

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

SOUTHEASTERN PENNSYLVANIA	:	August Term 2009
TRANSPORTATION AUTHORITY,	:	
Plaintiff,	:	No. 140
v.	:	
PHILADELPHIA TRANSIT CONSULTANTS,	:	COMMERCE PROGRAM
ET. AL.,	:	
Defendants.	:	Control No. 10122219

MEMORANDUM OPINION TO EXPLICATE THE ORDER OF SEPTEMBER 13, 2011

This action was instituted by Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") against defendant Philadelphia Transit Consultants (hereinafter "PTC"). The issue presently before the court is the interpretation of a release contained within a settlement agreement.

A. The FERP Project

SEPTA operates, maintains and controls the Market Street/Frankford Elevated Railway System (hereinafter "Frankford El"). In the early 1980's Septa began to undertake the rehabilitation and renovation of the existing structure and track of the Frankford El. This project was known as the FERP.

SEPTA engaged PTC a joint venture of Parsons Brinckerhoff, Quade & Douglas, Inc. and Sverdrup & Parcel and Associates, Inc. to provide design and engineering support services. SEPTA also engaged PTC, a joint venture of Parsons Brinckerhoff Construction Services, Inc. and Sverdrup Corporation, to provide construction management services.

FERP construction was done in phases and broken down into various contracts.¹ As part of FERP, new concrete decks, upon which the rails sit, were installed along the Frankford El. The concrete decks rest upon steel beams, referred to as “stringers” that run parallel to the rails and support the structure. The concrete decks were connected to the steel stringers at haunched portions of the concrete decks (“haunches”). At the connection points, the concrete haunches were physically attached to and rest upon the stringers. Approximately eleven concrete haunches exist in each span or bent. There are approximately 18,000 locations where the haunches are connected to the steel stringers. There are two faces to each haunch, one facing north and one facing south, meaning there are approximately 36,000 haunch faces on the elevated line.

PTC’s design for certain precast sections of line section CL-1 called for the precast concrete haunches to be affixed to the steel stringers with a grouted bearing connection.² This produced a composite action between the haunch-stringer connection. PTC observed certain haunch connections in line section CL-1 near expansion joints exhibiting distress, cracking and spalling. As such, PTC modified the connection design so that the concrete deck panels could be free to move and slip when a train passed overhead. This new method incorporated two different types of connections. At all haunch connections at a particular bent with the exception of the middle haunches, PTC’s new design called for slotted holes to be used in the connection plates between the haunches and stringers and called for hand tightening of bolts used in the slotted holes. For the middle haunches, PTC directed the bolted connections be fully torqued with a machine.

¹ The contracts were CL-1, CL-2D, CB-1, CL-3D, CL-3S, CB-2, CL-4D, SCB-1.

² PTC’s design also called for a slip connection at certain haunch locations.

In early June 1997, PTC observed spalling concrete at certain haunches above connection plates in the contract SCB-1 area. Further inspection found spalling and cracking in contract areas CL-4D, CB-2, CL-2D and CL-3S. After inspecting all FERP line sections, PTC determined that the cause of distress was improperly installed bolts on haunch connection plates in the subject contract areas. After concluding and reporting to SEPTA that the over-tightening of the bolted connections was the cause of the haunch distress in 1997, PTC recommended to SEPTA that bolts be “loosened” to prevent further damage to the haunches.

A. Septa hires a Consultant.

In 1998, SEPTA engaged Gannet Fleming, Inc., an outside engineering consultant, to evaluate the cause of the haunch problem and propose solutions. Gannet Fleming investigated and reported on the haunches in sections CL-2d, CL-3d, CL-4D, Allegheny and SCB-1 stating that the deck haunches need to be allowed to slide on the beam at all bearing points. Gannet Fleming also recommended the following: the non composite repair as the preferred method since it was least expensive, easiest to implement, and least destructive; repairs completed at all locations within any given span; and as repairs proceed there should be non-destructive testing performed to determine the interior condition of each haunch.

