

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ATAP CONSTRUCTION, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
LIBERTY MUTUAL INSURANCE CO.	:	
and RICHARD DEAN, INC.,	:	
Defendant and	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
MARIO MELE, et al.,	:	
Third-Party Defendants.	:	NO. 97-6079
	:	
Newcomer, J.	:	June , 1998

M E M O R A N D U M

Presently before this Court are defendant and third-party plaintiff Richard Dean, Inc.'s Motion for Summary Judgment as to Counts I and IV of its Third-Party Complaint, and the response thereto of third-party defendants Mario Mele, Richard Buckman, Joseph Hoeffel and the County of Montgomery, and third-party plaintiff's reply thereto. For the reasons that follow, the Court will deny third-party plaintiff's motion for summary judgment. Also before this Court are the Motion of Mario Mele, Richard Buckman, Joseph Hoeffel and the County of Montgomery for Summary Judgment, and third-party plaintiff Richard Dean, Inc.'s response thereto. For the reasons that follow, the Court will grant in part and deny in part third-party defendants' motion for summary judgment. Also before the Court are the Motion of Third-Party Defendant The Kwait Organization for Summary Judgment as to Count VI and Count VII of the Third-Party Complaint, and third-party plaintiff Richard Dean, Inc.'s response thereto. For the

reasons that follow, the Court will deny third-party defendant's motion for summary judgment.

I. Background

This action arises, in part, from demolition work performed by Richard Dean, Inc. ("Dean") in 1996 and 1997 as a general contractor on "Phase I" of a municipal project for the County of Montgomery ("County") in connection with the construction of the Montgomery County Human Services Center in Norristown, Pennsylvania (the "Montco Project"). On or about August 22, 1996, the County and Dean entered into a contract in the amount of \$864,000 in which Dean agreed, inter alia, to perform and complete all of the demolition work in accordance with the applicable contract documents. In furtherance of its contractual obligations with the County, Dean directed Liberty Mutual Insurance Company ("Liberty"), as surety, to issue a labor and material payment bond to the County, as obligee, in the amount of \$864,000.

In February 1997, Dean and ATAP Construction, Inc. ("ATAP") entered into a contract in the amount of \$565,000. Pursuant to the terms of contract between ATAP and Dean, ATAP agreed to perform all the necessary demolition work for the Montco Project. ATAP avers that it fully performed all of the demolition work required under the terms of the contract between Dean and ATAP. Dean, however, failed to pay ATAP the remaining balance due under the contract between Dean and ATAP.

Thus, this instant action was commenced by ATAP against Dean and Liberty for, inter alia, failure of Dean to pay ATAP the remaining contract balance of \$84,750.00 for the demolition services rendered by ATAP on the Montco Project.¹ ATAP asserts a breach of contract claim and a claim under the Award and Execution of Public Contracts Act, Pa. Stat. Ann. tit. 73, §§ 1621, et seq., against Dean; ATAP also asserts a bond claim against Liberty. Dean has filed an answer and counterclaims against ATAP. In its counterclaims, Dean asserts that ATAP breached the contract between ATAP and Dean by failing to properly perform its obligations owed under the contract, i.e., for incomplete and deficient work under the contract. Dean seeks the recovery of damages in excess of \$116,299.00.

Dean has also filed a third-party complaint against the County of Montgomery (the "County"), Mario Mele, Richard Buckman, and Joseph Hoeffel, in their capacities as County Commissioners (the "Commissioners"), and the Kwait Organization ("Kwait"), the County's architect. The third-party complaint contains eight counts - five against the County defendants, two against the Kwait Organization and one against all defendants.

In Count I of the third-party complaint, Dean asserts that the County and the Commissioners breached the underlying contract between the County and Dean ("County Contract") by

1. In its Complaint, ATAP also seeks the recovery of moneys allegedly owed to it by Dean for services ATAP rendered on four other construction projects. The dispute over these construction projects, however, has been settled.

