**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| SMYRNA HOSPITALITY, LLC,<br><br>Plaintiff,<br><br>v.<br><br>PETRUCON CONSTRUCTION, INC.<br><br>Defendant/Third-Party Plaintiff,<br>v.<br><br>FRAMEMASTERS, DIAMOND STATE WALL SYSTEMS, and DESIGN COLLABORATIVE, INC.<br><br>Third-Party Defendants. | ) | C.A. No. N10C-01-061 CLS |

Date Submitted: November 8, 2013
Date Decided: February 26, 2014

On Third-Party Defendant Design Collaborative, Inc.'s Motion for Summary Judgment. **GRANTED.**

**ORDER**

Donald Gouge, Jr., Esq., Donald L. Gouge, Jr., LLC, Wilmington, Delaware. Attorney for Plaintiff.

Joseph S. Naylor, Esq., Swartz Campbell, LLC, Wilmington, Delaware. Attorneys for Defendant Petrucon Construction, Inc.

Patrick McGrory, Esq. and Paul Cottrell, Esq., Wilmington, Delaware 19899. Attorneys for Third-Party Defendant Design Collaborative, Inc.

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**Scott, J.**

## Introduction

Before the Court is Third-Party Defendant Design Collaborative, Inc.'s ("DCI") motion for summary judgment of Defendant Petrucon Construction, Inc.'s ("Petrucon's) Amended Third-Party Complaint. The Court has reviewed the parties' submissions and considered the oral arguments made during the earlier hearing and the pretrial conference. For the following reasons, DCI's motion is **GRANTED.**

## Background

On June 15, 2005, DCI entered into a contract with Plaintiff Smyrna Hospitality, LLC ("Smyrna") to design the construction of Smyrna's hotel (the "Hotel"). On May 15, 2006, Smyrna entered into a separate contract with Petrucon for the construction of the Hotel. The agreement between Smyrna and Petrucon identified Smyrna as the owner and Petrucon as the contractor. In addition, it stated that DCI was the architect for the project. Although DCI was listed as the architect, there was no contractual relationship between DCI and Petrucon.

The final Certificate of Occupancy was issued for the Hotel in 2007. In January 2008, the Hotel began experiencing water penetration issues. In January 2010, Smyrna filed this suit, asserting four causes of action against Petrucon: Breach of Contract, Fraudulent/Intentional Misrepresentation, Breach of the

Covenant of Good Faith and Fair Dealing, and Negligence. In June 2011, Smyrna sold the Hotel to a non-party.

On June 17, 2011, Petrucon filed a third-party complaint which combined, in one-count, claims against DCI and two other parties for negligence, contribution and indemnification.[1] In DCI's answer, DCI asserted twenty affirmative defenses, including the economic loss doctrine and the statute of limitations.[2] In March 2013, DCI moved for summary judgment of the third-party complaint, arguing that any claim for negligence was barred by the economic doctrine, Petrucon had no right to indemnification in the absence of a contract, and that Petrucon could not seek contribution because Petrucon and DCI did not meet the definition of "joint-tortfeasors" under the Uniform Contribution Among Tort-Feasors Act, 10 *Del. C.* §§ 6301-08 (the "Act" or "Uniform Contribution Act").

Petrucon moved for partial summary judgment on Smyrna's claims and opposed DCI's motion. On September 23, 2013, the Court held oral argument on the pending motions for summary judgment. On September 27, 2013, the Court granted summary judgment in favor of Petrucon on three of Smyrna's claims, leaving only the claim for breach of contract, but excluding consequential

[1] The Court will only address those facts and parties which are relevant to this motion.
[2] Third Party Defendant Design Collaborative, Inc.'s Answer and Crossclaim to Petrucon Construction, Inc.'s Third Party Complaint, dated Jul. 21, 2011, Trans. ID. 38825043.

damages.[3] The Court granted summary judgment on the negligence claim under the economic loss doctrine because Smyrna failed to show that Petrucon breached a duty independent of its contractual obligations.

At the pretrial conference held on September 30, 2013, several issues were discussed, including the Court's desire for clarification of Petrucon's claims against DCI. With the Court's permission, Petrucon filed the Amended Third-Party Complaint. According to Petrucon, DCI was hired by Smyrna to prepare architectural designs, which included the windows and framing of the Hotel, and provide construction administration services.[4] "[DCI] was also involved in various fixes for problems that developed as the project progressed."[5] Petrucon asserted a claim DCI for negligence/contribution in a separate count, asserting that DCI breached legal and contractual obligations to Smyrna and Petrucon by failing to inform Smyrna or Petrucon and its subcontractors of the deficient construction, inadequately performing its construction administrative services, including monitoring the construction, and providing insufficient and incomplete designs.[6]

DCI again moved for summary judgment on the same grounds; however, in a footnote, DCI argued that, if Petrucon was seeking an independent claim for

[3] Order and Opinion, dated Sept. 27, 2013.
[4] Amended Third Party Compl., at ¶ 4.
[5] *Id.*
[6] *Id.* at ¶¶ 12-13.

negligence, rather than contribution, that claim would be barred by the applicable statute of limitations.