B. The Litigation

In June 1997, unrelated to the haunch distress problem, SEPTA instituted an action against PTC and Crossing Construction Company, Inc., a contractor, who performed work on the FERP project. The complaint sought indemnification and contribution from PTC with regard to CL-2S and CL-2D construction contracts for the FERP. The complaint alleged claims of negligence and breach of contract against PTC for failing to abide by the terms of its contract and ensure that others working under the construction contracts performed the work in a manner

that would have avoided damage to the elevated structure. The complaint also alleged that Crossing incorrectly placed the steel stringers in a particular contract area, the York-Dauphin curve, and that PTC failed to inspect, review and detect the incorrect placement of the stringers.

In February 1999, SEPTA filed an amended complaint. The amended complaint alleged that concrete cracking and spalling was discovered on the elevated structure. SEPTA alleged that the cracking and spalling on the elevated structure resulted directly from PTC's failure to ensure proper installation of bolts throughout the elevated structure in accordance with the terms of SEPTA's construction contracts.

In September 1999, SEPTA filed a motion seeking leave to file a second amended complaint to add additional claims against PTC for breach of contract, contractual indemnity and negligence with regard to concrete cracking and spalling. SEPTA's proposed second amended complaint alleged that PTC as the construction manager improperly reviewed and assured that the bolts were installed properly throughout the elevated structure in accordance with the terms of SEPTA's construction contracts. The second amended complaint also alleged that PTC's defective project design and production of defective specifications was to blame for the damage suffered to the structure. The proposed amended complaint added claims that PTC was responsible for damage of a continuing nature to the elevated structure because it had breached and been negligent in the performance of its obligations under the Design and Engineering Services Agreement.

In June 2000, SEPTA and PTC entered into a settlement agreement. The Settlement Agreement provided in part as follows:

H. WHEREAS, it is the desire of the parties to this Agreement, in exchange for the mutual considerations set forth herein, to fully and finally compromise, settle

and terminate the CL-4D claims³, the Stringer Relocation Claim⁴, the Haunch Repair Claims⁵, all of the claims that have been asserted by SEPTA in the Original and Amended Complaint, as well as all claims that were proposed to be asserted in the Second Amended Complaint and accompanying motion papers filed in The Litigation⁶, and claim by PTC and/or Crossing, and to protect all parties to this agreement from liability in The Litigation, and liability for the payment of any further monies by way of settlement or judgment, and otherwise, as set forth below.....

COVENANTS

2. As more specifically set forth below, PTC agrees to undertake and complete, or contract with others who are acceptable to SEPTA, the PTC Haunch Repairs.⁷ For purposes of this paragraph, PTC will submit to SEPTA, the proposed methods of repair for the different types of Haunch Distress that will be repaired (i.e. debonded plate injection, debonded plate with a crack, debonded plate with a spall, major repair, and the injection of all haunches at each expansion span that is affixed to the slotted plates and the replacement of bolts in slotted plates at expansion spans that exhibit horizontal restraint to the structure). Within seven (7) calendar days from submission by PTC, SEPTA will review and either approve or comment upon the proposed methods....

³ “CL-4D Claims” means any and all known claims by SEPTA against PTC which relate to alleged deficiencies in the design or construction or management of that segment of the FERP commonly referred to as Contract CL-4D.

⁴ “Stringer Relocation Claim” means a claim asserted by SEPTA against PTC and Crossing in the Complaint filed in The Litigation relating to alleged deficiencies in the design, construction, and/or management of construction of structural steel support “stringers” on that segment of the FERP commonly known as the York-Dauphin curve and related to Contract Nos. CL-2S and CL-2D.

⁵ “Haunch Repair Claims” means claims asserted, or proposed to be asserted by SEPTA against PTC in the Amended Complaint and proposed Second Amended Complaint (the filing of which has been denied by the Court) filed in The Litigation relating to alleged deficiencies in the design, construction and/or management of construction of certain concrete deck haunches constructed by or on behalf of Cornell and/or Buckley/Cornell on various sections of the FERP and relating to Contract Nos. CL-3S, SCB-1, CL-2D, CL-4D, and CB-2.