failing to promptly pay the remaining balance due under the contract or by failing to provide a timely written notice of deficiencies with Dean's work. In Count II, Dean asserts a quantum meruit claim against the County and the Commissioners. In Count III, Dean asserts a claim under the Contractor and Subcontractor Payment Act, 73 P.S. §§ 501, et seq., against the County and the Commissioners.² In Count IV, Dean asserts a claim under the Award and Execution of Public Contracts Act, Pa. Stat. Ann. tit. 73, §§ 1621, et seq., against the County and Commissioners. In Count V, Dean pleads a breach of contract claim against the County and the Commissioners for affirmative obstruction of Dean's contractual obligations. Under Counts VI and VII, Dean pleads an intentional interference with contractual relations claim and an unjust enrichment claim respectively against Kwait. Under Count VIII, Dean asserts a contribution and indemnity claim against all defendants.³

In response to Dean's third-party complaint, the County filed an answer and counterclaims against Dean. Under the counterclaims, the County seeks damages in excess of \$300,000 against Dean for Dean's alleged breaches of the County Contract. The County alleges that Dean breached its express and implied duties under the contract by, among other things, failing to

2. The Court dismissed Count III against all defendants in a prior Order.

3. By way of prior Order, the Court dismissed the contribution claim against Kwait.

perform and complete the required demolition work under the County Contract, failing to complete the required demolition work within the time frame provided for under the County Contract, performing incomplete, defective and deficient demolition work, failing to perform its work in a workmanlike fashion, demolishing portions of the building that were to remain, and damaging portions of the building that were not to be damaged.

Dean presently moves for summary judgment against the County and the Commissioners on Counts I and IV of its third-party complaint. The Commissioners move for summary judgment on all counts of the third-party complaint in which they are named, and the County moves for summary judgment as to Counts II and V of the third-party complaint. Kwait also moves for summary judgment against Dean on Counts VI and VII of the third-party complaint. The parties have filed responses.

II. Standard of Review

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506 (E.D. Pa. 1993). A trial court may enter summary judgment if, after review of all evidentiary material in the record, there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. Long v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983); Bank of America Nat'l Trust and Savings Ass'n v. Hotel Rittenhouse Assoc., 595 F. Supp. 800, 802 (E.D. Pa. 1984).

Where no reasonable resolution of the conflicting evidence and inferences therefrom, when viewed in a light most favorable to the non-moving party, could result in a judgment for the non-moving party, the moving party is entitled to summary judgment. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 883 (3d Cir.), cert. denied, 454 U.S. 893 (1981); Vines v. Howard, 676 F. Supp. 608, 610 (E.D. Pa. 1987).

The party moving for summary judgment has the burden of proving that there are no genuine issues as to any material fact, and that he is entitled to judgment as a matter of law. Hollinger v. Wagner Mining Equip. Co., 667 F.2d 402, 450 (3d Cir. 1981); Cousins v. Yeager, 394 F. Supp. 595, 598 (E.D. Pa. 1975). The burden then shifts to the non-moving party to present opposing evidentiary material beyond the allegations in the complaint showing a disputed issue of material fact. Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 96 (3d Cir. 1982); Goodway Mktg., Inc. v. Faulkner Advertising, Inc., 545 F. Supp. 263, 265, 267-68 (E.D. Pa. 1982). The non-moving party must present sufficient evidence for a jury to return a verdict favoring that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505 (1986).

III. Discussion

A. Dean's Motion for Summary Judgment

Dean contends that it is entitled to summary judgment on Count I because the County failed to timely issue payment pursuant to the terms of the County Contract. Dean argues that

it is also entitled to summary judgment on Count IV because the County failed to comply with the mandatory notice and payment provisions of the Award and Execution of Public Contracts Act (the "Act"), Pa. Stat. Ann. tit. 73, §§ 1621, et seq. Finally, Dean submits that the Court should preclude the County and the Commissioners from presenting any evidence as to any deficiency item alleged against Dean that was identified in writing for the first time more than fifteen days after the County received Dean's "Application for Payment" dated April 4, 1997. Dean argues that it is entitled to such a ruling because the County violated the Act, and in order to effectuate the mandatory provisions of the Act, the Court must preclude the County from identifying those deficiencies in Dean's work that were required to be identified under the mandatory provisions of the Act at an earlier time.

The County and the Commissioners, of course, argue that Dean is not entitled to summary judgment on either Count I or Count IV. As an initial matter, these third-party defendants argue that Dean cannot rely on provisions of the County Contract that deal with progress payments to support its breach of contract claim in Count I because Dean's request for payment was a final payment, and as such, Dean must satisfy the provisions of the County Contract regarding final payment. Under these final payment terms, the County argues that Dean was never entitled to payment of the remaining balance due under the County Contract. The County also submits that Dean was not entitled to payment

because there is a factual dispute as to whether the demolition work on the Montco Project was finished.

