

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

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|----------------------------------|---|-----------------------------|
| E.J. DESETA, INC., | : | JUNE TERM, 2005 |
| | : | |
| Plaintiff, | : | NO. 2017 |
| | : | |
| v. | : | COMMERCE PROGRAM |
| | : | |
| GOLDNER/ACCORD BALLPARK, L.P., | : | Control Nos. 101783, 111668 |
| HERMAN GOLDNER CO., INC., | : | |
| UNITED STATES FIRE INS. CO., and | : | |
| XL REINSURANCE AMERICA, INC., | : | |
| | : | |
| Defendants, | : | |
| | : | |
| v. | : | |
| | : | |
| RAMOS/CARSON/DEPAUL, a Joint | : | |
| Venture, and EWING COLE CHERRY | : | |
| BROTT, INC., | : | |
| | : | |
| Add'l Defendants, | : | |
| | : | |
| v. | : | |
| | : | |
| DRISCOLL/HUNT, a Joint Venture, | : | |
| | : | |
| Add'l Defendant. | : | |

ORDER

AND NOW, this 10th day of January 2006, upon consideration of the Preliminary Objections of Ramos/Carson/DePaul, a Joint Venture (“RCD”), to the First Amended Joinder Complaint of Goldner/Accord Ballpark, L.P., and the Preliminary Objections of Driscoll/Hunt, a Joint Venture (“DH”) to the Joinder Complaint of Ewing Cole Cherry Brott, Inc., the respective responses in opposition, the briefs in support and opposition, all other matters of record, and in accord with the Opinion issued contemporaneously, it is **ORDERED** that the Preliminary Objections of both RCD and DH are **SUSTAINED**

and the claims asserted against RCD and DH in the Joinder Complaints are
DISMISSED.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. January 10, 2006

This case is one of several arising out of the construction of the Phillies' stadium (the "Project"). The owner of the Project (the "Owner"), who is not a party to this lawsuit, entered into a contract with additional defendant, Ewing Cole Cherry Brott, Inc. ("Ewing Cole"), under which Ewing Cole was to provide architectural services in

connection with the Project. The Owner also entered into a contract with additional defendant, Driscoll/Hunt (“DH”), under which DH was to act as the construction manager of the Project. DH entered into a sub-contract with additional defendant, Ramos/Carson/DePaul (“RCD”), under which RCD was to act as concrete contractor for the Project. DH also entered into a sub-contract with defendant, Goldner/Accord Ballpark, L.P. (“Goldner”), under which Goldner was to provide mechanical and plumbing services for the Project. Goldner entered into a sub-subcontract with plaintiff, E. J. DeSeta, Inc. (“DeSeta”), under which DeSeta was to perform HVAC work on the Project.

DeSeta brought this breach of contract action¹ against Goldner for reimbursement for the additional costs DeSeta allegedly incurred due to delays and inefficiencies it encountered in performing its work on the Project. Goldner filed a First Amended Joinder Complaint (the “GFAJC”) in which it asserted claims against RCD, which Goldner alleges caused the delay suffered by DeSeta, and against Ewing Cole, which Goldner alleges submitted “flawed, inaccurate and inconsistent architectural design drawings” for the Project, which allegedly contributed to the delay suffered by DeSeta. *See* GFAJC, ¶¶ 21, 35.

RCD has filed Preliminary Objections to Goldner’s Joinder Complaint, which are presently before the court. Ewing Cole did not file Preliminary Objections, but instead filed its own Joinder Complaint (the “ECJC”) against DH. DH has filed Preliminary Objections to Ewing Cole’s Joinder Complaint, which are also presently before the court.

¹ DeSeta sets forth three counts for breach of contract against Goldner, as well as quasi-contractual claims for unjust enrichment, quantum meruit, breach of implied-in-fact contract, and violation of the Pennsylvania Contractor and Subcontractor Payment Act. DeSeta has also set forth a claim against the general partner of Goldner and against Goldner’s bonding companies. However, it is clear that the gist of DeSeta’s action against Goldner sounds in contract.

I. RCD's Preliminary Objections to Goldner's Joinder Complaint Must Be Sustained.

Goldner, in its Joinder Complaint, asserts a Count against RCD styled "Contribution and Indemnity," but which really sets forth a claim for negligent or possibly intentional misrepresentation against RCD. Specifically, Goldner alleges that

RCD supplied false information respecting its schedule, planned means and method of performing its work as well as the sequence of its work and ability to complete the [sic] its work within the time frames, sequence and schedule it represented would be followed knowing that others, including DeSeta and Goldner would justifiably rely on the representations and information in planning and sequencing their work.

GFAJC, ¶ 21. Such allegations fail to set forth a valid claim against RCD for several reasons.