⁶ “The Litigation” means a lawsuit captioned *SEPTA v. Philadelphia Transit Consultants, et. al.* June Term, 1997, No. 2046, in the Court of Common Pleas of Philadelphia County, Pennsylvania, and includes without limitation all claims, the Complaint, Amended Complaint, proposed Second Amended Complaint, Joinder Complaints, Counterclaims and Cross Claims filed therein.

⁷ PTC Haunch Repairs is PTC’s repair of those Haunches jointly determined by PTC and Septa to contain Haunch Distress on the line sections CL-3S, CL-2D, CL-4D, SCB-1 and CB-2, which have not been repaired before the date of this Agreement by or on behalf of Cornell and/or Buckley/Cornell, or are not the subject of a separate agreement to repair executed by Cornell and/or Buckley/Cornell. PTC Haunch Repairs shall also include the injection of all haunches at each expansion span that is affixed to the slotted plates and the replacement of bolts in slotted plates at expansion spans that exhibit horizontal restraint to the structure. The parties hereto specifically agree that Crossing shall not be involved in, obligated, liable for or otherwise be responsible for any portion of the PTC Haunch Repairs.

11. Except as otherwise stated herein in this Agreement, SEPTA, PTC and Crossing do hereby mutually remise, release and forever discharge each other of and from any and all actions, claims, demands, fees (including attorney fees), expenses, damages of all kinds (including without limitation compensatory, consequential, punitive and exemplary damages), liabilities, judgments, decrees, awards, levies, fines, liens, executions, injunctions, causes of action and suits, at law or in equity, of any kind or nature, in contract, tort (including negligence), or warranty, which relate to or arise out of the facts and circumstances alleged in The Litigation, and/or which were asserted, proposed to be asserted, or known claims which could have been asserted in The Litigation, including any and all known claims with respect to Line Sections CL-2S, CL-3S, CL-2D, CL-4D, SCB-1 and CB-2. Nothing in this Agreement shall release SEPTA, PTC or Crossing or limit the parties' rights to seek indemnity or contribution from any persons or entities in the event a claim is asserted by any person or entity alleging that he, she or it suffered harm or damage to property, personal injury or death arising out of or relating to work on the FERP. Nor is anything in the proceeding paragraph and this Agreement intended to affect or modify any provision for indemnity or contribution set forth in this Agreement, the Consultant Contracts between SEPTA and PTC, or Crossing's contract in the event such a claim is asserted...

20. The undersigned parties hereto warrant and represent, each to the other, that they have, either personally or through their attorney or attorneys, investigated, to such party's full satisfaction, all facts surrounding the various claims, controversies and disputes relating to said incident and the resulting injuries and are fully satisfied with the terms and effects of this Agreement.

The action was dismissed by order to settle, discontinue and end on October 2, 2000.

Between November 2000 and October 2001, PTC performed haunch repairs. On October 25, 2001, SEPTA was advised that the principals of PTC would not proceed further with the repairs. PTC claimed that SEPTA failed to provide notice of the alleged distress during the performance of the work in those areas. On October 30, 2001, PTC informed SEPTA that a review of the additional inspections provided to PTC by Septa to repair were untimely made in contravention of the Settlement Agreement or were repaired or scheduled to be repaired by SEPTA. SEPTA disagreed with PTC's interpretation of untimely notification and stated that the new haunch distress locations were PTC's responsibility to repair under the Settlement Agreement.

SEPTA and PTC entered into a tolling agreement in 2004 to allow SEPTA to further investigate the on-going problems with FERP. In August 2009, SEPTA instituted suit against PTC alleging claims related to the Settlement Agreement and the repairs undertaken in connection with the agreement. On September 13, 2011, the court denied SEPTA's motion for partial summary judgment and granted PTC's motion for partial summary judgment. This opinion is filed to explicate the order granting PTC's motion for partial summary judgment.

DISCUSSION

I. The Release contained within the Settlement Agreement bars SEPTA's claims for Breach of the Design and Engineering Services/Construction Management Services Contracts (count IV), breach of implied warranty (count V) and professional negligence (count VI).