With respect to Count IV, the County argues that Dean's reliance on § 1626.4⁴ of the Act is misplaced. The County contends that § 1626.4 is inapplicable because this section addresses progress payments, not final payments. Because Dean's request for payment was allegedly a final payment, the County argues that § 1627 governs and that under this section,⁵ Dean was

4. Section 1626.4 provides that:

(a) The contracting body may withhold payment for deficiency items according to terms of the public contract. The contracting body shall pay the contractor according to the provisions of this act for all other items which appear on the application for payment and have been satisfactorily completed. The contractor may withhold payment from any subcontractor responsible for a deficiency item. The contractor shall pay any subcontractor according to the provisions of the act for any item which appears on the application for payment and has been satisfactorily completed.

(b) If a contracting body withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or fifteen calendar days of the date that the application for payment is received. If a contractor withholds payment from a subcontractor for a deficiency item, it must notify the subcontractor or supplier and the contracting body of the reason within fifteen calendar days of the date after the receipt of the notice of the deficiency item from the owner.

Pa. Stat. Ann. tit. 73, § 1626.4.

5. Section 1627 provides that:

A public contract containing a provision for retainage as provided in [§ 1625] shall contain a provision requiring the architect or engineer to make final inspection within 30 days of receipt of the contractor's request for final inspection and application for final payment. If the work is
(continued...)

not entitled to payment because Dean had not received an architect's final certification. In addition, the County argues that Dean is not entitled to payment under § 1627 as a matter of law because there is a factual dispute over whether the demolition work on the Montco Project was finished.

Counts I and IV of Dean's third-party complaint center around a request for payment made by Dean upon the County. On April 4, 1997, Dean hand delivered an "Application and Certification for Payment" with the application number "6R FINAL." Application 6R FINAL demanded payment in the amount of \$83,045.40 from the County; this amount was the only amount outstanding under the County Contract.

Dean, however, never received payment on application 6R FINAL. Instead, on May 27, 1997, Dean received a letter dated May 22, 1997 from Charles D. Garner, Sr., Director of Public Property for the County, regarding application number 6R FINAL.

5. (...continued)

substantially completed, the architect or engineer shall issue a certificate of completion and a final certificate for payment and the contracting body shall make payment in full within 45 days thereafter, except as provided in section 5, less only 1 and 1/2 times such amount as is required to complete any then remaining, uncompleted, minor items, which amount shall be certified by the architect or engineer and upon receipt by the contracting body of any guarantee bonds which may be required, in accordance with the contract documents, to insure proper workmanship for a designated period of time. The certificate given by the architect or engineer shall list in detail each and every uncompleted item and a reasonable cost of completion. Final payment of any amount so withheld for the completion of the minor items shall be paid forthwith upon completion of the items in the certificate of the engineer or architect.

Pa. Stat. Ann. tit. 73, § 1627.

In this letter, Garner informed Dean that Dean had to finish its work under the County Contract by June 6, 1997. Garner explained that any unfinished work as of June 6, 1997 would be completed by other contractors who were working on "Phase II" of the Montco Project. Garner stated that such action had to be taken so as to protect the County from delay damages by the Phase II contractors.⁶

Dean claims that the County's untimely response violated the terms of the County Contract. In support of this argument, Dean cites to sections 9.4.1, 9.5.1 and 9.5.2.3 of the County Contract. Section 9.4.1 provides that:

9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1.

(emphasis added) Section 9.5.1 provides in relevant part:

9.5.1 The Architect may decide not to certify payment and may withhold a Certificate of Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.1.

6. On May 28, 1997, counsel for Dean wrote to Garner in response to the County's demand. Counsel for Dean explained that it had "timely completed its contract work" and that an employee of the County had confirmed that such work was complete. In addition, counsel for Dean informed the County that \$83,045.50 was past due and owing to Dean and that it would soon take legal action to recover this money.