First, if one reads the claim as one for fraud, it is invalid because "it is well established that a cause of action for fraud must allege a misrepresentation of a past or present material fact . . . a promise to do something in the future, which promise is not kept, is not a proper basis for a cause of action for fraud." Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 67-8, 563 A.2d 1182, 1187 (1989).² See also Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. 1997). Instead, a promise of future performance gives rise to a contract action, if there is adequate consideration for the promise, or an equitable action to enforce the promise. See Shoemaker, 700 A.2d at 1006. Goldner cannot make out a breach of contract claim against RCD because there is no privity of contract between them, nor has Goldner

² Goldner cites College Watercolor Group, Inc. v. William H. Newbauer, Inc., for the holding that "statements of intention . . . which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent." 468 Pa. 103, 115, 360 A.2d 200, 206 (1976). However, in that case the court was focused on the issue of what constitutes fraud sufficient to void a contract. The court did not say that a misrepresentation of intention may give rise to its own cause of action; instead, the court found only that it may serve as a defense to a claim for breach of contract.

asserted a promissory estoppel claim against RCD since Goldner demands money damages not timely performance by RCD.

Secondly, if one reads Goldner's claim as a negligent misrepresentation claim, then it is barred by the economic loss doctrine. *See* Samuel Grossi & Sons, Inc. v. United States Fidelity & Guaranty Co., 2005 Phila. Ct. Com. Pl. LEXIS 283 (June 27, 2005) (dismissing sub-contractor's negligence claim against contractor which was based on its alleged failure to prevent delay in connection with the same Project). Goldner's claimed damages arise only in the event that it is found liable to pay money to DeSeta on DeSeta's breach of contract claims. *See* GFAJC, ¶¶ 12, 23. Such potential damages constitute economic loss for which a negligence action will not lie.

The only exception to the economic loss doctrine is for claims brought against "a design professional" or someone else who is "in the business of providing information to others." Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 480-2, 866 A.2d 270, 286-7 (2005). However, RCD was simply the sub-contractor who "provide[d] the structural concrete services and related work for the Project." GFAJC, ¶ 13. It was in the business of building things, not in the business of supplying information for use by others. Therefore, even if RCD did supply schedules as part of its contract with DH, and even if other parties relied upon those schedules, those parties may not bring a negligent misrepresentation claim against RCD if they suffered solely economic loss.

Finally, Goldner has not made out a claim for indemnity or contribution against RCD. Goldner does not allege that there was any contract of indemnity between it and RCD or that RCD had any contractual duty to DeSeta. Nor, as set forth above, did RCD have any tort duty to avoid accidental economic loss to DeSeta. Since RCD cannot be

liable to DeSeta in tort or in contract, there is no basis for shifting or apportioning liability between Goldner and RCD. *See* 42 Pa. C. S. § 8321 *et seq.* (Uniform Contribution Among Tortfeasors Act); Restatement Restitution § 76 (Indemnity).

Therefore, Goldner's claims against RCD must be dismissed.

II. DH's Preliminary Objections to Ewing Cole's Joinder Complaint Must Be Sustained.

In its Joinder Complaint against DH, Ewing Cole alleges that “[o]n information and belief, the joinder of Ewing Cole as an additional defendant by Goldner as regards a portion of the claim of DeSeta is caused by the negligent failure of [DH] to resolve [DeSeta's and Goldner's] claims” for delay damages and otherwise to coordinate the work of the various subcontractors. ECJC, ¶ 57. However, it is clear that, to the extent DH was obligated to resolve such claims by sub-contractors, the duty existed solely because of a provision in DH's contract with the Owner. *See id.* ¶¶ 25, 36-7, 44-5, 53-6. Therefore, the Owner is the only party that may bring a claim for DH's alleged non-performance of this contractual duty.

Ewing Cole is not in privity of contract with DH, so it cannot enforce any contractual duty against DH. Furthermore, Ewing Cole may not convert DH's contractual duty to the Owner into a tort duty owed by DH to Ewing Cole because the only loss claimed as a result of DH's non-performance of its duty is economic, *i.e.*, Ewing Cole may be obligated to pay damages to Goldner and/or DeSeta based on their claims raised in this action. Therefore, Ewing Cole's claims against DH sounding in negligence must be dismissed under the economic loss doctrine. *See Bilt-Rite*, 581 Pa. 454, 866 A.2d 270 (recognizing the continued validity of the economic loss doctrine as a bar to negligence actions, other than those brought against persons “in the business of providing

information to others.”); Grossi, 2005 Phila. Ct. Com. Pl. LEXIS 283 (dismissing another sub-contractor’s negligence claim against DH, which was based on DH’s alleged failure to prevent delay in connection with the Project); Restatement (Second) Torts § 766C (1979).

CONCLUSION

Based on these reasons, RCD’s Preliminary Objections to Goldner’s Joinder Complaint and DH’s Preliminary Objections to Ewing Cole’s Joinder Complaint must be sustained, and the claims against RCD and DH in the respective Joinder Complaints are dismissed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.