In Pennsylvania, releases are construed according to traditional principles of contract law. The fundamental rule in interpreting a contract is to ascertain and give effect to the intent of the contracting parties. The intent of the parties to a written agreement is embodied in the writing itself. Courts do not assume a contract's language was chosen carelessly, nor do they assume the parties were ignorant of the meaning of the language employed. When contractual language is clear and unequivocal, its meaning must be determined by its contents alone.⁸

The language of a contract is unambiguous if a court is able to determine its meaning without any guide other than knowledge of the basic facts on which the contract's meaning depends. The terms of a contract are ambiguous if the terms are reasonably or fairly susceptible of different constructions and are capable of being understood in more than one sense. Additionally, we will determine that the contract is ambiguous if the language is 'obscure in meaning through

⁸ Crawford Cent. Sch. Dist. v. Commonwealth, 585 Pa. 131, 143, 888 A.2d 616, 623 (2005).

indefiniteness of expression or has a double meaning.⁹ A release that is not obtained by fraud, duress, or mutual mistake is binding between the parties.¹⁰ The effect of a release is to be determined by the ordinary meaning of its language. Thus, "a release not procured by fraud, duress, or mutual mistake is binding between the parties."¹¹

The courts of Pennsylvania have traditionally determined the effect of a release using the ordinary meaning of its language and interpreted the release as covering only such matters as can fairly be said to have been within the contemplation of the parties when the release was given.¹² Moreover, "releases are strictly construed so as not to bar the enforcement of a claim which had not accrued at the date of the execution of the release."¹³ Claims that have not accrued will not have been within the contemplation of the parties. The basic reasoning behind the rule is "that it would be unfair for a release to bar claims that could not possibly have been contemplated or foreseen by the parties."¹⁴

PTC argues that under the terms of the Settlement Agreement, SEPTA's claims for breach of contract (count IV), breach of implied warranty (count V) and professional negligence (count VI) alleged in this complaint are barred by the release found in the Settlement Agreement. The release language provides in relevant part as follows:

⁹ Profit Wise Mkt. v. Wiest, 812 A.2d 1270, 1275 (Pa. Super. 2002)(*quoting* Baney v. Eoute, 784 A.2d 132, 136 (Pa. Super. 2001)).

¹⁰ Davis v. Gov. Emples, 775 A.2d 871 (Pa. Super. 2001).

¹¹ Strickland v. University of Scranton, 700 A.2d 979, 986 (Pa. Super. 1997).

¹² Vaughn v. Didizian, 436 Pa. Super. 436, 439, 648 A.2d 38, 40 (1994).

¹³ *Id.*(*citing* Restifo v. McDonald, 426 Pa. 5, 230 A.2d 199 (1967)).

¹⁴ Transportation Ins. Co. v. Spring-Del Assocs., 159 F. Supp. 2d 836, 841 (E.D. Pa. 2001)(*citing* Restifo, 230 A.2d at 201).

. . . SEPTA, PTC . . . do hereby mutually remise, release and forever discharge each other of and from any and all actions, claims, demands, fees . . . expenses, damages of all kinds . . . liabilities, judgments, decrees, awards, levies, fines, liens, executions, injunctions, causes of action and suits, at law or in equity, of any kind or nature, in contract, tort, or warranty, which relate to or arise out of the facts and circumstances alleged in The Litigation, and/or which were asserted, proposed to be asserted, or known claims which could have been asserted in The Litigation, including any and all known claims which respect to Line sections CL-2S, CL-2S, CL-2D, CL-4D, SCB-1 and CB-2.¹⁵

A review of the complaint filed in this action and the amended complaint and the proposed second amended complaint filed in the Litigation demonstrate that the claims for breach of contract, breach of implied warranty and professional negligence in this action are barred. In the amended complaint, SEPTA alleged PTC failed to insure that the bolts were properly installed in accordance with the contract, failed to abide by the terms of its contract and failed to insure the work was performed in a manner to avoid damage.¹⁶ The proposed second amended complaint added claims that PTC was responsible for damage of a continuing nature to the structure because PTC breached its obligations under the design and engineering contract to design a structure that could withstand all loads.¹⁷ In the amended complaint and the proposed second amended complaint, SEPTA alleged that cracking and spalling resulted from, among other things, PTC's failure to perform duties pursuant to the contract and from PTC's failure to insure conformance with the contract documents.¹⁸

In the instant complaint, the breach of contract claim alleges that PTC breached its underlying contractual and legal duties because it failed to formulate an adequate design and

¹⁵ Exhibit "G" to PTC's Partial Motion for Summary Judgment ¶11 (supplement).

