

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

CARSON/DEPAUL/RAMOS, A Joint Venture	:	JANUARY TERM 2005
RAMOS/CARSON/DEPAUL, A Joint Venture,	:	
	:	No. 02703
Plaintiffs,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control Nos. 042761, 042762,
THE PHILLIES, L.P.,	:	042763
	:	
Defendants.	:	

ORDER

AND NOW, this 24th day of November, 2008, upon consideration of defendant's three Motions for Summary Judgment, the opposition thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is hereby **ORDERED** said Motions are **GRANTED**, and plaintiffs' claims in this action are **DISMISSED** with prejudice.

BY THE COURT,

ARNOLD L. NEW, J.

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OPINION

This case is one of many that arose out of the construction of Citizens Bank Park, a baseball stadium (the “Project”) built for the Philadelphia Phillies (the “Phillies”). In order to construct the stadium, the Phillies as “Owner” entered into an agreement (the “Agreement”) with Driscoll/Hunt, a Joint Venture (“DH”). Under the terms of the Agreement, DH acted as Construction Manager on the Project. In that capacity, DH entered into a subcontract (the “Subcontract”) with Ramos/Carson/DePaul, A Joint Venture (“RCD”) to install concrete foundations for the Project. The Project was beset with numerous delays and disruptions which gave rise to claims by various subcontractors, including RCD, for additional compensation.

In a related action filed in February 2004, RCD sued DH for the additional costs incurred by RCD on the Project.¹ DH filed a counterclaim against RCD in which DH claimed RCD caused or contributed to the delays allegedly suffered by various other subcontractors and suppliers, so RCD must defend and indemnify DH with respect to those entities’ claims. DH and RCD eventually agreed to arbitrate their claims in the Related Action. In the arbitration, RCD

¹ Ramos/Carson/DePaul v. Driscoll Hunt, February Term, 2004, No. 02166, Court of Common Pleas, Philadelphia County (hereinafter, the “Related Action”).

asked for \$14.67 million for the additional work it performed on the Project. In November, 2007, the arbitrators found RCD was entitled to \$3.26 million on its claim.

This action was commenced in January, 2005, while the Related Action was still pending before this court. In this action, RCD asserted a claim against the Phillies for breach of contract, although there is no direct contract between the Phillies and RCD. Instead, RCD asserted a claim based on certain provisions within the Agreement between the Phillies and DH. The Phillies moved for summary judgment on the grounds RCD was not a party to the Agreement. In its opposition to the Motion for Summary Judgment, RCD claimed it is a third party beneficiary of certain payment provisions of the Agreement and, under the terms of that Agreement, the Phillies must pay RCD for any additional work DH directed RCD to perform on the Project. This court granted summary judgment and dismissed RCD's claim. The Superior Court reversed and remanded finding RCD is a third party beneficiary of the Agreement.²

RCD now claims it is entitled to seek from the Phillies the amounts the arbitrators failed to award against DH in the Related Action. DH has moved for summary judgment on the basis of collateral estoppel and satisfaction. DH argues all of RCD's claims in this action were asserted and decided in the arbitration of the Related Action. In opposition to DH's Motions, RCD argues the claims it is asserting in this action are somehow new and different than those asserted in the Related Action. Upon review of RCD's pleadings and the Superior Court's Opinion in this action, it is clear RCD is incorrect. The only claims RCD has asserted, and the only claims RCD could assert in this action against the Phillies, are the claims for extra work allegedly ordered by DH, which claims were previously arbitrated.

² The appeal in this case was pending while the Related Action was arbitrated. The Superior Court issued its decision December 31, 2007, a month and a half after the arbitrators entered their Final Award in the Related Action.

In its Complaint in this action, RCD asserted the following:

18. Because time was of the essence, and in order to meet the Project's substantial completion date, DH directed RCD to perform substantial extra Subcontract Work, which included RCD's employment of additional resources, material and equipment, and RCD increasing of overtime and weekend manpower hours, which was not covered by but went above and beyond RCD's bid.

