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

SAN LUCAS CONSTRUCTION COMPANY INC. Plaintiff	**:** FEBRUARY TERM, 2000
	: No. 2190
v.	**:**
ST. PAUL MERCURY INSURANCE COMPANY d/b/a The St. Paul Surety,	**:**
PHILADELPHIA HOUSING AUTHORITY, and BOB KAHAN d/b/a Contract Completion, Inc. Defendants	**: Control No. 102471**

ORDER

AND NOW, this 14th day of March 2001, upon consideration of defendant, St. Paul Mercury Insurance Company, d/b/a The St. Paul Surety ("St. Paul")'s Motion for Judgment on the Pleadings ("Motion"), plaintiff, San Lucas Contruction Co., Inc. ("San Lucas")'s opposition to it, the respective memoranda, all other matters of record, and in accord with the Opinion being contemporaneously filed with this Order, it is hereby **ORDERED** that the Motion is **Granted** and San Lucas's claims against St. Paul, only, are hereby dismissed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ..... March 14, 2001

Presently before this court is defendant, St. Paul Mercury Insurance Company, d/b/a The St. Paul Surety ("St. Paul")'s Motion for Judgment on the Pleadings ("Motion") and plaintiff, San Lucas Construction Company, Inc. ("San Lucas")'s opposition to it.

For the reasons set forth, the Motion is **Granted** and San Lucas's claims against St. Paul are dismissed.

BACKGROUND

This case arises out of a dispute over the unsuccessful completion of a construction contract involving the renovation of a public housing project and the termination of one of the general contractors.

Plaintiff, San Lucas, is a family owned construction business, located in Philadelphia. Compl. at ¶ 1. Defendant, Philadelphia Housing Authority ("PHA"), is the largest public housing agency in Pennsylvania. Id. at ¶ 3. On November 6, 1997, PHA hired San Lucas to provide general construction for a part of the public housing project known as the Richard Allen Homes project ("the Project"). Id. at ¶ 5. Defendant, St. Paul, a Minnesota corporation, is the surety for San Lucas's obligations under the Project. Id. at ¶ 2. Prior to issuing any bonds to San Lucas, St. Paul required San Lucas to sign a General Agreement of Indemnity, dated June 20, 1997 ("Indemnity Agreement").[1] St. Paul's Answer, New Matter and Counterclaim at ¶¶ 115-116 ("St. Paul's Answer"); San Lucas's Reply at ¶¶ 115-116. See Exhibit B3.[2] The Indemnity Agreement contained exculpatory clauses for the benefit of St. Paul, which provided that St. Paul could take certain actions without incurring liability, in the event that San Lucas breached its contract or failed to promptly discharge its obligations. See Exhibit B3 at ¶¶ 12-13.

[1]After execution of the Indemnity Agreement, on October, 16, 1997, St. Paul issued a performance bond on the Project for the benefit of PHA, as well as a materialmen's (payment) bond. St. Paul's Answer at ¶¶ 119-120; Exhibits B1 & B2.

[2]For purposes of convenience, "Exhibits" in this Opinion shall be understood as those exhibits attached to St. Paul's Motion. Further, Exhibit "A#" refers to exhibits attached to the Complaint and Exhibit "B#" refers to exhibits attached to St. Paul's Answer. San Lucas's Reply was attached at Exhibit "C".

During the course of the Project, problems developed between San Lucas and PHA which involved, *inter alia*, various delays in meeting the completion deadline. See Compl. at ¶¶13,16, 21, 23, 24, 25, 28, 32, 34, 35, 39, 44, 48. San Lucas and PHA disagree about the cause of the problems. See Exhibits A5, A6, A9, A10-25. The contract between PHA and San Lucas provided in pertinent part:

> Article 4. Payment for Materials, Etc. The Contractor agrees to make prompt payment for all materials furnished, for labor supplied or performed, equipment rented and services rendered by public utilities, in or in connection with the prosecution of the work, whether or not the said material, labor, equipment or services enter into and become a component part of the work or improvement contemplated.

Exhibit A1, art. 4. On December 10, 1999, PHA issued a "Notice of Intent to Default" to San Lucas. Compl. at ¶ 58; Exhibit A9. This notice included the following:

> Since you have failed to perform the work under Contract No. 9589 within the time required by its terms, or "cure the conditions endangering performance under [C]ontract No. 9589 as related to you at a meeting with you and your surety held on August 10, 1999," the Philadelphia Housing Authority (PHA) is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine the extent of your failure to perform and the recourse PHA must take to secure the services necessary to complete the contract . . . .

