

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

GREAT AMERICAN ALLIANCE	:	APRIL TERM, 2002
INSURANCE, CO.	:	
	:	
Plaintiff	:	No. 2565
	:	
v.	:	COMMERCE CASE MANAGEMENT
	:	PROGRAM
JHE, INC., JOHN R. ECCLESTON	:	
HELEN K. ECCLESTON, and	:	
SOUTHEASTERN TRANSPORTATION	:	
ASSOCIATION	:	
	:	
Defendants	:	Control No. 061108

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**ORDER and MEMORANDUM**

**AND NOW**, this 21st day of November, 2002, upon consideration of the Preliminary Objections filed by Defendants', JHE, Inc., John R. Eccleston and Helen K. Eccleston to the Plaintiff's, Great American Alliance Insurance, Co., Complaint and the Plaintiff's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that said Preliminary Objections are **Overruled**. The Defendants are ordered to answer the Plaintiff's averments within twenty (20) days of the date of this Order.

BY THE COURT:

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*COHEN, GENE D., J.*

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SOUTHEASTERN TRANSPORTATION ASSOCIATION	:	
	:	
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**MEMORANDUM OPINION**

*COHEN, GENE D., J.*

Before the Court are the preliminary objections of Defendants' JHE, Inc., John R. Eccleston and Helen K. Eccleston (the "JHE Defendants") to Plaintiff's, Great American Alliance Insurance, Co. ("Great American") Complaint. Co-defendant SEPTA has filed separate preliminary objections before this Court. The JHE Defendants have filed preliminary objections on the grounds that Great American has a full and adequate remedy at law that precludes Great American from proceeding in equity under Count I for injunctive relief, and Count IX, equitable subrogation. The JHE Defendants also preliminarily object to the inclusion of impertinent matter as to Count III, breach of trust, and object in the nature of a demurrer to Count V, conversion and Count VII, fraud.

The instant Complaint was brought by Great American, an issuer of surety bonds, which issued performance and payment bonds (the "Bonds") in connection with a construction project

for SEPTA. Under the construction contract, JHE, Inc. was hired as general contractor to complete SEPTA's 52nd and 63rd street renovations. The Bonds named JHE, Inc., as principal, and SEPTA as obligee. The Bond Agreement required Great American to cover JHE, Inc.'s contractual obligations, in the event that JHE, Inc. defaulted on its obligations. Compl., ¶¶ 1-10.

Pursuant to the terms of an Indemnity Agreement between the JHE Defendants and Great American, if Great American made payments or incurred costs in connection with the Bonds, Great American could demand immediate repayment and/or collateral from the JHE Defendants. The Indemnity Agreement expressly assigned to Great American the contract balances from the bonded construction project. Additionally, the JHE Defendants agreed to hold in trust for Great American all funds received under the bonded construction contracts. Compl., ¶¶ 11-15.

In November, 2001, the JHE Defendants informed Great American that JHE, Inc. was in severe financial distress and would be unable to complete the construction project. In return for Great American's financial assistance, JHE, Inc. agreed to direct SEPTA to pay all remaining contract payments to Great American. Compl., ¶¶ 16-19. On January 31, 2002, JHE, Inc. sent SEPTA written instructions directing SEPTA to make future contract payments to JHE, Inc.. Compl., ¶ 25. It is alleged that in contravention to the instructions of the January 31st letter, SEPTA sent payments to JHE, Inc. and that JHE, Inc., in violation of the terms of the Indemnity Agreement, converted such payments to pay Internal Revenue Service liens (the "IRS liens") instead of forwarding the payments to Great American. Compl., ¶¶ 34-36.

Great American, seeks a temporary restraining order and permanent injunction requiring the JHE Defendants and SEPTA to provide an accounting for contract related sums paid or pending, and for JHE, Inc. to account for all disbursements or distributions it made. Additionally,

Great American seeks an injunction requiring immediate turnover of all contract payments JHE, Inc. possesses, as well as, all future payments received from SEPTA.

Upon review of the pleadings and for the reasons set forth below, JHE Defendants' Preliminary Objections are Overruled.

1. JHE Defendants' preliminary objection under Pennsylvania Rule of Civil Procedure 1509(c) asserting that the existence of a full and adequate remedy under law precludes Great American from seeking injunctive relief or proceeding under the doctrine of equitable subrogation is **overruled**. A preliminary injunction may be appropriate "to preserve the status quo as it exists or as it existed before the acts complained of, thereby preventing irreparable injury or gross injustice." American Express Travel Related Services Co., Inc. v. Laughlin, 424 Pa. Super. 622, 626, 623 A.2d 854, 856 (1993). Additionally, the doctrine of equitable subrogation is a remedy in equity, independent of any contractual relationship, that entitles a surety who pays the debt of another to enforce his right to be reimbursed. Jacobs v. Northeastern Corp., 416 Pa. 417, 426, 206 A.2d 49, 53 (1965)(citing Memphis & Little Rock R.R. v. Dow, 120 U.S. 287, 301-302 (1887)). Moreover, where a trust relationship exists, a beneficiary is entitled to seek either equitable or legal relief. Id. (citing Second Restatement of Trusts § 199).