* * *

21. The additional costs RCD has incurred for performing the extra Subcontract Work at DH's direction are amounts properly due and owing under the Contract Documents.³

22. As a Subcontractor performing Work on the project, RCD is an intended third-party beneficiary of the Agreement for amounts properly due and owing with respect to the Work.

23. In September of 2003, RCD submitted a claim to DH for reimbursement of the additional costs it incurred in performing the extra Subcontract Work.

24. However, DH, as the Phillies agent, wrongfully failed and refused to reimburse RCD for the additional costs it incurred in performing the extra Subcontract Work.

25. Thereafter, in December of 2003, RCD put the Phillies on notice directly that it was seeking reimbursement of the additional costs it incurred in performing the extra Subcontract Work.

26. However, the Phillies wrongfully refused to acknowledge its contractual obligation to pay RCD for the amounts properly due and owing under the Contract Documents and have failed to reimburse RCD for the additional costs RCD incurred in performing the extra Subcontract Work.

* * *

29. As more particularly set forth above, RCD performed extra Subcontract Work that was not covered by but went above and beyond RCD's bid.

30. As more particularly set forth above, under the Contract Documents, RCD is entitled to reimbursement of the substantial costs it incurred in performing the extra Subcontract Work as [sic] DH's direction.⁴

From the above recitation, it is clear the only amounts RCD is demanding from the Phillies in this action are the costs RCD incurred in performing the extra work at DH's direction.

³ "The Contract Documents [are] incorporated into the Agreement [between the Phillies and DH, and they include] the General Conditions of the Contract, Drawings and Specifications, as well as certain addenda." Complaint, ¶ 11.

⁴ *Id.*, ¶¶ 18, 21-26, 29-30.

The claim asserted against the Phillies in this action is the same claim asserted and arbitrated against DH in the Related Action. In its Amended Complaint in the Related Action, RCD alleged as follows:

81. RCD, in response to DH's directives, throughout the Project worked additional overtime and weekends because DH insisted the Work was behind schedule and insisted that RCD was responsible for these delays.

82. RCD, in response to both DH's directives and mismanagement, throughout the Project employed additional resources such as material, equipment and manpower.

83. RCD, in response to both DH's directives and threats, was forced to plan and execute the Work for the Project not based on the Project Schedule, but rather was forced and directed to work according to daily and weekly directions from DH which were constantly changing, often contradictory, which resulted in maximizing RCD's costs while minimizing RCD's work efficiency, and which were apparently made without regard to an overall schedule or coordinated work plan.

84. DH, despite its wrongful threats and directives to RCD, has refused to pay RCD for the additional costs associated with RCD complying with these directives and threats and constructing the work in an accelerated, out of sequence and disrupted manner.

* * *

90. The [Sub]Contract provided, *inter alia*, that RCD would have unfettered access to its areas of work, that RCD could employ its planned construction means and methods, that RCD would not be unreasonably delayed by acts of DH or others, and that RCD could prosecute the work in accordance with the [Sub] Contract requirements.

91. As detailed above, DH actively interfered with RCD's [Sub]Contract performance through its breaches of [the Sub]Contract, including:

- a. failing to provide RCD with access to areas necessary to perform the Work;
- b. refusing to provide information to RCD which was necessary to RCD's [Sub]Contract performance;
- c. failed to turn over areas of the Project in accordance with the Contract Documents;
- d. unreasonably directing RCD to perform the Work in a manner inconsistent with the [Sub]Contract and the Project Schedule;
- e. failing to reasonably manage, coordinate and schedule the Project; and
- f. failing to pay RCD for extra work.

92. RCD gave notice at all relevant times that these interferences would delay and impact the Project and increase the costs to complete RCD's work.

93. DH's breaches of [Sub]Contract resulted in RCD experiencing delays to the Work, reduced productivity, inefficiency costs, out of sequence work, and additional costs.

