

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

GREAT AMERICAN ALLIANCE	:	APRIL TERM, 2002
INSURANCE, CO.	:	
	:	
Plaintiff	:	No. 2565
	:	
v.	:	COMMERCE CASE MANAGEMENT
	:	PROGRAM
JHE, INC., JOHN R. ECCLESTON	:	
HELEN K. ECCLESTON, and	:	
SOUTHEASTERN TRANSPORTATION	:	
ASSOCIATION	:	
	:	
Defendants	:	Control No. 070594

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ORDER and MEMORANDUM

AND NOW, this 21st day of November, 2002, upon consideration of the Preliminary Objections filed by Defendant Southeastern Transportation Association, to the Plaintiff's, Great American Alliance Insurance, Co., Complaint and the Plaintiff's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** that:

- 1) Defendant's Preliminary Objections as to Count X, Breach of Contract, and Count XII, Equitable Subrogation are **Overruled**; and
- 2) Defendant's Preliminary Objections to Count XI, Quantum Meruit, XIII, Unjust Enrichment, Count XIV, Negligence, and Plaintiff's claim for attorneys' fees are **Sustained**.

The Defendant is ordered to answer the Plaintiff's remaining averments within twenty (20) days of the date of this Order.

BY THE COURT:

COHEN, GENE D., J.

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GREAT AMERICAN ALLIANCE INSURANCE, CO.	:	APRIL TERM, 2002
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Plaintiff	:	No. 2565
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v.	:	COMMERCE CASE MANAGEMENT PROGRAM
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JHE, INC., JOHN R. ECCLESTON HELEN K. ECCLESTON, and SOUTHEASTERN TRANSPORTATION ASSOCIATION	:	
	:	
Defendants	:	Control No. 070594

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MEMORANDUM OPINION

COHEN, GENE D., J.

Before the Court are the preliminary objections of Defendant Southeastern Transportation Association (“SEPTA”) to Plaintiff’s, Great American Alliance Insurance, Co. (“Great American”) Complaint. Co-defendants JHE, Inc., John R. Eccleston and Helen K. Eccleston (the “JHE Defendants”) have filed separate preliminary objections before this Court. SEPTA objects in the nature of a demurrer as to Count X, breach of contract; Count XI, quantum meruit; Count XIII unjust enrichment; Count XII equitable subrogation; Count XIV negligence; and Great American’s general request for attorneys’ fees. SEPTA also objects for failure to conform to rule of court on the grounds that Great American failed to properly execute a verification.

The instant Complaint was brought by Great American, an issuer of surety bonds, which issued performance and payment bonds (the “Bonds”) in connection with a construction project for SEPTA. Under the construction contract, JHE, Inc. was hired as general contractor to

complete SEPTA's 52nd and 63rd street renovations. The Bonds named JHE, Inc., as principal, and SEPTA as obligee. The Bond Agreement required Great American to cover JHE, Inc.'s contractual obligations, in the event that JHE, Inc. defaulted on its obligations. Compl., ¶¶ 1-10.

Pursuant to the terms of an Indemnity Agreement between the JHE Defendants and Great American, if Great American made payments or incurred costs in connection with the Bonds, Great American could demand immediate repayment and/or collateral from the JHE Defendants. The Indemnity Agreement expressly assigned to Great American the contract balances from the bonded construction project. Additionally, the JHE Defendants agreed to hold in trust for Great American all funds received under the bonded construction contracts. Compl., ¶¶ 11-15.

In November, 2001, the JHE Defendants informed Great American that JHE, Inc. was in severe financial distress and would be unable to complete the construction project. In return for Great American's financial assistance, JHE, Inc. agreed to direct SEPTA to pay all remaining contract payments to Great American. Compl., ¶¶ 16-19. On January 31, 2002, JHE, Inc. sent SEPTA written instructions directing SEPTA to make future contract payments to JHE, Inc.. Compl., ¶ 25. It is alleged that in contravention to the instructions of the January 31st letter, SEPTA sent payments to JHE, Inc. and that JHE, Inc., in violation of the terms of the Indemnity Agreement, converted such payments to pay Internal Revenue Service liens (the "IRS liens") instead of forwarding the payments to Great American. Compl., ¶¶ 34-36.