In the instant Complaint, Great American asserts that the JHE Defendants' assumed the role of trustee in control of funds received as payment for services rendered on the bonded construction project. Compl., ¶ 13. Great American also asserts that it will be irreparably harmed by the continued dissipation of funds, because the JHE Defendants do not have sufficient assets to repay their debt obligations. Compl., ¶¶ 37-42. As surety, Great American asserts that it made payments to satisfy the debts of the JHE Defendants and ensure completion of the SEPTA

bonded construction project. Compl., ¶ 22. Therefore, accepting the facts as true, this Court holds that Great American is entitled to seek relief in the form of an injunction or under the doctrine of equitable subrogation.

2. JHE Defendants' preliminary objection for inclusion of impertinent matter is **overruled**. The Pennsylvania Rules of Civil Procedure permit parties to plead causes of action in the alternative. Pa. R. Civ. P. 1020(c). Rule 1020(c) was enacted to assist parties in avoiding the possibility that a meritorious claim will fail because that party chose the wrong legal theory. Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 626, 375 A.2d 1285, 1291 (1977). Here Great American has averred two related but distinct claims.

First, Great American asserts that JHE Defendants breached a duty of trust in administering the funds in their possession. Compl., ¶¶ 13, 19, 36. It is well settled law that liability for a breach of trust can arise from a trustee's misuse of trust funds. See Restatement Second Trusts §205. Plaintiff asserts that a trust was formed between Great American and the JHE Defendants through the Indemnity Agreement. Compl., ¶ 13. Great American argues that the Indemnity Agreement provides that the JHE Defendants agreed that "all funds received by them, or due or to become due under any contract covered by any Bond are trust funds." Compl., ¶ 13 (emphasis added). Great American further alleges that the JHE Defendants breached their duties under the trust when they used payments received under the bonded construction contract to pay the IRS liens. Compl., ¶ 36.

Second, Great American asserts in the alternative, that the relationship between the parties gave rise to a fiduciary duty between JHE Defendants and Great American. Pl. Mem. of Law. at 5. A relationship of confidence, dependance or justifiable trust between the parties can give rise

to a fiduciary duty. In Re Estate of Clark, 467 Pa. 628, 635, 359 A.2d 777, 781 (1976). Such a relationship generally exists between trustee and cestui que trust. Young v. Kaye et al., 443 Pa. 335, 343 (1971)(citations omitted).

Therefore, under Pennsylvania Rule of Civil Procedure 1020(c), Great American's claims for breach of trust and breach of fiduciary duty may be plead together as alternative causes of action despite relying on similar underlying facts.

3. JHE Defendants preliminary objections in the nature of a demurrer are **overruled**. For the purposes of reviewing preliminary objections asserting legal insufficiency, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000). When presented with preliminary objections which if sustained, would result in a dismissal of an action, a court should sustain the objections only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. Ct. 2000)(citation omitted). Essentially, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

Under Pennsylvania law, a court may sustain a claim for punitive damages when based on an allegation of fraud, if there are acts of "malice, vindictiveness, and a wholly wanton disregard for the rights of others." Pittsburgh Live, Inc. v. Servov, 419 Pa. Super. 423, 615 A.2d 438 (1992); Smith v. Renault, 387 Pa. Super. 299, 564 A.2d 188 (1989). Here, Great American asserts that JHE Defendants' fraudulent behavior and misrepresentations induced Great American to satisfy obligations

in excess of \$750,000. Pl. Mem. of Law at 7. Great American also argues that the JHE Defendants' knew that the JHE Defendants' promise to hold the proceeds from the bonded contracts in trust for Great American, and assign the remaining bonded contract proceeds to Great American, influenced Great American to provide the additional financing required to complete the bonded contract project. Compl., ¶ 60. Great American further argues that the JHE Defendants fraudulently misrepresented and concealed receipt of contract payments from SEPTA in order to divert the funds to satisfy other obligations. Compl., ¶¶ 65-67. Accepting the above facts as true, and all inferences reasonably deducible from those facts, Great American has properly plead a claim for fraud and may seek punitive damages. It should be noted that in order receive punitive damages, Great American will have the burden at trial to establish that the JHE Defendants' activity was malicious, outrageous, or demonstrated a wholly wanton disregard for the rights of Great American.

Additionally, Great American argues that the JHE Defendants converted approximately \$360,000 of bonded contract funds received from SEPTA which were to be held in trust by the JHE Defendants for Great American. Compl., ¶¶ 35, 53-55. Great American asserts that the JHE Defendants' conversion of the funds was wilful and wanton, thus justifying an award of punitive damages. Compl., ¶56. Pennsylvania Courts have held that a claim for conversion may support an award for punitive damages. Paves v. Corson, 765 A.2d 1128 (Pa. Super. Ct. 2000); Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp., 797 A.2d 269 (Pa. Super. Ct. 2002). Therefore, this Court finds that Great American has plead facts, that if true, could form the basis for a punitive damages claim based on conversion. Again, it should be noted that in order receive punitive damages, Great American will have the burden at trial to establish that the JHE Defendants' activity was malicious, outrageous, or demonstrated a wholly wanton disregard for the

rights of Great American.

**CONCLUSION**

For the above-stated reasons, this Court overrules the JHE Defendants' Preliminary Objections.

BY THE COURT:

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DATED: November 21, 2002

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*COHEN, GENE D., J.*