Exhibit A9. On December 20, 1999, San Lucas met with PHA and St. Paul to respond to PHA's Notice of Intent to Default. Compl. at ¶ 59.

Immediately, after the meeting with PHA, San Lucas met separately with representatives of St. Paul to review outstanding issues, including the status of claims by subcontractors and suppliers. Id. at ¶ 60. San Lucas acknowledged that $242,000 in subcontractors' claims were due at that time. Id. at ¶ 61. San Lucas also purportedly agreed to enter into a joint check agreement with St. Paul so that all funds from PHA could be monitored and directed by St. Paul. Id. at ¶ 62. In addition, St. Paul

purportedly agreed not to interfere with San Lucas' negotiations with PHA, which included asking PHA to reduce its retainage in order to pay subcontractors, asking PHA to increase the contract price, and asking for an additional time extension. Id. at ¶ 63. St. Paul, however, denies that it agreed to refrain from interfering with San Lucas's negotiations with PHA. St. Paul's Answer at ¶ 64.

The next day, on December 21, 1999, St. Paul sent letters to both PHA and San Lucas, referring to the meeting of December 20, 1999, as well as the concerns of PHA regarding the status of the Project and the unpaid bills for the Project. Compl. at ¶ 65; Exhibit A10. These letters demanded that PHA "refrain from paying out any portion of the remaining contract balance without the express written consent of [St. Paul]." Exhibit A10. On January 10, 2000, San Lucas issued a response letter, requesting instructions on how to proceed. Compl. at ¶ 67. Specifically, this letter indicated that San Lucas was not abandoning the job but also stated that San Lucas could not continue to provide labor and materials without payment from PHA. Exhibit A11. Thereafter, additional correspondence passed between St. Paul and San Lucas. Compl. at ¶ 69. See Exhibit A13.

On January 13, PHA issued a "Notice of Default" to San Lucas, advising that "[a]lthough you are in default, at this time the PHA is not terminating the above contract." Exhibit A14 (emphasis in original). Following this notice, the parties again exchanged correspondence, but St. Paul and PHA purportedly refused to meet with San Lucas. Compl. at ¶¶ 71-73. See Exhibits A15, A16, A17. Specifically, on January 21, 2000, St. Paul issued a letter to PHA, indicating its needs for documentation in order to investigate the matter and determine the appropriate action. Exhibit A17. Then, on January 24, 2000, PHA terminated its contract with San Lucas, asserting the same grounds it had asserted previously in its "Notice of Intent to Default", and demanded that St. Paul, as surety, ensure performance of the

underlying contract. Compl. at ¶ 75; Exhibit A18. On January 27, 2000, St. Paul sent a letter to San Lucas stating: "[i]t is our goal to resolve the performance and payment issues in the most cost effective manner. We would really appreciate your assistance and input in this process." Exhibit A19.

San Lucas's subsequent request for an appeal through the administrative process within the PHA was denied. Compl. at ¶¶ 76-77; Exhibit A20.

Within this context, San Lucas filed its Complaint against PHA, St. Paul and Bob Kahan, setting forth counts for wrongful termination against PHA, tortious interference with contract against both St. Paul and Bob Kahan, as well as claims for exemplary and punitive damages against both St. Paul and Kahan. Compl. at ¶¶ 91-113. St. Paul filed its Answer with New Matter and Counterclaim, raising the exculpatory clauses in the Indemnity Agreement as a defense, along with a fraud claim. St. Paul's Answer at ¶¶115-143. San Lucas, in its Reply, asserted that St. Paul did not act to "minimize any ultimate loss" as provided in the Indemnity Agreement but rather acted "recklessly, foolishly and incomprehensibly" in not investigating before acting and taking over the Project. San Lucas's Reply at ¶ 117.

Thereafter, St. Paul filed this Motion for Judgment on the Pleadings, contending that it is entitled to judgment as a matter of law in light of the Indemnity Agreement's "unambiguous exculpatory clauses" and the absence of any allegations which would constitute "deliberate and willful malfeasance." St. Paul's Motion at ¶¶ 18-22. In response, San Lucas filed its Answer, asserting that the Indemnity Agreement is a contract of adhesion which contains self-serving exculpatory clauses that attempt to circumvent St. Paul's legal duty to act in good faith, particularly with regard to its duty to investigate all claims asserted by defendant PHA. San Lucas's Answer at ¶¶ 18-22.