Great American, seeks a temporary restraining order and permanent injunction requiring the JHE Defendants and SEPTA to provide an accounting for contract related sums paid or pending, and for JHE, Inc. to account for all disbursements or distributions it made. Additionally, Great American seeks an injunction requiring immediate turnover of all contract payments JHE,

Inc. possesses, as well as, all future payments received from SEPTA.

Upon review of the pleadings and for the reasons set forth below, SEPTA's Preliminary Objections are Sustained in part and Overruled in part.

1. SEPTA's preliminary objections in the nature of a demurrer are **Sustained** in part and **Overruled** in part. For the purposes of reviewing preliminary objections asserting legal insufficiency, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000). When presented with preliminary objections which if sustained, would result in a dismissal of an action, a court should sustain the objections only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. Ct. 2000)(citation omitted). Essentially, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

a. Great American has plead facts sufficient to support its breach of Contract Claim, including the recovery of damages from the "February 2002 Check."

SEPTA's demurrer to Great American's cause of action for a breach of contract is **overruled**.

To establish a 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." CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). A party need not state every term of the contract in detail, however, they must plead every element. Id.

Here, Great American avers the existence of a contractual relationship on two grounds. First,

Great American argues that SEPTA was named as obligee to the performance and payment bonds issued to JHE, Inc. as principal. Compl., ¶ 9. Second, Great American argues that SEPTA is bound by JHE, Inc's., January 31, 2002, letter directing SEPTA to pay remaining contract payments due under the construction project to Great American. Compl., ¶ 25. Great American also contends that SEPTA, breached its obligation to pay Great American approximately \$360,000 of bonded contract funds. Compl., ¶¶ 27, 35. Included in the \$360,000 of alleged damages is a check in the amount of \$244,000, (the "February 2002 Check") which Great American argues was forwarded to JHE, Inc. after SEPTA received the notice of direction to make payment to Great American. Compl., ¶ 77-80. Accepting as true all of the well pleaded, material and relevant facts, as well as every inference reasonably deducible therefrom, this Court finds that Great American has properly plead a cause of action for breach of contract. Moreover, accepting as true, Great American's allegation that the February 2002 Check was mailed after SEPTA received notice to mail payments to Great American, this Court finds that the February 2002 Check is properly included as potential evidence of damages.

b. Great American's claim for Quantum Meruit/Quasi Contract and Unjust Enrichment is dismissed.

SEPTA's demurrer to Great American's cause of action for Quantum Meruit/Quasi Contract and Unjust Enrichment is **sustained** without prejudice. An action based on the quasi-contract doctrine of quantum meruit requires that one person be unjustly enriched at the expense of another. Mitchell v. Moore, 729 A.2d 1200, 1202 n.2 (Pa. Super. Ct. 1999)(citation omitted). Unjust enrichment is an equitable doctrine which requires a plaintiff to establish "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefits

without payment of value.” Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa. Super. Ct. 1999)(citation omitted). app. denied, 561 Pa. 700, 751 A.2d 193 (2000).

SEPTA argues that Great American’s claim for unjust enrichment is improper because SEPTA made contract payments for services received under the construction contract. Prelim. Objections ¶ 35-38. Great American argues that SEPTA’s misdirection of payments to JHE, Inc., unjustly enriched SEPTA. Compl., ¶ 89. As it is undisputed that SEPTA paid for services received under the bonded construction contract, Great American’s claim for unjust enrichment is misplaced.

