

into a Subcontract Agreement (the “Subcontract”) with RCD to install concrete foundations for the Project. The Project was apparently beset with numerous delays and disruptions which gave rise to claims by various subcontractors, including RCD, for additional compensation from DH and the Owner.

In February, 2004, RCD commenced an action against DH to recover approximately \$15 million in impact/delay damages that RCD allegedly incurred during the course of the Project (the “First Action”).¹ In its Amended Complaint in the First Action, RCD asserted claims against DH for breach of contract and breach of the duty of good faith and fair dealing based on DH’s alleged delay and interference with RCD’s work on the Project which caused RCD to incur additional costs.²

In September, 2005, RCD moved to amend its already Amended Complaint in the First Action to assert a fraud claim based on DH’s alleged representations that RCD could submit its impact claims at the end of the Project. While its Motion to Amend was pending in the First Action, RCD commenced this action against DH in which it asserted the same fraud claim that it sought leave to add in the First Action.

The court in the First Action denied RCD’s Motion to Amend on the basis that the fraud claim was essentially duplicative of RCD’s breach of contract claims.³ The court properly found

¹ The First Action is styled Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 2166 (Phila. Co.). That action is being handled by Judge Abramson.

² The Subcontract requires that RCD submit any delay or impact claims promptly after they arise, but RCD apparently did not timely submit its present claims in accordance with the Subcontract’s provisions. As a result of their late submission, DH disclaims liability for RCD’s present impact claims. However, RCD asserts that DH expressly agreed orally and in writing that RCD could submit its impact claims at the end of the Project, rather than throughout the Project as required in the Subcontract, so that its present claims are not untimely.

³ The court’s reasons for denying RCD leave to amend to add a fraud count in the First Action are set forth in footnote 2 of its opinion dated June 29, 2006, a copy of which is attached hereto.

that the gist of RCD's action against DH sounded in contract not in tort.⁴ The court noted that the issues presented by RCD's claims are whether the parties modified the Subcontract to allow RCD to submit claims late, and, if so, whether DH breached that modified agreement by not paying the amounts that RCD now claims as delay damages.⁵ The court in the First Action found that the parties modified their agreement in writing to permit RCD to file late claims. In essence, the court is enforcing as a contract the representations that RCD claims were fraudulently made.⁶ As a result of the court's rulings in the First Action, the parties will soon go to trial on RCD's claim that DH breached the modified Subcontract by not paying RCD's late filed impact claims.

In this action, DH filed a Preliminary Objection to RCD's fraud claim based on prior pending action, which objection this court sustained due to the pendency of the First Action.

A party may raise preliminary objections based on the pendency of a prior action. In order to plead successfully the defense of *lis pendens*, *i.e.*, the pendency of a prior action, it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same. The purpose of the *lis pendens* defense is to protect a defendant from harassment by having to defend several suits on the

⁴ The Gist of the Action Doctrine was also the basis for one of DH's Preliminary Objections to the fraud claim in this action.

The 'gist of the action' doctrine operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims. . . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. . . . In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts. . . . [T]he doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.

Hart v. Arnold, 884 A.2d 316, 339-340 (Pa. Super. 2005). Since RCD's fraud claim arises out of the Subcontract between the parties, and it essentially duplicates RCD's breach of contract claims in the First Action, the fraud claim is barred by the gist of the action doctrine.

⁵ As the court in the First Action also noted, it does not matter whether DH breached the parties' modified agreement intentionally, negligently or otherwise; RCD's claim still sounds in contract, not in tort.

⁶ Since the representations are enforceable as a contract, they are not false or fraudulent.

same cause of action at the same time. The doctrine of *lis pendens* requires that the prior action be pending. Under Pennsylvania law, the question of a pending prior action is purely a question of law determinable from an inspection of the pleadings. Once the defense is raised, a court may dismiss or stay the subsequent proceedings.

Crutchfield v. Eaton Corp., 806 A.2d 1259, 1261-2 (Pa. Super. 2002).

Upon an inspection of the pleadings filed in this action and the First Action it is clear that they are the same action. The parties – RCD as plaintiff and DH as defendant – are clearly the same in this action and the First Action.⁷ In addition, the fraud claim raised in this action is the same as the fraud claim presented (and rightly refused) in the First Action. Furthermore, the relief requested by RCD in both actions – reimbursement for impact/delay damages – is identical. Rather than allow RCD to split its claims against DH, waste scarce judicial resources, and possibly obtain inconsistent judgments on indistinguishable claims, this court opted to dismiss RCD’s duplicative second action. Therefore, this court’s March 17th Order dismissing the First Amended Complaint in this action in favor of the First Action should be affirmed on appeal.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

⁷ It is irrelevant for *lis pendens* purposes that DH added another subcontractor, Richard Goettle Inc., as an additional defendant in the First Action, so that DH could claim indemnification from Goettle for any damages RCD might recover against DH.