¹⁶ Exhibit "C" to PTC's Partial Motion for Summary Judgment, Amended Complaint ¶ 48, 53.

¹⁷ Exhibit "E" to PTC's Partial Motion for Summary Judgment, Proposed Second Amended Complaint ¶121.

¹⁸ Exhibit "C" to PTC's Partial Motion for Summary Judgment ¶ 59, 60; Exhibit "E" to PTC's Partial Motion for Summary Judgment, Proposed Second Amended Complaint ¶ 59, 60.

perform its construction management role on the FERP which led to haunch damage. SEPTA also alleges that PTC breached its obligations under these contracts by failing to advise SEPTA of the actual cause of the haunch distress at the time of the haunch failures and Settlement Agreement.

As for the professional negligence claim, SEPTA alleges that PTC negligently performed design engineering and construction management services on the FERP. As for the breach of implied warranty claim, SEPTA alleges that PTC breached the implied warranty that the plans and specifications designed the structure as to be reasonably fit for its intended purpose. The allegations within the amended complaint and the proposed second amended complaint demonstrate that SEPTA was aware that a design defect was causing the haunch problem. The claims alleged in the instant complaint rely upon the same facts or related facts alleged in the Litigation. The Settlement Agreement specifically bars SEPTA from bringing causes of action which relate to or arise out of the facts and circumstances alleged in The Litigation.¹⁹ As such, the claims for breach of contract, breach of implied warranty and professional negligence are barred by the release in the Settlement Agreement. Of course, the claim for implied warranty as it relates to the repair work performed after the Settlement Agreement was signed is not barred by the release.

SEPTA argues in opposition that the release does not act as bar since the claims alleged had not accrued as of the date of the Settlement Agreement because SEPTA was not aware of the design defect causing the haunch problem. Although, SEPTA may not have been aware of the specific design feature causing the haunch problem, SEPTA was certainly aware that a problem existed with the design. In SEPTA's motion for leave to amend the second amended complaint,

¹⁹ Exhibit "G".

SEPTA stated that “during the latest repair work in 1999, SEPTA discovered that there is significant amount of additional damage throughout the structure” and “that it believes that the damage to the structure is much more significant than originally known and believes there is an issue with the design of the structure.”²⁰ Based on the forgoing, PTC’s motion for summary judgment is granted and counts VI (breach of contract), count V (breach of implied warranty) and count VII (professional negligence) are barred by the release in the Settlement Agreement.²¹

II. Count VII of the complaint is barred by the Parole Evidence Rule.

In count VII of the complaint, SEPTA alleges a claim for fraudulent inducement.²² Specifically, SEPTA alleges that at the time of the Settlement Agreement, PTC intentionally made representations SEPTA as to the cause of the haunch failures which were false and “were calculated to induce SEPTA to enter into the Settlement Agreement.” SEPTA alleges that PTC falsely represented that “the haunch support failures were the direct result of the excessive tightening of the bolts on connecting plates of the elevated structure by the contractor(s). SEPTA alleges that PTC’S material misrepresentations with regard to the haunch failures were

²⁰ Exhibit “D” to PTC’s Partial Motion for Summary Judgment, Memorandum p. 2.

²¹ The court does not find persuasive SEPTA’s argument that the scope of the release contained within the Settlement Agreement should be limited to contracts CL-3S, CL-2D, CL-4D, SCB-1 and CB-2. The release clearly states “SEPTA...remise, release and forever discharge... which relate to or arise out of the facts and circumstances alleged in the Litigation, and/or which were asserted, proposed to be asserted, or known claims which could have been asserted in the Litigation....” SEPTA knew at the time the Settlement Agreement was executed that repairs were to be completed at all given spans on the FERP. (See Exhibit “F” to PTC’s Partial Motion for Summary Judgment p. 12-13). Therefore, the release should not be limited in scope to permit SEPTA to bring claims for CL-3D, CL-1 and CB-1.

