SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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RE: ***Exterior Erecting Services, Inc. v. Metropolitan Regional Council of Carpenters of the Philadelphia Vicinity, Brandywine Contractors, Inc., and DRS Specialities of Maryland, LLC.***
C.A. No. S12L-08-024 RFS

Upon Plaintiff's Motion to Dismiss Counterclaim.
Motion Granted.

Submitted: February 28, 2013
Decided: May 16, 2013

Dear Counsel:

Plaintiff Exterior Erecting Services, Inc. ("EES) has moved to dismiss the counterclaim filed by Defendant Metropolitan Regional Council of Carpenters of the Philadelphia Vicinity ("Metropolitan") and Defendant Brandywine Contractors, Inc. ("BCI")(together "Counterclaim Plaintiffs"). The counterclaim seeks to recover costs expended by BCI to complete work allegedly left unfinished by EES on a construction project described below. The motion to dismiss is granted pursuant to Super.Ct.Civ.R. 12(b)(6).

Posture. This case pertains to construction work on a building known as Carpenter's Union Training Center located on a parcel of land in Georgetown, Delaware. The land and the building are owned by Metropolitan, which undertook improvements to the Training Center in 2011. The construction work is referred to herein as the Project.

Metropolitan entered into the prime contract with BCI as the general contractor for the Project, and BCI entered into a subcontract with DRS Specialities of Maryland, LLC ("DRS") for performance of a portion of the construction work.

DRS subcontracted with various business entities, including EES, for portions of work under the prime contract. EES agreed to deliver materials and to perform certain tasks for consideration in the amount of $509,625.81.

In the complaint, EES seeks recovery of monies for work performed under the sub-subcontract with DRS. Because EES believes DRS is unable to pay its debts,[1] EES seeks recovery from Counterclaim Plaintiffs. Counterclaim Plaintiffs deny owing EES any monies.

Counterclaim. The counterclaim alleges that EES did not complete its work under the DRS/EES sub-subcontract. It further alleges that under the prime contract, BCI was liable for completing EES's unfinished work, the cost of which totaled $38,178.50. The Counterclaim Plaintiffs identify their claim as a set-off against the lien claim and the *in personam* counts of the complaint.

Standard of review. A motion to dismiss for failure to state a claim under Super.Ct.Civ.R 12(b)(6) will be granted only if there is no reasonably conceivable set of circumstances susceptible of proof under the complaint (here, the counterclaim) upon which the moving party might prevail.[2] The Court must assume all well pled facts in the counterclaim to be true.[3]

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[1]A default judgment was entered against DRS on November 5, 2012. No action has been taken by DRS since that date.

[2]*Spence v. Funk*, 396 A.2d 967 (Del.1978).

[3]*American Ins. Co. v. Material Transit, Inc.,* 446 A.2d 1011 (Del.Super.1982).

Privity of contract between EES and Counterclaim Plaintiffs. It is undisputed that EES did not contract for services with either of the Counterclaim Plaintiffs.

However, the Counterclaim Plaintiffs argue that a contractual relationship exists between themselves and EES based on a "Joint Check Agreement" ("Agreement") between BCI as general contractor, DRS as subcontractor and EES as sub-subcontractor. At the request of EES, BCI agreed to pay for EES's services in the form of joint checks payable to DRS and EES. The five-paragraph Agreement made the following relevant provisions.

> Paragraph 1 states that DRS's requests to BCI for a joint check must be accompanied by EES's invoices, that is, provided to DRS by EES.
>
> Paragraph 2 states that any joint check shall be endorsed by DRS and delivered to EES. Proceeds of such a check shall be applied by EES to a DRS account specifically identified for the Project. BCI may but has no obligation to monitor or enforce these provisions.
>
> Paragraph 3 states that BCI must pay any properly requested joint check within ten days of receiving the funds from Metropolitan for performance of specified tasks by EES under the sub-subcontract.
>
> Paragraph 4 states that any joint check issued pursuant to the Agreement shall constitute a payment to DRS under its contract with BCI.
>
> Paragraph 5 provides that "nothing in this Agreement is intended to, and nothing in this Agreement shall be interpreted or construed to alter or modify any of the respective rights and/or obligations of the General Contractor and Subcontractor under the Subcontract."

The plain language of the Agreement shows that BCI did not intend to enter into a contract with EES. Instead, it shows that BCI made every effort to demonstrate that the existing contractual relationships remained unchanged.

Relying on *Quality Elec. Co., Inc. v. Eastern States Constr. Service, Inc.*,[4] Counterclaim Plaintiffs argue that the Agreement raises a fact question as to whether it had a contractual relationship with EES. In *Eastern*, the Delaware Supreme Court found that a fact question as to privity arose under a joint check agreement. The agreement listed Quality as a sub-contractor to Eastern and confirmed that Eastern had "entered into a contract" with Quality to furnish materials and/or labor for the construction project.

No such language exists in the case at bar. On the face of the record, the evidence is clear that there is no contractual relationship between EES and Counterclaim Plaintiffs.

Counterclaim Plaintiffs also rely on the First Priority Assignment as evidence of privity. The Assignment was drafted by Metropolitan and signed only by EES. The Assignment provides that BCI will pay one amount due to ESS directly into the Carpenters Health & Welfare Fund of Philadelphia & Vicinity, as requested by EES. The Assignment is not a contract and is not evidence of privity between EES and Counterclaim Plaintiffs.

Both the Agreement and the Assignment pertain only to the manner in which EES chose to be paid under the sub-subcontract between DRS and EES. Neither instrument shows any intent on the part of Counterclaim Plaintiffs to step into a contractual relationship with EES. As a matter of law, these instruments do not establish privity of contract between EES and BCI/Metropolitan.

Economic loss doctrine. EES argues in its motion that because there is no privity of contract the only theory of recovery available to Counterclaim Plaintiffs is in tort.[5] EES further argues that such recovery is barred by the economic loss doctrine. Counterclaim Plaintiffs concede this issue by not addressing it in their response.[6]

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[4]1995 WL 379125, *3 (Del.Super.).

[5]The economic loss doctrine is a court-adopted measure that prohibits certain claims in tort where overlapping claims based in contract adequately address the injury alleged. *Brasby v. Morris*, 2007 WL 949485, *6 (Del.Super.).

[6]*Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del.1999).

Not a set-off. As argued by EES, Counterclaim Plaintiffs concede that they allege a counterclaim for damages, as opposed to a "counterclaim in the nature of a set-off against Plaintiff," as described in the counterclaim.

Metropolitan's damages. EES argues for dismissal of the counterclaim against Metropolitan because EES does not plead damages. However, in his affidavit, Michael W. Pergeorelis, treasurer and director of finance for BCI, avers that under the prime contract, Metropolitan is liable to reimburse BCI for labor and material costs as well as expenses incurred by BCI in completing the Project. EES cannot prevail on this issue.

The determinative issue on this motion is privity. As discussed above, there is no privity of contract between Counterclaim Plaintiffs and EES. Assuming all well-pled facts in the counterclaim to be true, there is no reasonably conceivable set of circumstances upon which Counterclaim Plaintiffs can show privity with EES.

For these reasons, EES's motion to dismiss the counterclaim under Rule 12(b)(6) is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary