

**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 No. 050200
THE PHILLIES, L.P.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 17th day of October, 2006, upon consideration of defendant's Motion for Summary Judgment, the opposition thereto, and all other matters of record, it is hereby **ORDERED** that said Motion is **GRANTED**, and plaintiffs' claims in this action are **DISMISSED** with prejudice.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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OPINION

This case is one of several that arise out of the construction of Citizens Bank Park, a baseball stadium (the “Project”) built for the Philadelphia Phillies (the “Phillies”). The Phillies entered into an agreement (the “Agreement”) with Driscoll/Hunt, a Joint Venture (“DH”) to act as Construction Manager on the Project. In that capacity, DH entered into a subcontract (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 Phillies.

In this action, RCD asserts a claim against the Phillies for breach of the Agreement between the Phillies and DH. RCD claims that it is a third party beneficiary of certain payment provisions of that Agreement so that, under the terms of the Agreement, the Phillies must pay RCD for certain additional work that DH directed RCD to perform on the Project. The Phillies have moved for summary judgment on RCD’s breach of contract claim, which motion is presently before the court.

The payment provisions of the Agreement between the Phillies and DH, upon which RCD bases its claims for additional sums due, are as follows:

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 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].¹

In order to determine if RCD is a third party beneficiary of the Agreement between the Phillies and DH, the court must apply the standards set forth in the Restatement (Second) of Contracts.² Under the Restatement, “[a] promise in [the Agreement between the Phillies and DH] creates a duty in the [Phillies] to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”³

In order to determine whether RCD is an “intended beneficiary” of the Agreement between the Phillies and DH, the Restatement requires that RCD pass the following test:

Unless otherwise agreed between [the Phillies] and [DH], [RCD] is an intended beneficiary if recognition of a right to performance in [RCD] is appropriate to effectuate the intention of the [Phillies and DH] and either

(a) the performance of the promise will satisfy an obligation of [DH] to pay money to [RCD]; or

(b) the circumstances indicate that [DH] intends to give the beneficiary the benefit of the promised performance.⁴

¹ Complaint, Ex. A (Agreement between Phillies and DH), § 12.10.

² See, e.g., Scarpitti v. Weborg, 530 Pa. 366, 371, 609 A.2d 147, 149 (1992); Limbach v. City of Philadelphia, 905 A.2d 567 (Pa. Commw., 2006).

³ Restatement (Second) of Contracts, § 304 (1981).

⁴ *Id.*, § 302.

Condition “(a)” of the Restatement’s test is satisfied in this case because DH is obliged to pay money to RCD for work performed on the Project under the terms of the Subcontract between them. Because the disjunctives “either” and “or” are used with respect to conditions “(a)” and “(b)”, condition “(b)” need not also be satisfied if condition “(a)” is. However, because the conjunctive “and” is used in the sentence preceding the alternate conditions, RCD must also establish that “recognition of a right to performance in [RCD] is appropriate to effectuate the intention of [the Phillies and DH].”⁵

RCD has not proffered any evidence to show that the Phillies and DH intended to give RCD the right to demand payment directly from the Phillies. Instead, the facts upon which both parties rely indicate that, in drafting their Agreement so as to have the Phillies pay subcontractors such as RCD directly, the Phillies’ and DH’s intention was to avoid the payment of certain taxes.⁶ Specifically, the parties intended to avoid the payment of the Philadelphia Business Privilege Tax, which applies as follows:

A general contractor performing contracts on the basis of "cost-plus-a-fixed-fee" or "cost-plus-a-percentage" or "construction management" is required to report as gross receipts the full contract price . . . unless the owner of the property and/or the general contractor, acting pursuant to authorization by the owner, purchases the materials, or hires all labor or engages all subcontractors, and the owner **(a) pledges his credit and is liable in the first instance to the materialmen, suppliers, laborers or subcontractors as distinguished from merely guaranteeing payments to them or undertaking to reimburse the general contractor for the cost of such materials, services or subcontracts, and (b) agrees to make payment directly to the materialmen, suppliers, laborers or subcontractors.** Such sales or services will be regarded as made directly to the

⁵ See *Scarpitti*, 530 Pa. at 371, 609 A.2d at 149 (“The first part of the [Restatement’s] test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third party beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third party beneficiaries. If a party satisfies both parts of the test, a claim may be asserted under the contract.”)

⁶ See Plaintiffs’ Opposition Brief to the Motion of the Phillies, L.P. for Partial Summary Judgment, p. 4-5, and Ex. 3, p. 3 (in which DH recognizes the Phillies’ intention “with respect to payment, especially as it relates to Sales Tax recapturing and avoidance of the gross receipts tax imposed by the Philadelphia Business Privilege Tax.”)

owner, in which case the general contractor will not be required to include such payments in his gross receipts.

Phila. Bus. Priv. Tax Reg. § 312(2) (Aug., 2001) (emphasis supplied). The parties' focus on the tax is clear since the language they chose for their Agreement mirrors the exemption language in the tax regulations.

There is no other evidence showing that either the Phillies or DH intended to benefit RCD or the other subcontractors in drafting the Agreement's payment provisions. In fact, the parties specifically disclaimed such an intention in the Agreement: "Nothing in the Contract Documents shall be deemed to give any third party any claim or right of action against the [Phillies] or [DH]."⁷ Since RCD has failed to show that it was an intended third party beneficiary of the Agreement between the Phillies and DH, RCD's breach of contract claim against the Phillies must be dismissed.

CONCLUSION

For all the foregoing reasons, the Phillies' Motion for Summary Judgment on RCD's claim is granted.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

⁷ Complaint, Ex. A (Agreement between Phillies and DH), § 14.23.