For the reasons set forth, St. Paul's Motion is granted and San Lucas's claims against St. Paul are dismissed.

DISCUSSION

The question presented is whether St. Paul's Motion for Judgment on the Pleadings should be granted because as a matter of law the exculpatory clauses in the Indemnity Agreement are valid and enforceable under the facts alleged so as to absolve St. Paul of any liability. Concomitantly, this court must consider whether the pleadings support a conclusion that St. Paul engaged in deliberate and willful malfeasance of (conduct which is excluded from the exculpatory clauses and which would constitute tortious interference with contract), when it demanded that PHA refrain from making additional payments on the contract to San Lucas without St. Paul's express written consent. This court holds that the exculpatory clauses are valid and enforceable and St. Paul's actions, as alleged in the pleadings, cannot reasonably constitute deliberate and willful malfeasance that would otherwise make it liable for tortious interference with contract.

A. Legal Standard

Rule 1034 of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). On a motion for judgment on the pleadings, which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party, but only those facts specifically admitted by the nonmovant may be considered against him. Mellon Bank v. National Union Ins. Company of Pittsburgh, 2001 WL 79985, at *2 (Pa.Super. Jan. 31, 2001). However, "neither party will be deemed to have admitted conclusions of law." Id. See also, Flamer v. New Jersey

Transit Corp., 414 Pa.Super. 350, 355, 607 A.2d 260, 262 (1992)("While a trial court cannot accept the conclusions of law of either party when ruling on a motion for judgment on the pleadings, it is certainly free to reach those same conclusions independently.")(citations omitted).

In ruling on a motion for judgment on the pleadings, the court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any documents or exhibits properly attached to them. Kelly v. Nationwide Ins. Co., 414 Pa.Super. 6, 10, 606 A.2d 470, 471 (1992). See also, Kotovosky v. Ski Liberty Operating Corp., 412 Pa.Super. 442, 445, 603 A.2d 663, 664 (1992). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise. Ridge v. State Employees Retirement Board, 690 A.2d 1312, 1314 n.5 (Pa.Commw.Ct. 1997)(citations omitted). "This may often be the case when the dispute will turn on the construction of a written agreement." Brown v. Cooke, 707 A.2d 231, 232 (Pa.Super.Ct. 1998)(citations omitted).

B. St. Paul's Motion Is Timely And Not Premature

San Lucas, in its opposition to the Motion, first argues that it is premature since, at the time that St. Paul filed its motion, it had not filed or served its Joinder Complaint against Galo Gutierrez and Urkia Hernandez,[3] and these additional defendants had not yet responded. San Lucas's Mem. of Law in Opposition to St. Paul's Motion ("San Lucas's Mem. of Law"), at 2. In support of this point, San Lucas relies upon Sameric Corp. of Brookhaven v. Kober Co., Inc., 73 Pa. D.& C.2d 437 (C.P. Phila. 1975), which held that the motion for judgment on the pleadings was premature where the builder-defendant had

[3]Galo Gutierrez is the President of San Lucas and Urkia Hernandez is its Secretary, as evidenced by their signatures on the PHA-San Lucas Contract. See Exhibit A1.

joined owner and sureties as additional defendants, but had inadvertently not filed the complaint and service had not been made.

This court finds no merit in San Lucas's assertions in light of the facts of this case. First, Pa.R.C.P. 1034(a) explicitly allows for such a motion after the "relevant" pleadings are closed. The relevant pleadings to the claims filed by San Lucas, for which St. Paul seeks to be dismissed, are San Lucas's Complaint, St. Paul's Answer, New Matter and Counterclaim, and San Lucas's Reply to New Matter and Counterclaim. The docket clearly reflects that these pleadings had been filed prior to St. Paul's Motion for Judgment on the Pleadings. Further, St. Paul's Motion to Join Additional Defendants was filed before its present motion. In addition, the Joinder Complaint has actually been filed and served, and defendants Gutierrez and Hernandez have answered it. Clearly, the relevant pleadings to the present motion before the court have been closed.

Therefore, this court finds that St. Paul's motion was not premature but was timely filed.