(emphasis added) Section 9.5.2.3 provides:

9.5.2.3 Rights of the County

The County reserves its right to either accept an Application for Payment and process same in full, or withhold from any payments otherwise due the Contractor so much as may be necessary to protect the County for any reason. The foregoing right shall be construed solely for the benefit of the County and will not require the County to determine or adjust any claims or disputes between the Contractor and any Sub-contractors, vendors or suppliers, or to withhold any moneys for their protection.

(emphasis added).

Based on these provisions, Dean contends it was contractually entitled to a written notice from either Kwait or the County that its payment application was being denied and the reasons invoked for refusing to certify payment as due to Dean. Dean claims that it did not receive any written notification from Kwait or the County that it was withholding certification of payment as to application number 6R FINAL within seven days. In addition, Dean contends that it did not receive from Kwait or the County, within seven days of receipt of application number 6R FINAL, a written list of deficiencies items that were alleged as not completed in accordance with the County Contract. Dean argues that this failure to provide notice is a breach of contract, and because the facts that form the basis of this claim are undisputed, Dean claims that it is entitled to summary judgment on Count I.

The Court, however, finds that Dean is not entitled to summary judgment on Count I for the following reasons. To begin, it is not clear that the language of the contract requires the

County to provide Dean with a written notice of deficiencies within a seven day period. Although section 9.4.1 requires Kwait to either issue a "Certificate of Payment" to the County or provide the County and Dean with a written explanation as to why its withholding certification within seven days after receipt of an "Application for Payment," Section 9.5.2.3 does not impose a similar requirement on the County. This section merely states that "[t]he County [has reserved] its right to either accept an Application for Payment and process the same in full, or withhold from any payments otherwise due the Contractor so much as may be necessary to protect the County for any reason." This language does not explicitly adopt the notice requirements that are imposed on the architect (indeed, in its reply brief, Dean specifically concedes that no time limitation has been imposed on the County as to when it would have to provide Dean with a written notice (Reply at 4)); thus, it could be argued that the County does not have the same notice requirements as the architect. Consequently, if the County does not have the same notice requirements of the architect, it would not be proper to find that the County breached the County Contract by failing to provide a written notice of deficiencies to Dean within seven days from the architect's receipt of application 6R FINAL.

In addition, the County argues that Dean actually relies on the wrong provisions of the County Contract - sections 9.4.1, 9.5.1 and 9.5.2.3 - to support its claim in Count I. In this regard, the County argues that if application 6R FINAL is a

request for final payment under the County Contract, then section 9.10.1, as set forth in the Supplementary General Conditions, would govern this claim. Under section 9.10.1, Dean would not be entitled to final payment until the County conducted a final inspection of and accepted Dean's work. Dean has not established that the County made a final inspection of or accepted Dean's work.⁷ Consequently, if application 6R FINAL is a request for final payment, then Dean may not be able to recover under Count I. Because a factual question exists as to whether application 6R FINAL is actually a final payment or progress payment, the Court cannot grant summary judgment on Count I.⁸

The Court also finds that Dean is not entitled to summary judgment on Count IV. Under this claim, Dean argues that it is entitled to payment of application 6R FINAL, plus other

7. Moreover, this section requires Dean to provide the County with certain releases, and there is no evidence that Dean provided such releases to the County.

8. Dean argues that even if 6R FINAL is a final payment under the terms of the County Contract, sections 9.4.1, 9.5.1 and 9.5.2.3 would still apply because these provisions are necessarily incorporated by section 9.10.1.2. Section 9.10.1.2 provides that "[w]ithholding of any amount due the County under any other section of this Specification or as outlined in its Contract shall be deducted from the final payment due the Contractor." Contrary to Dean's position, the Court finds that this language does not incorporate the above-mentioned sections. Section 9.10.1.2 merely stands for the unremarkable proposition that if the County had previously withheld moneys under any other part of the County Contract, then these moneys should be deducted from the final payment due the contractor. This section does not stand for the proposition that the written notice requirements, which are imposed on the architect for progress payments, are imposed on the County for purposes of determining final payment. Consequently, the Court rejects Dean's argument.

statutorily awarded damages, because the County allegedly violated section 1626.4 of the Act. This section provides that:

(a) The contracting body may withhold payment for deficiency items according to the terms of the public contract. The contracting body shall pay the contractor according to the provisions of this act for all other items which appear on the application for payment and have been satisfactorily completed. . . .

(b) If a contracting body withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or fifteen calendar days of the date that the application for payment is received.