94. As a result of DH's breaches of the [Sub]Contract, RCD has incurred over \$15 million in damages.⁵

In April, 2007, in its submission to the arbitrators in the Related Action, RCD claimed "[a]s a result of the delay and disruption to RCD's work for which DH is responsible, [RCD's expert] quantified RCD's damages amounting to \$14,164,939."⁶ RCD's claim against DH in the Related Action is based on the same allegedly wrongful acts by DH as RCD's claim against the Phillies in this action. In both actions, RCD claims it is entitled to more money because DH made RCD do more work than RCD had originally agreed to perform under the Subcontract.

In the appeal in this action, the Superior Court confirmed RCD's current claim against the Phillies is limited to the amounts due from DH to RCD. The Superior Court described RCD's claim in this action as follows:

During the course of construction, DH directed RCD to perform certain extra work, necessitating the use of additional resources, materials, equipment, overtime, and weekend manpower hours not encompassed by RCD's original bid. In September 2003, RCD submitted a claim to DH for reimbursement of these extra costs; however, DH refused to reimburse RCD. In December 2003, RCD notified the Phillies that it was seeking reimbursement for these costs. The Phillies also refused to reimburse RCD.⁷

The Superior Court then considered whether such a claim could be asserted by RCD as a third party beneficiary of the Agreement between the Phillies and DH.⁸ In order to determine

⁵ Amended Complaint in Related Action, ¶¶ 81-84, 91-94.

⁶ Initial Position Paper of Claimants, p. 7.

⁷ Ramos/Carson/DePaul v. The Phillies, No. 3226 EDA 2006, pp. 3-4 (Pa. Super. Dec. 31, 2007).

⁸ The Agreement provided in pertinent part:

Notwithstanding anything to the contrary contained in this Agreement, [DH] and the [Phillies] have agreed that . . . [DH], acting on behalf of the [Phillies] and pursuant to authorization by the [Phillies], shall purchase or cause the purchase of materials and hire all labor and engage all

whether RCD is a third party beneficiary, the Superior Court applied a two-part test, both prongs of which must be satisfied in order to find third party beneficiary status:

- (1) the recognition of the beneficiary's right must be appropriate to effectuate the intention of the parties, and
- (2) the performance must satisfy an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.⁹

The Superior Court found “the second part of the test was satisfied by the Phillies’ payments to RCD for the work performed, which satisfied an obligation of DH to pay RCD.”¹⁰ In other words, if the Phillies’ obligation to pay RCD had not been based on DH’s obligation to pay RCD, RCD would have failed the third party beneficiary test, and it would not have been permitted to assert a claim under the Agreement between the Phillies and DH. The Superior Court’s holding belies RCD’s current claim that “[t]he Phillies are responsible for the costs of the Work separate and apart from DH’s responsibility for claims asserted by RCD against DH.”¹¹ Instead, the Superior Court made clear the Phillies are responsible for payment only to the extent DH is obligated to pay RCD.

The issue of how much, if anything, DH owes RCD was previously litigated in the arbitration of the Related Action. In the arbitration, RCD claimed it incurred more than \$14

Subcontractors and Suppliers, as provided in the Contract Documents, and the [Phillies] shall (1) pledge its credit and agree to be liable in the first instance to such Subcontractors and Suppliers for payments properly due and owing with respect to the Work of such Subcontractors and Suppliers under the terms of the Contract Documents, as distinguished from merely guaranteeing payments to them or undertaking to reimburse [DH] or any other party for the cost of such trade subcontracts and purchase orders, and (2) agree to make payments directly to such Subcontractors and Suppliers when and if such payments are authorized by [DH] and approved by the [Phillies].

Complaint, Ex. A (Agreement), § 12.10.

⁹ Ramos/Carson/DePaul v. The Phillies, No. 3226 EDA 2006 at p. 6, citing Guy v. Liederbach, 501 Pa. 47, 60, 459 A.2d, 744, 751(1983).