## Standard of Review

The Court will grant a motion for summary judgment, "after adequate time for discovery"[7] "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[8] It is the moving party's burden to show that material facts are not in dispute; then, the nonmoving party must show specific facts demonstrating that a dispute of fact exists.[9] In rendering a decision, the Court views the facts in a light most favorable to the nonmoving party.[10]

## Discussion

### I. Petrucon's Third-Party Claim for Negligence against DCI is barred by the Applicable Statute of Limitations.

Ordinarily, a party who fails to raise an affirmative defense is considered to have waived that defense.[11] The applicable statute of limitations in this case is 10

[7] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[8] Del. Super. Ct. Civ. R. 56(c).
[9] *Roberts v. Delmarva Power & Light Co.*, 2 A3.d 131, 136 (Del. Super. 2009).
[10] *Id.*
[11] *See Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 2012 WL 3201139, at *15 (Del. Ch. Aug. 7, 2012) *reargument denied*, CIV.A.5140-CS, 2012 WL 4503731 (Del. Ch. Oct. 1, 2012).

*Del. C.* § 8106, which provides for a 3-year period.[12] The hotel was completed in late 2007 and began experiencing the water intrusion problems in January 2008. Although DCI did not make an argument based on the statute of limitations in its first motion for summary judgment, DCI did not waive the defense because DCI included the statute of limitations as an affirmative defense in its answer to the original third-party complaint. Even if the Court views the later time period of January 2008 as the time the action accrued, Petrucon would have had to file its negligence complaint in January 2011. Petrucon did not file the original third-party complaint until June 17, 2011. Therefore, DCI is entitled to summary judgment on Petrucon's negligence claim based on the operation of the statute of limitations.

## II. Petrucon is not entitled to Contribution from DCI because DCI and Petrucon are not Joint-Tortfeasors.

The Delaware Supreme Court describes the right to contribution as "the right of one who has discharged a common liability to recover from another who is also liable."[13] In 1949, Delaware adopted the Uniform Contribution Act "with some modifications."[14] The Supreme Court has stated that the right to contribution was "codified" in the Act.[15] Under the Act, "[t]he right to contribution exists among

[12] § 8106(a).
[13] *Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1284 (Del. 2011).
[14] *Lutz. v. Boltz*, 100 A.2d 647, 647 (Del. Super. 1953).
[15] *Reddy*, 20 A.3d at 1284.

joint tortfeasors",[16] which is defined as "2 or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."[17] The Act also states that "[a] joint tortfeasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share thereof."[18]

In *ICI America, Inc. v. Martin-Marietta Corp.*,[19] an owner entered into a contract with a general contractor for the construction of a commercial plant, who then contracted with a supplier of concrete products to be used for concrete flooring.[20] When the owner sued the supplier for breach of express and implied warranties, the supplier filed a third-party complaint against the general contractor seeking contribution.[21] In response to the general contractor's argument that any negligence in the performance of its contract would establish a breach of its duty to the owner, but not to the supplier, the District Court explained

> [T]he Delaware law is otherwise. If [the general contractor and the supplier] are joint tortfeasors, a duty of contribution between them is created by 10 Del.C. § 6302(a). Indispensible to a joint tortfeasor relationship is a 'common liability' either 'joint' or 'several' that two or more parties have to the person injured. Without this dual liability

[16] § 6302(a).
[17] § 6301.
[18] § 6302(b).
[19] *ICI America Inc.*, 368 F. Supp. 1148 (1974).
[20] *Id.* at 1149.
[21] *Id.* at 1149-50.

> to [the owner] of [the general contractor and the supplier], no right of contribution can exist. If, however, as appears from the complaint and third-party complaint, [the general contractor and the supplier] each breached duties which they owed to [the owner], each became liable to [the owner] and a right of contribution arose. The duty which [the general contractor] owed to [the owner] alleged in the third-party complaint does not defeat [the supplier's] right of contribution, but is essential to it.[22]

The Court also stated:

> It is immaterial that the liability of [the supplier] alleged by [the owner] in the complaint rests upon a different theory than that alleged against [the general contractor] by [the supplier] in its third-party complaint. *A third-party claim may be based on negligence although the main claim sounds in contract*.[23]

Petrucon has cited to two cases in which our state courts have interpreted the Act as requiring the "common liability" analysis applied in *ICI*, rather than requiring an action for contribution to be based on the same underlying legal theories.[24] In one case, *Blackshear v. Clark*, the Supreme Court held that contribution pursuant to the Act was available to a doctor sued in tort who sought contribution from his employer through the doctrine of *respondeat superior*.[25] The Court stated "[t]he Basis Of liability (sic) is not relevant, nor is the relationship among those liable for the tort. In short, it makes no difference whether the [employer's] liability is based upon the doctrine of Respondeat superior or any

[22] *Id.* at 1151 (citing *Lutz*, 100 A.2d 647).
[23] *Id.* (emphasis added).
[24] *Blackshear v. Clark*, 391 A.2d 747, 748 (Del. 1978); *Pringle v. Scarberry*, 1981 WL 383062 (Del. Super. Aug. 12, 1981).
[25] *Blackshear*, 391 A. 2d at 748.