Had Great American made specific allegations that SEPTA was unjustly enriched because it failed to make payment for services received, then Great American may have been entitled to proceed on its unjust enrichment claim. However, the Complaint as it stands fails to sufficiently support a claim for unjust enrichment. Without a sustainable unjust enrichment claim, Great American’s claim under quantum meruit must fail. Therefore, the preliminary objection to Great American’s claim under quantum meruit and unjust enrichment is **sustained** without prejudice.

c. Great American has properly plead its claim for Equitable Subrogation

SEPTA’s demurrer to Great American’s cause of action for Equitable Subrogation is **overruled**. Equitable Subrogation is doctrine based in equity that entitles a surety, who pays the debt of another, to assume the role of the person paid and enforce its rights to be reimbursed. Jacobs v. Northeastern Corp., 416 Pa. 417, 425-26, 206 A.2d 49, 53 (1965)(citing Pearlman v. Reliance Ins. Co., 371 U.S. 132, 136-37 (1962)). The doctrine is “enforced solely for the purposes of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.” Id.

Here, Great American has averred that it paid the debt of JHE, Inc., pursuant to its obligations

under the Bond and Indemnity Agreements. Compl., ¶ 22-23. The Complaint further avers that Great American has a right under equitable subrogation to payments from the bonded construction project, because of its performance as surety to ensure timely completion of SEPTA's bonded construction project. Compl., ¶ 84. Therefore, accepting as true all of the well pleaded, material and relevant facts, as well as every inference reasonably deducible therefrom, this Court finds that Great American has a cause of action for equitable subrogation.

d. Great American's claim for Negligence is dismissed.

SEPTA's demurrer to Great American's cause of action for Negligence is **sustained**. To state a cause of action based on negligence, a plaintiff must establish the existence of a defendant's duty, a breach of that duty, and a causal connection between the breach of duty and an injury suffered by the plaintiff. Petrongola v. Comcast Spectator, L.P., 789 A.2d 204, 209 (Pa. Super. Ct. 2001). Additionally, the economic loss doctrine will bar a plaintiff from proceeding under a tort claim when the plaintiff has not alleged any non-economic damages. REM Coal Co. v. Clark Equipment Co., 386 Pa. Super. 401, 563 A.2d 128 (1989). The purpose of the economic loss doctrine is to maintain the separate sphere of tort and contract law. New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989).

Here, Great American has averred that SEPTA misdirected payments to JHE, Inc. after being informed to send payments directly to Great American. Compl., ¶ 35. It is also asserted that SEPTA agreed to abide by JHE, Inc.'s written request that SEPTA send payments directly to Great American. Compl., ¶ 27. Furthermore, Great American avers that SEPTA's misdirection of funds to JHE, Inc., and JHE, Inc.'s use of those funds has dissipated one of the only assets available to repay Great American. Compl., ¶ 35-39. The Complaint also avers that the SEPTA had custody and

control over property of Great American and SEPTA's actions proximately caused damage to Great American. Compl., ¶ 91-92. However, Great American does not aver that they suffered any non-economic injury as a result of SEPTA's conduct. Therefore, the economic loss doctrine bars Great American's negligence claim because Great American's well-plead economic injuries are not the proper subject for tort relief but rather are proper claims in contract law. Because Great American has failed to allege any non-economic injury, this Court sustains SEPTA preliminary objection and dismisses Great American's negligence claim.

e. Great American has insufficiently plead its claim for Attorneys' Fees

The preliminary objections to Great American's demands for attorneys' fees are **sustained** without prejudice. Under Pennsylvania law, "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." Snyder v. Snyder, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993). Great American has failed to provide any basis for its demand for attorneys' fees. Therefore, this Court finds that Great American's claim for attorneys' fees is improper and is dismissed without prejudice.

2. The preliminary objections to Great American's Complaint for failure of the pleading to conform to law is **overruled**. Although Great American's Complaint was improperly verified by counsel, a proper verification was supplied to this Court as Exhibit "A" to Great American's Reply to SEPTA's Preliminary Objections. Under Rule 126 of the Pennsylvania Rules of Civil Procedure, a court may disregard any error or defect of procedure which does not affect the substantial rights of the parties. Therefore, since the error was corrected, there is no harm to the parties.

CONCLUSION

For the above-stated reasons, this Court sustains in part and overrules in part the SEPTA's

Preliminary Objections.

BY THE COURT:

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DATED: November 21, 2002

COHEN, GENE D., J.