¹⁰ Ramos/Carson/DePaul v. The Phillies, No. 3226 EDA 2006 at p. 7.

¹¹ Plaintiff’s Memorandum In Opposition To The Phillies, L.P.’s Motions, p. 11.

million in additional costs because it followed DH's directions. However, the arbitrators in the related action found RCD was not entitled to more than \$3.26 million of the amount claimed. The arbitrators further stated their "Final Award is in final settlement of all claims for damages made in this arbitration, including any other claims made by each of RCD and [DH] but not addressed above, which such claims were considered and are denied."¹²

Under the doctrine of collateral estoppel, RCD cannot now recover in this action from the Phillies the damages it was expressly denied in the Related Action.¹³ Furthermore, since the \$3.26 million awarded by the arbitrators has already been paid by DH, such claim has been satisfied, and RCD may not obtain a double recovery against the Phillies in this action.¹⁴

In its opposition to the current summary judgment motions, RCD asserts its claims against the Phillies in this action are for "damages for which DH, as the construction manager, is not responsible" and "for delays caused by the [Phillies] or those for whom the [Phillies are] responsible," such as the "engineer of record."¹⁵ RCD's argument contradicts the express

¹² Arbitrators' Final Award in Related Action, p. 2.

¹³ "The doctrine of collateral estoppel operates to prevent a question of law or an issue of fact which has once been litigated in a court of competent jurisdiction from being relitigated in a subsequent proceeding. There is no requirement that there be an identity of parties in the two actions in order to invoke the bar. Collateral estoppel may be used as either a sword or a shield by a stranger to the prior action if the party against whom the doctrine is invoked was a party or in privity with a party to the prior action. Collateral estoppel applies if five elements are present: 1) the issue decided in the prior case is identical to the one presented in the later case; 2) there was a final judgment on the merits; 3) the party against whom the plea is asserted was a party or in privity with a party to the prior case; 4) the party against whom the doctrine is asserted or his privity has had a full and fair opportunity to litigate the issue in the prior proceeding; and 5) the determination in the prior case was essential to the judgment therein." Mellon Bank v. Rafsky, 369 Pa. Super. 585, 592-593, 535 A.2d 1090, 1093 (1987).

An arbitration award of damages may have collateral estoppel effect in subsequent court proceedings. *See Incollingo v. Maurer*, 394 Pa. Super. 352, 360, 575 A.2d 939, 942 (1990) ("We have reviewed the arbitration proceedings. There is no doubt that they dealt with the same issue of damages presented in the suit against appellees, as far as [appellant] is concerned. The appellant is not entitled to a second bite of the apple by means of suing the appellees for the same damages he has already recovered from his own insurance company.")

¹⁴ "[T]hird party has the option to proceed against either the agent or his principal, or both, but is entitled only to one satisfaction." Joseph Melnick Building & Loan Ass'n v. Melnick, 361 Pa. 328, 334, 64 A.2d 773, 776 (1949).

¹⁵ Plaintiff's Memorandum In Opposition To The Phillies, L.P.'s Motions, pp. 7, 22.

language of the Complaint in which RCD asserted only a claim for the cost of extra work undertaken “at DH’s direction.”¹⁶

There is no mention of an engineer’s misfeasance, nor of wrongdoing by anyone other than DH, in the Complaint in this action. To the extent RCD now wishes to amend its Complaint to assert such a claim, it may not. The Project was completed by April, 2004, more than four years ago. Any additional claim RCD may have against the engineer directly, or against the Phillies in any capacity other than as principal for DH, is time barred under either the two year negligence statute of limitations or the four year contract statute of limitations.¹⁷

CONCLUSION

For all the foregoing reasons, the Phillies’ Motions for Summary Judgment are granted and this action is dismissed.

BY THE COURT,

ARNOLD L. NEW, J.

¹⁶ Complaint, ¶¶ 21, 30.

¹⁷ 42 Pa. C. S. §§ 5524, 5525.