

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

CORNELL & COMPANY, INC.,	:	SEPTEMBER TERM, 2007
	:	
Plaintiff,	:	NO. 00721
	:	
v.	:	COMMERCE PROGRAM
	:	
PKF-MARK III, INC., and THE	:	Control No. 09020859
TRAVELLERS CASUALTY AND	:	
SURETY COMPANY,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 30th day of June, 2009, upon consideration of plaintiff's Motion for Summary Judgment on defendant PKF-Mark III, Inc.'s Counterclaim, the response thereto, and all other matters of record, it is **ORDERED** that the Motion is **GRANTED in part**, and Count I of the Counterclaim for Breach of Contract and Count IV of the Counterclaim for Declaratory Judgment are **DISMISSED**. The remainder of the Motion is **DENIED**.

BY THE COURT,

ARNOLD L. NEW, J.

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OPINION

In 2001, defendant PKF-Mark III, Inc. (“PKF”) entered into a construction contract (the “Prime Contract”) with non-party Southeastern Pennsylvania Transportation Authority (“SEPTA”) for the reconstruction of a portion of the Market Street Elevated railway (the “Project”). One of the necessary components of the Project was the design and erection of Temporary Shoring Towers to hold up the railway while other work was being done.

As of April, 2004, PKF had not been able to furnish and install the Towers itself, so it contracted with plaintiff Cornell & Company, Inc. (“Cornell”) to erect the Towers. PKF’s and Cornell’s relationship was governed by a written subcontract (the “Subcontract”) containing the following terms, among others:

The Subcontractor shall indemnify and hold harmless the Contractor for any and all loss, damage, liability, expense, claims, demands, and causes of action of any kind . . . arising or allegedly arising, in any way from or in connection with the work or services performed by the Subcontractor, or by one of its subcontractors, by anyone employed by them, or by those for whose acts either may be liable.¹

Subcontractor shall at its sole expense defend any suit brought against the Contractor based upon any claim or cause of action within the foregoing

¹ Subcontract, § 13(d).

indemnity provisions and satisfy any judgment rendered against the Contractor. . . Subcontractor shall pay all costs, expenses, administrative and attorneys' fees and other costs of litigation incurred by the Contractor in connection with any such proceeding or in connection with enforcing the indemnity provisions of this Agreement.²

The Subcontractor shall indemnify the Contractor, and the Owner against, and save them harmless from any and all loss, damage, costs, expenses, administrative and attorney's fees suffered or incurred on account of any breach and/or an alleged breach of the aforesaid obligations and covenants, and any other provision or covenant of this Subcontract.³

In the event either party institutes suit in Court against the other party, or against the surety of such party, in connection with any dispute or matter arising under this Subcontract, the prevailing party shall be entitled to recover a [sic] reasonable attorney's and administrative fees in addition to any other relief granted by the Court.⁴

Notwithstanding anything to the contrary set forth herein, the Subcontractor shall not be responsible to and/or liable to Contractor for any special, indirect, incidental or consequential damages of any kind, arising from Subcontractor's obligation under this Subcontract, whether such damages are based upon breach of contract, breach of warranty, tort, strict liability or otherwise."⁵

In October, 2004, PKF sued SEPTA for breach of the Prime Contract for failure to pay PKF approximately \$44 million PKF claimed was due and owing (the "SEPTA Litigation"). Shortly thereafter, in December, 2004, SEPTA terminated the Prime Contract. At the time the Prime Contract was terminated, none of the Temporary Shoring Towers had been erected by Cornell. One of the grounds SEPTA gave for terminating the Prime Contract was the failure to erect the Towers. SEPTA filed a counterclaim against PKF in the SEPTA Litigation for breach of the Prime Contract based on a number of Project delays and defective work, including the

² Subcontract. § 13(e).

³ *Id.*, § 13(k).

⁴ *Id.*, § 25.

⁵ *Id.*, § 42.

non-existent Towers. SEPTA and PKF ultimately settled their claims against each other with SEPTA paying PKF \$10 Million.

In the meantime, Cornell filed this action against PKF alleging PKF owed it approximately \$400,000 under the Subcontract. PKF filed a counterclaim against Cornell for breach of the Subcontract, breach of a contractual duty to defend PKF in the SEPTA Litigation, breach of a contractual duty to indemnify PKF in the SEPTA Litigation, and a declaratory judgment regarding indemnification in future actions brought by other subcontractors. Cornell moved for summary judgment on all of PKF's counterclaims, which motion is presently before the court.

