's Trial Ex. 10. Therefore, in addition to Arena not having a duty to notify Middletown of the intentions of the University of the Arts to terminate the Prime Contract, the evidence shows that Middletown knew that the viability of the Project was at stake due to a lack of funding.

Arena is not liable to Middletown for breach of good faith and fair dealing.

Arena's Claim of Tortious Interference with Contractual Relations

Next, Arena filed a counterclaim for tortious interference with contractual relations against Middletown. To maintain such a cause of action, Arena must show (1) the existence of a contract between Arena and a third party, (2)

[7] Chip Arena contemplated entering into a Termination Agreement with the University of the Arts, but never signed it because he hoped to continue work on the Project. Tr. II, p. 106. In fact, by letter dated January 29, 2001, Chip Arena made a proposal to the University of the Arts for both Arena and Middletown to complete the Project. Def's Trial Ex. D167; Tr. II, pp. 94-95.

purposeful action on the part of Middletown, specifically intended to harm the existing contract, (3) the absence of privilege or justification on the part of Middletown, and (4) the occasioning of actual legal damage as a result of Middletown's conduct. Nix v. Temple University of the Commonwealth System of Higher Education, 408 Pa. Super. 369, 378-79, 596 A.2d 1132, 1137 (1991).

Arena asserts that "Middletown falsely represented to the [University of the Arts] that Arena was overbilling for services performed on behalf of the [University] and caused the [University] to terminate the Prime Agreement with Arena." Answer with New Matter and Counterclaim, ¶ 59. Arena further asserts that "[a]s a result of Middletown's wrongful interference with contract, Arena has suffered, among other things, loss of work and capital, injury to business, interest charges and restrictions upon the ability to pursue other business, loss of revenue, unabsorbed overhead costs and loss of profits." Answer with New Matter and Counterclaim, ¶ 61. Arena points to Harry Arena's memorandum entitled "Arena & Co. Apparent Overbilling by Phase" as evidence of Middletown's purposeful action intended to harm the Prime Contract between Arena and the University of the Arts. Pltf's Trial Ex. 13.

It is undisputed that a contract between Arena and a third party, the University of the Arts, existed. In addition, the evidence shows that Harry Arena did distribute a memorandum entitled "Arena & Co. Apparent Overbilling by Phase" to University of the Arts staff at a May 12, 2000 meeting. Pltf's Trial Ex. 13; Tr. I, p. 78. The memorandum was designed to show the differential between rates charged by Middletown to Arena for Middletown labor, and rates charged

by Arena to the University of the Arts for Middletown labor. Pltf's Trial Ex. 13.

Harry Arena testified that, at the time that his memorandum accused Arena of "alleged overbilling," he knew that Middletown's work on the Project was dependent on the existence of the Prime Contract. Tr. II, p. 19. This testimony points to Middletown's motivation to ensure that the Prime Contract was not terminated. Thus, the allegation that Middletown specifically intended to harm the Prime Contract between Arena and the University of the Arts is not supported by all of the evidence.

Assuming, *arguendo*, that Arena has proven that Middletown purposefully intended to harm the Prime Contract, Arena has failed to show that it suffered damages as a result of Middletown's conduct or Harry Arena's memorandum. The evidence demonstrates that the Prime Contract was terminated because the University of the Arts determined that it was more cost-effective to terminate the Prime Contract and finish the Project using contractors other than Arena and Middletown. In the Spring of 2000, before the May 12, 2000 meeting, Mr. Trojan recommended to Peter Solmssen, the President of the University of the Arts at the time, that the Project be terminated for lack of funding. Tr. I, pp. 136-137, 144-145. Mr. Trojan testified that the problem was a "two-pronged sword." First, expected gifts from donors did not "materialize." Second, the costs of the Project were much higher than originally anticipated because the University of the Arts had changed its specifications based on evolving ideas of what it wanted built, and because of site conditions. Tr. I, pp. 137-138.