²² Although, count VII is titled negligent misrepresentation, the count sounds in fraud. SEPTA acknowledges that the count sounds in fraud. In footnote 300 of its brief in opposition to PTC’s motion for summary judgment, SEPTA stated the following: “Although couched as a claim for “negligent misrepresentation,” the supporting allegations made clear that SEPTA is asserting a claim for negligent/fraudulent misrepresentation.” Notwithstanding SEPTA’s claim that the count sounds in negligent/fraudulent misrepresentation, the court will treat the count as one sounding in fraud.

false or were made with reckless disregard for the truth and were calculated to induce SEPTA to enter into the Settlement Agreement.

The parol evidence rule provides as follows:

"Where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract. . . and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parol evidence."²³

For the parol evidence rule to apply there must be a writing that represents the "entire contract between the parties."²⁴ To determine whether or not a writing is the parties' entire contract, the writing must be looked at and "if it appears to be a contract complete within itself, couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the [parties'] engagement, it is conclusively presumed that [the writing represents] the whole engagement of the parties"²⁵ This is commonly referred to as an integration clause.

Once a writing is determined to be the parties' entire contract, the parol evidence rule applies and evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is almost always inadmissible to explain or vary the terms of the contract. However, where a party avers that a term was omitted from the contract because of fraud, accident, or mistake or where a term in the parties' contract is ambiguous, parol evidence

²³Gianni v. R. Russell & Co., 281 Pa. 320, 126 A. 791, 792 (Pa. 1924) (citations omitted); *see also* Scott v. Bryn Mawr Arms, Inc., 454 Pa. 304, 312 A.2d 592, 594 (Pa. 1973).

²⁴ Gianni, 126 A. at 792.

²⁵ *See* HCB Contractors v. Liberty Place Hotel Assocs., 539 Pa. 395, 652 A.2d 1278, 1279 (Pa. 1995).

may be introduced to vary a writing meant to be the parties' entire contract or clarify or resolve the ambiguity.²⁶

In the case *sub judice*, the Settlement Agreement contains an express written integration clause. Paragraph 22 of the Agreement expressly provides as follows:

Each of the undersigned parties hereto agrees that this Settlement Agreement and Release constitutes the ENTIRE AGREEMENT among the parties pertaining to the subject matter contained herein that there are no covenants, promises or undertakings outside of this Agreement beyond those specifically set forth herein, and that the terms of this Agreement are contractual and not a mere recital.

Additionally, paragraph 20 of the Settlement Agreement expressly addresses the subject matter to which the alleged misrepresentations pertain, i.e., the basis of the parties' decisions to enter into the Settlement Agreement, and states:

that they have, either personally or through their attorney or attorneys, investigated, to such party's full satisfaction, all facts surrounding the various claims.

Here, the integration clause prevents the admission of parole evidence in order to refute express terms of the contract. Here, the parties were sophisticated, were represented by counsel, and conducted investigations into the cause of the haunch distress. The parole evidence rule does not allow SEPTA to allege misrepresentations in a contract which was written and agreed to by the parties' years before. Consequently, SEPTA's claim in count VII (fraud) is barred by the parole evidence rule.

Conclusion

For the foregoing reasons, PTC's partial motion for summary judgment is granted and counts IV(breach of contract), V(breach of implied warranty) and VI (professional negligence)

²⁶ Estate of Herr, 400 Pa. 90, 161 A.2d 32, 34 (Pa. 1960); *see also* Waldman v. Shoemaker, 367 Pa. 587, 80 A.2d 776, 778 (1951).

are barred by the settlement agreement and count VII (fraudulent inducement) is barred by the parole evidence rule.

BY THE COURT,

MARK I. BERNSTEIN, J.