I. PKF's Claim for Breach of Contract.

Cornell argues PKF's claim for breach of the Subcontract must be dismissed because PKF has failed to prove its damages. "To establish a claim for breach of contract, a claimant 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 damages."⁶ In its Counterclaim, PKF alleges "Cornell breached its Subcontract with PKF by failing to perform pursuant to the terms of the Subcontract in numerous ways."⁷ Specifically, PKF alleges Cornell failed to have its shop drawings approved by SEPTA and failed to fabricate any Temporary Shoring Towers prior to SEPTA's termination of the Prime Contract.⁸

It is undisputed no Temporary Shoring Towers were constructed, but the parties dispute who is to blame for the failure. If the fault lies with Cornell, then Cornell has breached the

⁶ CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999).

⁷ Answer with Counterclaim, ¶ 145.

⁸ *Id.*, ¶¶ 96, 103-104. PKF also alleges Cornell breached the Subcontract by failing to defend and indemnify PKF in the SEPTA litigation. Those breaches are dealt with in subsequent sections of this Opinion.

Subcontract. However, even if Cornell breached the Subcontract, PKF must still prove Cornell’s breach caused PFK damages. “In order to recover for damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss.”⁹

PKF attempts to prove its damages through its expert. The expert identifies the following categories of damages for which Cornell allegedly bears some responsibility due to its failure to erect the Temporary Shoring Towers:

Unpaid Contract Value for Work Performed	\$ 6,325,293
Added Costs for Foundation/Caisson Work	\$ 2,760,495
Added Costs for Temporary Towers	\$ 151,600
Unresolved Change Order Work	\$ 757,811
Cost for Added Non-Manual Personnel	\$ 747,363
Outside Services for Contract Administration	\$ 251,745
Interest on Late Payments	\$ 1,058,156
Interest on Increased Costs	\$ 687,566
Project Overhead Costs	\$ 2,038,127
Legal Expenses	\$ 6,328,299
Total Claimed from SEPTA	\$ 21,106,455
Amount Paid by SEPTA	<u>(\$10,000,000)</u>
Total For Which PKF Claims Cornell is Partially Responsible	\$ 11,106,455 ¹⁰

PKF does not claim Cornell is liable for the entire \$11 million in damages. Instead, PKF’s expert attempts to show how a portion of these damages may be fairly attributed to Cornell. According to his calculations, the value of the Temporary Shoring Towers is 15% of the value of all the incomplete and improper work SEPTA identified as the basis for termination of the Prime Contract.¹¹ He also determines Cornell was responsible for 37% of the time delay

⁹ Logan v. Mirror Printing Co., 410 Pa. Super. 446, 450, 600 A.2d 225, 226 (1991).

¹⁰ Expert Report of Scott D. Gray, p. 17.

¹¹ SEPTA identified seven failures of performance by PKF as the grounds for termination. Failure to erect the Temporary Shoring Towers was one of them. *Id.*, p. 18.

in building the Temporary Shoring Towers. Since 37% of 15% is approximately 5%, he concludes Cornell is liable for 5% of the \$11,106,455 in damages suffered by PKF, which amounts to \$555,000.

PKF's expert does not address causation in his report. Instead, he assumes Cornell's failure to build the Temporary Shoring Towers was one of the contributing causes of PKF's damages. PKF offers no other evidence to link each of the above items of claimed damages to Cornell's alleged breach of the Subcontract. In the absence of such evidence, the trier of fact is left to speculate whether and how the failure to construct Temporary Shoring Towers caused PKF's claimed damages. For instance, did the lack of Towers, or something else, cause SEPTA not to pay PKF for work actually performed? And how did the failure to build the Towers cause the need for additional non-manual personnel? How did it increase overhead costs, etc?

While delay in constructing the Temporary Shoring Towers could have caused the "Additional Costs for Temporary Towers" claimed by PKF, PKF must still proffer evidence as to which items cost more and how Cornell's alleged breach caused the additional costs. Without evidence linking Cornell's breach to PKF's damages, PKF may not recover such damages. Therefore, PKF's claim for contract damages must be dismissed.

Even if PKF could prove that Cornell caused all of PKF's damages, PKF would still not be able to recover such damages from Cornell. Under the terms of the Subcontract, Cornell is not liable to PKF for "any special, indirect, incidental or consequential damages." In other words, PKF may recover only direct damages from Cornell.

The legal distinction between direct and consequential damages is nicely explicated in Pennsylvania's Uniform Commercial Code. Although the UCC does not apply to the Subcontract in this case because it is not a contract for the sale of goods, the court will apply by

analogy the general contract principles articulated in the UCC to this construction contract dispute.¹²

Under the UCC, “the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price.”¹³ In other words, the direct damages for failure to deliver goods, or, in this case, services, is the additional cost of replacement goods, or services, which is also called the cost of “cover.” If, after Cornell’s alleged breach, PKF had contracted with another subcontractor to erect the Temporary Shoring Towers, and the new subcontractor charged more than Cornell because the costs of labor and materials had increased in the meantime, then PKF might have been able to recover from Cornell, as direct damages, the additional amounts it had to pay the replacement subcontractor to erect the Towers. However, PKF never engaged a replacement subcontractor after Cornell’s alleged breach because SEPTA terminated the Prime Contract. Since PKF never needed to effect “cover” for the Towers, PKF never incurred any direct damages as a result of Cornell’s alleged breach.