Mr. Trojan's memorandum entitled "Funds Available to Complete Terra

Phase I, II & Façade" shows that the University of the Arts was experiencing a significant cash shortfall for the Project. Pltf's Trial Ex. 12; Tr. I, p. 66, 141-143. Mr. Garbarino and Ms. DeVries both testified that it was more cost-effective for the University of the Arts to terminate the Prime Contract, use Mr. Garbarino as a construction manager, and use contractors other than Arena and Middletown to finish the Project. Tr. I, pp. 187-188, 199-200. Mr. Trojan specifically testified that the University of the Arts' decision to terminate the Prime Contract was based on funding problems, not allegations of overbilling by Arena of Middletown labor. Tr. I, pp. 163, 168.

Furthermore, Harry Arena's representations, including his memorandum entitled "Arena & Co. Apparent Overbilling by Phase," did not persuade the University of the Arts that Arena's billing was inappropriate. After consultation with an attorney in August 2000, the University of the Arts confirmed that it had been properly billed by Arena for Middletown labor. Tr. I, pp. 157-158.

Although Harry Arena's memorandum may have been indicative of the deteriorating relationship between Chip Arena and Harry Arena and that may have been a concern to the University of the Arts, the evidence demonstrates that the University's costs and lack of funding were the reasons why the Prime Contract was terminated and why the Project was finished without Arena and Middletown. Arena did not suffer legal damage as a result of Middletown's conduct. Therefore, Middletown is not liable to Arena for tortious interference with contractual relations.

Arena's Claim of Defamation

The final claim to be discussed is Arena's counterclaim of defamation. To maintain an action for defamation, Arena must show (1) the defamatory character of the communication, (2) the communication's publication by Middletown, (3) its application to Arena, (4) the understanding of the recipient of the communication's defamatory meaning, (5) the understanding of the recipient that the communication was intended to be applied to Arena, (6) harm to Arena, and (7) abuse of a conditionally privileged occasion. Davis v. Resources for Human Development, Inc., 770 A.2d 353, 357 (Pa. Super. 2001).

Arena claims that "Middletown's publication of its May 12, 2000 memo asserting that Arena had overbilled the [University of the Arts] included false statements [impugning] Arena's financial practices, business practices and the qualifications and reputation of key senior personnel." Answer with New Matter and Counterclaim, ¶ 64. Arena asserts that Harry Arena's memorandum was distributed to representatives of the University of the Arts, the "Architect" and "other parties." Answer with New Matter and Counterclaim, ¶ 65. Further, Arena contends that the publication was "injurious to Arena's reputation, prompted the termination of the Prime Agreement and exposed the corporation to economic harm and harm to its relationships with its existing and potential clients." Answer with New Matter and Counterclaim, ¶ 66. In its Proposed Conclusions of Law, Arena argues that Harry Arena's May 12, 2000 memorandum constitutes defamation *per se* which requires proof of general damages only. Def's Proposed Conclusions of Law, p. 9.

This court agrees that Harry Arena's May 12, 2000 memorandum is capable of defamatory meaning because it ascribes the conduct of improper overbilling to Arena which could have adversely affected Arena's fitness for business. Pltf's Trial Ex. 13.[8] Significantly, however, the record fails to show that the University of the Arts (or any recipient of the memorandum) understood the memorandum as intended by Harry Arena. The University of the Arts determined (with the aid of Frances McElhill, Esquire) that Arena could properly charge the University two times the Direct Personnel Expense for the work of Middletown employees. Tr. I, pp. 175, 181-182. In August 2000, the University of the Arts consulted an attorney and confirmed its conclusion that it had not been improperly billed by Arena for Middletown labor. Def's Trial Ex. D140; Tr. I, pp. 157-158.

In addition, the record fails to show that Arena suffered general damages (or special damages) as a result of Harry Arena's May 12, 2000 memorandum. Arena contends that the termination of the Prime Contract is evidence of Arena's general damages. Def's Proposed Conclusions of Law, p. 10. However, the record reflects that the University of the Arts relied on considerations of cost and funding, not allegations of overbilling, in its decision to terminate the Prime Contract and to finish the Project with other contractors. Tr. I, pp. 163, 168, 187-188, 199-200. Contrary to Arena's argument, Mr. Trojan's opinion in a July 10, 2000 memorandum that the University of the Arts did not want to become further involved in a disagreement between Arena and Middletown is not dispositive of

[8] It is apparent from the memorandum, however, that the numbers upon which Harry Arena relied for his calculations would have to be verified, and the memorandum explicitly cautions the reader to do so. Pltf's Trial Ex. 13.

the conclusion that Harry Arena's May 12, 2000 memorandum caused the University of the Arts to terminate the Prime Contract. Def's Trial Ex. D133. The University of the Arts simply decided it could finish the Project less expensively without Arena and Middletown.

Arena further asserts that the University of the Arts' investigation into the allegations of overbilling amounts to general damages to Arena. Def's Proposed Conclusions of Law, p. 10. This court does not agree. The fact that the University of the Arts hired an attorney to confirm its conclusion that it had not been overbilled by Arena is insufficient to show that Harry Arena's May 12, 2000 memorandum caused Arena to suffer general damages. First, the University of the Arts, not Arena, was the entity to undertake that analysis. Second, the University of the Arts concluded that it had not been improperly billed.

Several other allegations by Arena are unsupported by the evidence. Arena did not present any evidence establishing defamation with respect to recipients other than the University of the Arts. The record does not show that Harry Arena distributed the memorandum to anyone other than those individuals attending the May 12, 2000 meeting at the University of the Arts. Tr. I, p. 78. Arena did not present any evidence of harm to its relationships with its existing or potential clients. Arena did not present any evidence of harm to its reputation, or the reputation of its personnel. Finally, in its Proposed Conclusions of Law, Arena argues that the defamation consisted of Harry Arena's verbal statements on behalf of Arena as well. Def's Proposed Conclusions of Law, p. 9. Arena's Counterclaim, however, does not contain allegations of slander and refers only to

Harry Arena's May 12, 2000 memorandum. Answer with New Matter and Counterclaim, ¶¶ 63-66.

For these reasons, Middletown is not liable to Arena for defamation.

Conclusions of Law

1. Pursuant to the terms of the Agreement between Middletown and Arena, Arena did not have a duty to pay Middletown for hours which Middletown employees did not work on the Project.

2. Furthermore, the Agreement was dissolved based on the doctrine of impossibility.

3. Based on the record before the court, Middletown's claim of breach of contract is dismissed.

4. With respect to Middletown's claim of promissory estoppel, Middletown failed to prove that Arena promised Middletown that the Prime Contract would contain a provision stating that it could not be terminated for convenience.

5. Middletown also failed to prove that Arena promised Middletown that if the Prime Contract was terminated for convenience, then Arena would pay Middletown for unearned profit for work which Middletown could not perform.

6. Based on the record before the court, Middletown's claim of promissory estoppel is dismissed.

7. With respect to Middletown's claim of breach of good faith and fair dealing, and upon review of the terms of the Agreement, Middletown failed to prove that Arena had a duty of good faith and fair dealing to notify Middletown of the intentions of the University of the Arts.

8. Based on the record before the court, Middletown's claim of breach of good faith and fair dealing is dismissed.

9. With respect to Arena's of tortious interference with contractual relations, Arena failed to prove that Middletown specifically intended to harm the Prime Contract between Arena and the University of the Arts.

10. In addition, Arena failed to prove that it suffered damages as a result of Middletown's conduct or Harry Arena's May 12, 2000 memorandum.

11. Based on the record before the court, Arena's claim of tortious interference with contractual relations is dismissed.

12. With respect to Arena's claim of defamation, Arena failed to prove the understanding by the staff at the University of the Arts of the defamatory meaning of Harry Arena's May 12, 2000 memorandum.

13. In addition, Arena failed to prove general damages or special damages as a result of Harry Arena's May 12, 2000 memorandum.

14. Based on the record before the court, Arena's claim of defamation is dismissed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.