Pa. Stat. Ann. tit. 73, § 1626.4. Dean argues that according to section 1626.4(b), the County had an obligation to notify Dean in writing of any deficiency item for which it was relying to deny payment in fifteen days from receipt of application 6R FINAL.⁹ Because the undisputed facts demonstrate that Dean never provided Dean with a deficiency notice, Dean claims that it is entitled to summary judgment on Count IV of its third-party complaint for the County's violation of section 1626.4.

The Court, however, finds that Dean has not established that it is entitled to summary judgment on Count IV. Although this issue was not raised by the parties, the Court, sua sponte, finds that section 1626.1 may preclude Dean from prevailing on Count IV. Section 1626.1 plainly reads that "[p]erformance by a contractor in accordance with the provisions of a public contract

9. Because the County Contract did not set forth a time limitation for providing such notice, the fifteen day period provided for in section 1626.4(b) would apply.

shall entitle the contractor to payment by the contracting body." Pa. Stat. Ann. tit. 73, § 1626.1. Thus, to be entitled to payment from the contracting body, a contractor must perform in accordance with the terms of the contract. In this case, evidence has been produced, in the form of correspondence between Dean and ATAP, that some of the demolition work that Dean agreed to perform for the County may not have been completed by ATAP its subcontractor; although ATAP did not complete the work, ultimate responsibility under the County Contract would lie with Dean. Thus, if Dean did not perform in accordance with the County Contract, then it would not be entitled to payment under § 1626.1, which provides that a contractor must perform in accordance with the contract in order to be entitled to payment.

Dean is also not entitled to summary judgment on Count IV because there exists a factual dispute as to whether application number 6R FINAL is a final payment. If this application for payment is ultimately found to be a final payment request, then it appears that the provisions of section 1626.4 would not apply to this claim. Instead, section 1627 of the Act, which is entitled "Final payment under contract," would apply to Count IV of Dean's third-party complaint. Section 1627 requires the architect to make a final inspection within thirty days and requires the owner to pay the contractor within 45 days of such certification. In this case, there exists a question of fact as to whether Dean specifically made a request for "final inspection and application for payment" so as to trigger the running of the

30-day period contained in section 1627. In addition, a question of fact exists as to whether the architect conducted the inspection within the 30-day period. If the architect did not conduct this inspection within this period, then it would appear that the County would be in violation of section 1627, and thus liable to Dean under the Act. However, these issues cannot be resolved at the summary judgment stage.

Finally, this Court rejects Dean's argument that the County should be precluded from presenting any evidence or defense as to any deficiency item alleged against Dean that was identified in writing for the first time more than 15 days after the County's receipt of application number 6R FINAL. Dean's request for preclusion proceeds on the assumption that if the County is found to have violated section 1626.4 of the Act, preclusion is required by the Act in order to effectuate the purposes of the Act, which is to require prompt payment to contractors under public contracts. Despite the superficial appeal of Dean's argument, the Court must reject it.

After reviewing the provisions of the Act, the Court concludes that the relief requested by Dean is not mandated by the Act. First, such a holding would lead to an absurd and draconian result. For example, if an unscrupulous contractor submitted a request for payment even though the contractor did not complete the work and the contracting body failed to provide notice within the time provided for under the Act by one day, then the contracting body would be forever barred from using

evidence -- that the contractor did not do the work -- which was identified after the period of notice provided for under the Act. Such a result surely is not required under the Act.

Indeed, a close reading a section 1626.5, which provides for penalties and attorney fees, supports the Court's position. This section states that a court "may award . . . a penalty equal to 1% per month of the amount withheld in bad faith." The section adds that an amount is "deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section [1624.4]." Pa. Stat. Ann. tit. 73, § 1626.5(a). Consequently, the specific language of this section provides that not all violations of this section will result in the imposition of a penalty. Bad faith will only be found where there is a finding of arbitrary or vexatious behavior, thus implying that behavior which is not arbitrary or vexatious will not be in violation of this section, i.e., good faith or mistaken violations of the Act will not be penalized.¹⁰

10. Dean argues that any violation of section 1626.4 is done in bad faith. The Court, however, rejects this proposition as contrary to the explicit language of section 1626.5. As stated above, bad faith is explicitly defined as arbitrary or vexatious behavior. In order to ensure that contractors would not bring vexatious suits for violations of this Act, the last sentence of section 1626.5(a) provides that bad faith could never be found where there is compliance with section 1626.4. However, this sentence does not support the conclusion that every violation of section 1626.4 would be found to be in bad faith; indeed, if this proposition were true, then the preceding sentence of section

(continued...)

Clearly, the legislature of the Commonwealth of Pennsylvania did not intend to preclude contracting bodies from supporting valid breach of contract claims with evidence of deficiencies that were identified after the notice period provided for in section 1626.4 merely because the contracting body may have violated section 1626.4. First, nothing in the Act provides for such a remedy. Second, the purpose of the Act - which is prompt payment - would not be frustrated by such a finding because the Act already provides an incentive for contracting bodies to comply with the provisions of the Act. In this regard, section 1626.5 specifically provides for an interest penalty and the award of attorney fees against the contracting body for a violation of the Act, if there is bad faith conduct. Thus, there is no need to add further incentives by the way of preclusion of evidence. Consequently, the Court will not preclude the County from supporting its breach of contract counterclaims with evidence of Dean's allegedly deficient performance.¹¹

10. (...continued)
1626.5(a) would be mere surplusage. In essence, if every technical violation of section 1626.4 was deemed to be done in bad faith, there would be no need to find that the contracting body's conduct was undertaken in bad faith. Consequently, the Court rejects Dean's argument as contrary to the plain language of section 1626.5(a).

11. The Court also notes that even if there is an ultimate finding that the County violated the Act, the Court would stay the judgment because the County may be entitled to set-off if it is successful on its counterclaims.

B. The Commissioners' and County's Motion for Summary Judgment

The Commissioners and the County have also moved for summary judgment. The Commissioners move for summary judgment on all Counts of the third-party complaint in which they were named. The County argues that it cannot be liable under the theory of quantum meruit because an express contract exists between the County and Dean, and thus Count II must be dismissed against it. The County also submits that Count V must be dismissed against it because it cannot intentionally interfere with a contract to which it is a party. Dean has filed a response opposing the Commissioners' and the County's motion on all grounds except as to the Commissioners' argument that they cannot be liable for contribution.¹²

As an initial matter, the Court finds that the Commissioners are entitled to summary judgment on Count IV. Under the Act, only "contracting bod[ies]" are liable for violating the payment terms of the Act. Under section 1621, a "contracting body" is defined as:

Any officer, employee, authority, board, bureau, commission, department, agency or institution of the Commonwealth of Pennsylvania or any state-aided institution or any political subdivision, local authority or other incorporated district or public instrumentality, which has authority to enter into a public contract.

12. The Court thus will grant summary judgment in favor of the Commissioners and against Dean as to the contribution cause of action set forth in Count VIII.

Pa. Stat. Ann. tit. 73, § 1621. The Commissioners plainly do not fall under any of the three categories delineated in this section. First, the Commissioners are not officers, employees, an authority, a board, a bureau, a commission, a department, an agency or institution of the Commonwealth of Pennsylvania. Second, the Commissioners are not a state-aided institution. Finally, they are not a political subdivision, local authority, or other incorporated district or public instrumentality. The Commissioners thus do not qualify as a contracting bodies under section 1626.5. Therefore, summary judgment will be granted on Count IV in favor of the Commissioners.

The Court will also grant summary judgment in favor of the Commissioners on Dean's breach of contract claims under Counts I and V. "It is fundamental law that one cannot be liable for a breach of contract unless one is a party to that contract." Electron Energy Corp. v. Short, 408 Pa. Super. 563, 567, 597 A.2d 175, 177 (1991). Here, the County Contract is only between the County and Dean. The Commissioners are not parties to the Contract; at most, Dean can only argue that they are agents of the County. Thus, the Commissioners cannot be liable for breaches of the County Contract. The Court will therefore grant summary judgment in favor of the Commissioners on Counts I and V.

The Commissioners also move for summary judgment on Dean's quantum meruit/unjust enrichment claim. To prevail on a claim of unjust enrichment, "a claimant must show that the party against whom recovery is sought either 'wrongfully secured or

passively received a benefit that it would be unconscionable for her to retain.'" Torchia v. Torchia, 346 Pa. Super. 229, 233, 499 A.2d 581, 582 (1985) (citation omitted). Thus, Dean must show that the Commissioners received a benefit that it would be unconscionable for them to retain. Because Dean cannot show that the Commissioners received a benefit, Dean's claim for unjust enrichment against the Commissioners must fail. The only party that could have received a benefit would have been the County. Therefore, the Court will enter summary judgment in favor of the Commissioners on Count II of the third-party complaint.