Instead, PKF claims to have incurred many incidental and consequential damages due to Cornell’s failure to erect the Towers.

Incidental damages resulting from the breach of the seller include:

- (1) expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected;
- (2) any commercially reasonable charges, expenses or commissions in connection with effecting cover; and
- (3) any other reasonable expense incident to the delay or other breach.

¹² See Barrack v. Kolea, 438 Pa. Super. 11, 20, 651 A.2d 149, 154 (1994) (Court applied UCC goods provisions by analogy in construction contract dispute.)

¹³ 13 Pa.C.S. § 2713.

Consequential damages resulting from the breach of the seller include:

- (1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (2) injury to person or property proximately resulting from any breach of warranty.¹⁴

The additional, unreimbursed costs, increased overhead, interest, and attorneys' fees PKF claims as damages are all necessarily incidental and consequential to, and not the direct result of, Cornell's alleged breach of the Subcontract because they do not relate directly to the erection of the Towers. As such, they are not recoverable from Cornell under the Subcontract.

The "Additional Costs for Temporary Towers" claimed by PKF sound like direct damages for the costs of cover, but PKF never attempted to effect cover for Cornell's nonperformance. These additional costs may be costs PKF incurred trying to erect the Temporary Towers itself, prior to its Subcontract with Cornell, but such costs cannot be charged to Cornell as direct damages because they necessarily do not flow from Cornell's breach. Without evidence showing these additional costs resulted directly from Cornell's alleged breach of the Subcontract, PKF may not recover such damages from Cornell.

Because PKF alleges only indirect, incidental, and consequential damages resulting from Cornell's alleged breach, PKF's claim for damages is barred by the limitation of damages provision of the Subcontract. Since PKF has failed to prove it is entitled to any damages, and damages are an element of its claim for breach of the Subcontract, its contract claim must be dismissed.

¹⁴ 13 Pa.C.S. § 2715.

II. PKF's Claims For Breach of the Duty to Indemnify/Defend PKF in the SEPTA Litigation.

PKF claims Cornell must indemnify it for the losses PKF suffered in connection with the SEPTA Litigation. Specifically, PKF demands reimbursement from Cornell for the costs of defending SEPTA's Counterclaim in the SEPTA Litigation.¹⁵

In order to recover its attorneys fees and costs under the indemnification provisions of the Subcontract, PKF must show its fees and costs were incurred "in connection with the work or services performed by" Cornell or "on account of any breach" of the subcontract by Cornell.¹⁶ To the extent PKF proves Cornell breached the Subcontract and caused some of the delay in erecting the Temporary Shoring Towers, PKF may be able to recover its defense costs attributable to the portion of SEPTA's claim that was based on Cornell's failure to erect the Towers.

Cornell did not raise this issue in its Motion for Summary Judgment.¹⁷ As a result, PKF was not obligated, in its response, to proffer evidence of its defense costs and of Cornell's potential liability in order to defeat Cornell's request for summary judgment. Since the issue was not fully briefed, summary judgment on this issue is denied.

III. PKF's Claim for Declaratory Judgment.

PKF asks this court to declare Cornell "contractually obliged to defend, indemnify and hold harmless PKF for any legal actions brought by PKF's other subcontractors, suppliers and/or materialmen, with respect to the SEPTA/MSE- Cobbs Creek Section Project."¹⁸ PKF does not

¹⁵ Memorandum of Law in Support of Response to Motion for Summary Judgment, p. 4.

¹⁶ Subcontract, §13(d),(k).

¹⁷ Cornell discusses this issue in its Reply brief, but PKF is not required to respond to issues first raised in a Reply.

¹⁸ Answer with Counterclaim, ¶ 156.

point to any pending action for which it seeks such a declaration. Without considering the nature of the claims brought by the other subcontractors, the court is unable to declare Cornell contractually obligated to defend or indemnify PKF. Therefore, PKF's claim for declaratory judgment must be dismissed.

IV. Cornell's Attorney's Fees.

Under the terms of the Subcontract, the party who prevails in a lawsuit is entitled to collect its reasonable attorney's fees and costs from the other party.¹⁹ Cornell claims it is entitled to its attorney's fees under this provision. Since the court has not dismissed PKF's entire counterclaim, Cornell has not yet prevailed in this matter. Therefore, the court will not award any attorney's fees at this juncture.

CONCLUSION

For all the foregoing reasons, Cornell's Motion for Summary Judgment is granted in part and denied in part.

BY THE COURT,

ARNOLD L. NEW, J.

¹⁹ Subcontract, § 25.