other legal concept. The point is that both it and the Doctor are (at least) 'severally' liable for the same injury to plaintiff."[26] In the other case, *Pringle v. Scarberry,* this Court allowed contribution where the underlying action was one for willful and wanton conduct and the third-party claim for contribution was based on negligence.[27]

Despite the above holdings, this Court has also interpreted the Act as requiring that each person sharing the common liability to be liable "in tort."[28] For example, in *Ulmer v. Whitfield,* this Court summarized the right to contribution under the Act as requiring that "each of the persons must be liable in tort."[29] The Court explained that, "[t]o be liable in tort, a person must have done or omitted to do an act contrary to the obligation of the law. The tort liability must be based on a duty other than that created by contract."[30]

In *DiOssi v. Edison,*[31] a plaintiff working for a valet service at a party was injured when an underage partygoer struck him while driving after he had consumed alcohol. The defendants, parents of an eighteen year old whom the party was for, had contracted with a caterer for the event and discussed the prevention of

[26] *Id*.
[27] *Pringle,* 1981 WL 383062 at *1.
[28] *See Ulmer v. Witfield,* 1985 WL 189262 (Del. Super. Sept. 10, 1985),
[29] *Id.* at *1.
[30] *Id.* at * 2. (internal citations omitted).
[31] *Di Ossi v. Edison*, 1989 WL 135755 (Del. Super. Oct. 25, 1989).

underage drinking with the caterer. When the plaintiff sued the parents, the parents asserted that the caterer was liable to them for indemnification or contribution.[32] The Court found that the defendants had no claim under the Act for contribution "because they [were] not proceeding under the legal theory required under that provision, a tort."[33] Although it found that contribution was not available under the Act, the Court stated that

> it would be an anomaly under the law if a party could contract to perform its specific duties, breach its performance of those duties causing the other contracting party to be liable, and then as a shield to liability claim that there is no remedy for its breach because the party proceeds under a contract theory rather than by tort. Additionally, preclusion of the claim for indemnification or contrition under contract would be inconstant with § 6305 which provides that the chapter does not impair any right of indemnity under existing law. Delaware law has recognized that where there is no cause of action available for contribution under 10 *Del. C.* §§ 6301-08, there may be an action available in contract.[34]

The Court acknowledges that the facts and considerations involved in a construction case differ from those facts and considerations in a case like *Di Ossi*.[35] As this Court has previously stated, the "[a]llocation of liability among

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[32] *Id.* at *1.
[33] *Id.* at *2.
[34] *Id.* (internal citation omitted).
[35] *See also Quereguan v. New Castle Cnty.*, 2006 WL 1215193, at *7-8 (Del. Ch. Apr. 24, 2006), *reargument denied* 2006 WL 2522214 (Del. Ch. Aug. 18, 2006)). In *Queraguan*, the plaintiff, owner of residential property alleged damages as a result of water intrusion from a neighboring property owned by the county and leased to the State. The Court followed the decision in *Di Ossi* and found that, while the County sufficiently alleged a claim for breach of contract, it had

design professionals, contractors and subcontractors, is a problem inherent in complex litigation involving construction."[36] Nevertheless, the Court is persuaded by its decision in *Di Ossi* and finds that, since Petrucon will not be found liable in tort, it cannot qualify as a joint tortfeasor. As the Court stated in its decision on Petrucon's motion, Smyrna's negligence claim against Petrucon failed under the economic loss doctrine because Smyrna did not assert facts showing that Petrucon breached a duty independent of its contractual duties to Smyrna. Accordingly, if Petrucon is found liable, it would only be for breach of contract and not for a tort. Therefore, Petrucon is not a joint-tortfeasor entitled to contribution under the Act. Furthermore, unlike the parents and the caterer in *Di Ossi*, Petrucon had no contract with DCI which would have given it standing to recover contribution or indemnification flowing from contract.

Moreover, based on the facts presented by Petrucon, the same rationale would apply to a tort claim by Smyrna against DCI. According to Petrucon, Smyrna contracted with DCI to prepare architectural designs and perform administrative services. It is the failure to properly perform these duties that Petrucon asserts caused the water intrusion problems at issue in this case. Petrucon has not presented facts which show that DCI breached some sort of duty owed to

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no right to contribution under the Act, but could seek indemnification or contribution from the State under the lease.

[36] *Millsboro Fire Co. v. Construction Management Svcs.*, 2006 WL 1867705, at *4 (Del. Super. Jun. 7, 2006).

Smyrna independent of DCI's contractual duties owed to Smyrna. It follows that Smyrna would have had to pursue an action in contract, not in tort. Therefore, like Petrucon, DCI would also not qualify as a "joint-tortfeasor."

## Conclusion

For the reasons set forth above, DCI's motion for summary judgment of Petrucon's Amended Third-Party Complaint is **GRANTED.**

**IT IS SO ORDERED.**

/s/ Calvin L. Scott
**Judge Calvin L. Scott, Jr.**