C. The Exculpatory Clauses In The Indemnity Agreement Are Valid And Enforceable To Absolve St. Paul From Liability And St. Paul's Actions As Admitted Cannot Be Construed As Willful And Deliberate Malfeasance

St. Paul, in support of its Motion, contends that paragraphs 12 and 13 of the Indemnity Agreement clearly and unambiguously exculpate it from liability for any conduct short of deliberate and willful malfeasance. St. Paul's Mem. of Law in Support of Its Motion ("St. Paul's Mem. of Law"), at 9-10. In response, San Lucas argues that the exculpatory clauses are not enforceable because the Indemnity Agreement is a mere contract of adhesion, in which San Lucas had no power to negotiate its terms. San Lucas's Mem. of Law, 6-7. San Lucas also argues that the exculpatory clauses are void against public policy. Alternatively, San Lucas urges that St. Paul acted in bad faith in contravention of 42 Pa.C.S.A. §

8371 in failing to investigate PHA's determination of default and termination of its contract with San Lucas. Id. at 7-8.

Generally, exculpatory clauses or contracts against liability, while not favored at law, may nevertheless be valid. Leidy v. Deseret Enterprises, Inc., 252 Pa.Super. 162, 167, 381 A.2d 164, 167 (1977). Our Supreme Court has established the following principles:

> It is generally accepted that an exculpatory clause is valid where three conditions are met. First, the clause must not contravene public policy. Secondly, the contract must be between persons relating entirely to their own private affairs and thirdly, each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion . . . .

Topp Copy Products, Inc. v. Singletary, 533 Pa. 468, 471, 626 A.2d 98, 99 (1993)(citations omitted). In addition, even if an exculpatory clause is determined to be valid, it must meet the following standards:

> (1) the contract language must be construed strictly, since exculpatory language is not favored by the law; (2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; (3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and (4) the burden of establishing the immunity is upon the party invoking the protection under the clause.

Id. See also, Employers Liability Assurance Corp. v. Greenville Business Men's Ass'n, 423 Pa. 288, 291-92, 224 A.2d 620, 623 (1966); Dilks v. Flohr Chevrolet, 411 Pa. 425, 434, 192 A.2d 682, 687 (1963).

In Pennsylvania, an adhesion contract is defined as a "standardized contract form offered to consumers of goods and services on [an] essentially 'take it or leave it' basis without affording [the] consumer a realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing [to the] form contract." Todd Heller, Inc. v. United Parcel Service, Inc., 754 A.2d 689, 699-700 (Pa.Super.Ct. 2000)(citations omitted). "The fundamental

nature of this type of contract is such that the consumer who is presented with it has no choice but to either accept the terms of the document as they are written or reject the transaction entirely." Id. at 700. Nonetheless, "merely because a contract is a contract of adhesion does not automatically render it unconscionable and unenforceable." Id. Rather, the issue of whether a contract or clause is unconscionable is a question of law for the court. Id. For a contractual provision to be deemed unconscionable, the court must determine both "that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." Id. In addition, since insurance contracts are frequently viewed as adhesion contracts, Pennsylvania courts strictly construe exclusionary provisions and exceptions to the insurer's general liability under the policy. See Treasure Craft Jewelers v. Jefferson Ins. Co. of New York, 583 F.2d 650, 655 (3d Cir. 1978)(citing Pennsylvania cases).

In support of its argument that the Indemnity Agreement is a contract of adhesion, San Lucas asserts that as "a small family construction company, [it] is powerless to negotiate the documents demanded by [ ] St. Paul, the world's largest surety company." However, San Lucas fails to allege that it could not deal with another surety company or that it had not benefitted from the contract relations which existed between itself and St. Paul. Further, as admitted, San Lucas and St. Paul are both business entities which entered into the Indemnity Agreement as a condition precedent to St. Paul's issuance of a performance bond and a materialmen's bond on the Project. See Compl. at ¶¶ 1-2; St. Paul's Answer at ¶¶ 115-116 and San Lucas's Reply at ¶¶ 115-116. Therefore, this court doubts San Lucas's assertion that the Indemnity Agreement constitutes a contract of adhesion and this court is not bound to accept mere legal conclusions. See Phillippe v. J.H. Rhoads, 233 Pa.Super. 503, 506-07, 336 A.2d 374, 376-77

(1975)(holding that indemnity clause does not contravene public policy and appellants do not allege that they could not deal with another business for installing the fixtures and equipment necessary for selling gasoline). C.f., Leidy, 252 Pa.Super. at 172, 381 A.2d at 170 (holding that reply to new matter specifically denying the validity of the exculpatory clause precluded the entry of judgment on the pleadings).