The Court also will grant summary judgment in favor of the Commissioners on Dean's indemnification claim under Count VIII. In light of the Court's above-findings with respect to the liability of the Commissioners, the only party that could potentially be liable to Dean under a theory of indemnity is the County. Thus, the Court grants summary judgment in favor of the Commissioners on Count VIII.

The County also seeks summary judgment with respect to Counts II and V of the third-party complaint. The Court, however, will deny the County's request. Although the quasi-contractual doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded on a written agreement or express contract, there could be a finding at trial that the County Contract was not in place when work was allegedly performed by Dean for the County between the dates of April 11, 1997 to June 30, 1997. Under this scenario, the doctrine of

unjust enrichment would be available to Dean. Thus, the Court will deny the County's motion for summary judgment as to Count II.

With respect to Count V, the County argues that a claim of intentional interference with contractual relations cannot succeed because one cannot be found to intentionally interfere with a contract to which it is a party. See Nix v. Temple University, 408 Pa. Super. 369, 379, 569 A.2d 1132, 1137 (1991). The County's motion on this ground must be denied, however. Dean does not set forth an intentional interference with contractual relations claim, rather it sets forth a separate and distinct claim for breach of contract based on the County's alleged affirmative interference with Dean's performance of its contractual obligations. Because Pennsylvania law allows a separate and distinct claim where there is affirmative interference by an owner with a contractor's work, see Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 509 Pa. 553, 506 A.2d 862 (1986), the County's motion on the above-mentioned ground must be denied.

C. Kwait's Motion for Summary Judgment

Kwait argues that it is entitled to summary judgment on Counts VI and VII of the third-party complaint. With respect to Count VI, Kwait contends that Dean cannot establish that it intentionally interfered with the County Contract or that any interference was improper. In addition, Kwait argues that it is entitled to qualified immunity as an architect, which protects it

from an intentional interference with contractual relations claim. With respect to Count VII, Kwait argues that it received no benefit from any work done by Dean, and thus Dean cannot establish a valid unjust enrichment claim.

Notwithstanding Kwait's arguments, the Court finds that Kwait is not entitled to summary judgment as to either claim. With respect to the intentional interference with contractual relations claim, the Court finds that genuine issues exist as to whether Kwait intended to harm Dean's contract with the County and whether such interference, if any, was improper. With respect to Dean's unjust enrichment claim, a genuine issue of material fact exists as to whether Kwait wrongly received a benefit in the form of construction management services provided by Dean to Kwait. Thus, the Court will deny Kwait's Motion for Summary Judgment.

An appropriate Order follows.

Clarence C. Newcomer, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ATAP CONSTRUCTION, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
LIBERTY MUTUAL INSURANCE CO.	:	
and RICHARD DEAN, INC.,	:	
Defendant and	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
MARIO MELE, et al.,	:	
Third-Party Defendants.	:	NO. 97-6079

O R D E R

AND NOW, this day of June, 1998, upon consideration of the following Motions, and any responses and replies thereto, it is hereby ORDERED that:

1. Defendant and Third-Party Plaintiff Richard Dean, Inc.'s Motion for Summary Judgment as to Counts I and IV of the Third-Party Complaint is DENIED;

2. Motion of Third-Party Defendants Mario Mele, Richard Buckman, Joseph Hoeffel and the County of Montgomery is GRANTED in part and DENIED in part. The Motion is granted to the extent that Mario Mele, Richard Buckman and Joseph Hoeffel seek summary judgment on all Counts of the third-party complaint in which they are named; the Motion is denied in all other respects. IT IS FURTHER ORDERED that JUDGMENT is ENTERED in favor of Mario Mele, Richard Buckman and Joseph Hoeffel and against third-party plaintiff Richard Dean, Inc. on all Counts of the Third-Party Complaint in which these third-party defendants are named; and

3. Motion of Third-Party Defendant The Kwait Organization for Summary Judgment as to Counts VI and VII of the Third-Party Complaint is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.