Even assuming *arguendo* that the Indemnity Agreement is an adhesion contract, the exculpatory clauses may still be valid and enforceable but must be strictly construed against St. Paul, as the drafter. See Todd Heller,754 A.2d at 700; Phillippe, 233 Pa.Super. at 507, 336 A.2d at 376 (stating "an agreement or instrument which reduces legal rights which would otherwise exist is strictly construed against the party asserting it and must spell out with the utmost particularity the intention of the parties.")(citation omitted). Despite San Lucas's arguments, this court does not find that the language in the Indemnity Agreement is ambiguous, nor is it unconscionable. See Tuthill v. Tuthill, 763 A.2d 417, 420 (Pa.Super.Ct. 2000)(noting that the fact that parties have different interpretations of a contract does not render it ambiguous, but a contract will be found to be ambiguous only if it is fairly susceptible of different constructions and capable of being understood in more than one sense).

Paragraph 12 of the Indemnity Agreement provides the following, in pertinent part:

> 12. In the event the Contractor shall breach, or default in or delay the performance of, any Bonded Contract, or fail promptly to discharge all obligations which might be claimable under any Bond executed in connection therewith or which might give rise to a lien or charge upon any unpaid contract balance or the property of an Obligee named in any such Bond, or in the event of any breach of the terms of this instrument, the undersigned, and each of them, hereby assign and set over unto the Surety, as of the date hereof, their right, title and interest in and to: (a) All of the deferred payments and retained percentages, and all moneys and properties that may be, and that thereafter may become, payable to the Contractor on account of, and all claims and actions and causes of action relating to, such contract, or on account of or relating to extra work or materials supplied in connection therewith, as well as all other moneys or properties of the Contractor, hereby agreeing that

> such money and the proceeds of such payments, properties, claims, actions and causes of action shall be the sole property of the Surety to be by it credited upon any sum due or to become due it under the terms of this instrument. . . . In addition, in any such event aforesaid, the Surety, at its option and in its sole discretion, may take possession of all or any part of the work under any or all Bonded Contracts, and at the expense of the Undersigned complete, or cause the completion of, such work, or re-let, or consent to the re-letting or completion thereof; and in such event, may invite the Obligees, and the Obligees are authorized, to declare the Contractor in default under such contracts, any provisions thereof to the contrary notwithstanding. Neither the Surety nor the Obligees shall incur any liability to any of the Undersigned in the exercise of the rights granted by this Section 12, except for deliberate and willful malfeasance.

Exhibit B3 at ¶ 12 (emphasis added). The Indemnity Agreement also expressly stated:

> If it becomes necessary or advisable in the judgment of the Surety to control, administer, operate or manage any or all matters connected with the performance of any Bonded Contract for the purpose of attempting to minimize any ultimate loss to the Surety, or for the purpose of discharging its obligations of suretyship, the Undersigned hereby expressly covenant and agree that such action on the part of the Surety shall be entirely within its rights and remedies under the terms of this instrument and as Surety, and do hereby fully release and discharge the Surety, in this connection, from liability for all actions taken by it or for its omissions to act, except for deliberate and willful malfeasance.

Id. at ¶ 13 (emphasis added). This language, on its face, clearly and unambiguously releases St. Paul from liability for discharging its obligations of suretyship under any bonded contract and taking over the contract's completion or the contract's monies in the event that San Lucas breaches its contract or fails to promptly discharge its obligations. An important caveat to these clauses, and their enforceability, is that St. Paul may not act with deliberate and willful malfeasance in protecting its ultimate loss as surety.

Alternatively, San Lucas asserts that the exculpatory clauses are unenforceable as void against public policy since St. Paul is a governmentally regulated surety. San Lucas's Mem. of Law, at 7. San Lucas relies upon Rempel v. Nationwide Life Ins. Co. Inc., 227 Pa.Super. 87, 93, 323 A.2d 193, 196 (1974), which stated that "a clause in an insurance contract which seeks to exculpate the insurer for torts

committed by its agent while acting within the scope of his employment is void as against public policy." Despite its reliance on Rempel, San Lucas fails to cite a case which stands for the proposition that a surety's indemnity agreement rendered in conjunction with a performance bond is void against public policy. Rather, courts have found indemnity agreements to be contrary to public policy in the following instances: (1) in the employer-employee relationship; (2) in situations where one party is charged with the duty of a public service; (3) in agreements which attempt to exculpate one from liability for the violation of a statute or regulation designed to protect human life; and (4) in the limitations of consequential damages for personal injury in the case of consumer goods. See Leidy, 252 Pa.Super. at 168-69, 381 A.2d at 167-68 (cases and examples cited therein). This court does not agree that the exculpatory clauses in the present instance can be held void against public policy since St. Paul would still be held liable if its actions constituted willful and deliberate malfeasance.

Finally, San Lucas argues that St. Paul acted in bad faith in contravention of 42 Pa. C.S.A. § 8371, and that St. Paul's conduct renders the exculpatory clauses inapplicable. First, no bad faith claim is presently before this court since San Lucas did not include any bad faith claim in its Complaint.[4] This court is also not convinced that San Lucas could assert such a claim against St. Paul under the circumstances.

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[4]San Lucas did allege that "St. Paul is subject to the implied-in-law duty to act fairly and in good faith in order not to deprive Plaintiff of the benefits of the San Lucas PHA Contract and the related bonds obtained from St. Paul." Compl. at ¶ 98. Despite this allegation, this court does not find that San Lucas has stated a cause of action under 42 Pa.C.S.A. § 8371, which normally involves the mishandling of claims or denial of coverage or benefits. See Brickman v. CGU Ins. Co., July 2000, No. 909, slip op. at 19 (Jan. 8, 2001)(Herron, J.).

The facts admitted by San Lucas demonstrate that it had failed to promptly pay its subcontractors and could possibly be in default under the construction contract with PHA,[5] which permits St. Paul to act in accordance with the Indemnity Agreement in order to minimize its liability as surety. For example, San Lucas specifically admitted that $242,000 was due on subcontractors' claims. Compl. at ¶ 61. The construction contract with PHA required San Lucas to make prompt payment to all its subcontractors. See Exhibit A1, art. 4. San Lucas also admitted that it was negotiating with PHA to ask PHA to reduce its retainage so that San Lucas could immediately pay its subcontractors and to ask PHA to extend the time on its contract. Id. at ¶ 63. Paragraph 12 of the Indemnity Agreement clearly authorized St. Paul to take over control of the construction work and the contract monies in the event that San Lucas failed promptly to discharge its obligations which might be claimable under any bond. Exhibit B3 at ¶ 12. San Lucas implicitly, if not explicitly, admitted to its failure to pay its subcontractors in a timely manner.

Further, San Lucas's own allegations, which may be deemed admissions, contradict themselves. On the one hand, San Lucas alleged that St. Paul agreed to refrain from interfering with San Lucas's negotiations with PHA. Compl. at ¶ 64. On the other hand, San Lucas admitted that it had "agreed with St. Paul to enter into a joint check agreement with St. Paul so that all funds from PHA could be monitored and directed by St. Paul." Id. at ¶ 62. In addition, San Lucas admitted that St. Paul issued letters to PHA and San Lucas, demanding payment of all contract funds directly to St. Paul. Id. at ¶ 65. St. Paul's letter of December 21, 1999 to San Lucas explicitly stated that "we have demanded that the

[5]This court does not now make a determination as to whether San Lucas's default was material or whether San Lucas had a legitimate defense for its actions. Rather, the court must confine itself to whether the pleadings show that St. Paul's actions were justified under the circumstances.

[PHA] refrain from paying out any portion of the remaining contract balance without the express written consent of [St. Paul.]." Exhibit A10. St. Paul's letter to the PHA stated that "claim is hereby made for payment to the surety of the entire amount of the contract funds remaining in the custody of the [PHA]. . .". Id. Under these circumstances, this court finds no reason to hold that the exculpatory clauses in the Indemnity Agreement are invalid or unconscionable.

Moreover, this court does not find that St. Paul's actions as alleged could constitute deliberate and willful malfeasance or tortious interference with the San Lucas-PHA contract. The only allegations of St. Paul's alleged malfeasance are that St. Paul, on December 21, 1999, made demand upon PHA for the remaining contract funds and to refrain from paying San Lucas out of the retainage, even though St. Paul had previously agreed to refrain from interfering with San Lucas's negotiations with the PHA. Compl. at ¶¶ 64-65. Nonetheless, San Lucas had agreed that all funds from the PHA could be monitored and directed by St. Paul. Id. at ¶ 62. Thereafter, St. Paul, along with the PHA, had refused to meet with San Lucas, despite San Lucas's requests. Id. at ¶ 73. Approximately one month after St. Paul's demand on the PHA, the PHA terminated its contract with San Lucas even though San Lucas had completed in excess of 82% of the contract. Id. at ¶ 78. Following this termination, which San Lucas asserts was wrongful, correspondence passed between San Lucas and St. Paul regarding the costs to complete the contract and San Lucas's reasons for the extensive delays on the Project. Id. at ¶¶ 82-88. San Lucas also asserts in a conclusory manner that St. Paul is obligated to conduct an investigation of PHA's wrongful termination before taking action and that St. Paul intentionally and/or tortiously interfered with San Lucas's contractual relationship with the PHA. Id. at ¶¶ 89, 99. In addition, without providing an adequate factual basis, San Lucas alleges that "[t]he intentional and/or tortuous acts and conduct of St.

Paul are incomprehensible, outrageous and reflect an evil motive and a reckless disregard of the rights of San Lucas." Id. at ¶ 103. However, this court is not bound to accept mere legal conclusions. See Mellon Bank, 2001 WL 79985, at *2. Rather, Pennsylvania is a fact pleading state, which requires that the pleader define the issues, apprise the defendant of an asserted claim, and set forth all material and essential facts to support that claim. Miketic v. Baron, 450 Pa.Super. 91, 104-05, 675 A.2d 324, 330-31 (1996)(holding that defendants were properly granted judgment on the pleadings in their favor where plaintiff failed to provide factual bases to establish abuse of privilege in a defamation action). See Pa.R.C.P. 1019. Here, San Lucas failed to allege sufficient facts that would demonstrate that St. Paul was not justified in acting as it did.

While it may be true that St. Paul interfered with San Lucas's contractual relationship with PHA and with San Lucas's negotiations with PHA, the real question of St. Paul's liability depends upon whether St. Paul's actions were improper. St. Paul, as surety, had a right to protect reasonably its own liability and act in accordance with paragraphs 12 and 13 of the Indemnity Agreement. Section 773 of the Restatement (Second) of Torts provides that:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Id. Pennsylvania courts have routinely upheld this section. See, e.g., Kelly-Springfield Tire Co. v. D'Ambro, 408 Pa.Super. 301, 311, 596 A.2d 867, 872 (1991); Gresh v. Potter McCune Co., 235 Pa.Super. 537, 541, 344 A.2d 540, 542 (1975); Bahleda v. Hankison Corp., 228 Pa.Super. 153, 156-

57, 323 A.2d 121, 123 (1974); Ramondo v. Pure Oil Co., 159 Pa.Super. 217, 224, 48 A.2d 156, 160 (1946). Under the clear exculpatory provisions of the Indemnity Agreement, St. Paul was authorized to take over the Project's monies or its completion in the event that San Lucas failed to pay promptly its obligations or was in default of its contract with the PHA. Exhibit B3 at ¶¶ 12-13. Both conditions existed even though San Lucas had failed to pay its subcontractors. It owed them $242,000, even though the San Lucas-PHA contract required San Lucas to pay its subcontractors. Compl. at ¶ 61; Exhibit A1, art. 4. Under the circumstances, St. Paul did not act improperly in taking over control of the contract proceeds and in deciding to complete the Project on December 21, 1999. San Lucas has stated no facts which would establish that St. Paul acted with deliberate or willful malfeasance.

Even accepting all of San Lucas's allegations in the light most favorable to San Lucas, this court finds that St. Paul's actions cannot reasonably be construed as willful and deliberate malfeasance. This court finds that the exculpatory clauses in the Indemnity Agreement are valid and enforceable and St. Paul's actions cannot be construed as willful and deliberate malfeasance which would make it liable for tortious interference with the San Lucas-PHA contract.

CONCLUSION

For the reasons stated, this court grants St. Paul's Motion for Judgment on the Pleadings and dismisses San Lucas's claims for tortious interference and punitive damages[6] against St. Paul, only. A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[6]Incidentally, a request for punitive damages cannot stand as an independent cause of action. Holl & Associates, P.C. v. 1515 Market Street Associates, P.C., May 2000, No. 1964, slip op. at 5 (Aug. 10, 2000)(Herron, J.).