

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

DELAWARE COUNTY : CIVIL ACTION
REDEVELOPMENT AUTHORITY :
 :
 v. :
 :
 :
 :
 MCLAREN/HART ENVIRONMENTAL :
ENGINEERING CORPORATION : No. 97-3315

M E M O R A N D U M

Padova, J. April , 1998

Plaintiff, Delaware County Redevelopment Authority, claims that it suffered damages as a result of a flawed environmental assessment performed by Defendant, McLaren/Hart Environmental Engineering Corporation ("McLaren/Hart"), concerning a property Plaintiff bought subsequent to the assessment. Plaintiff claims that, as a result of Defendant's faulty report, it sustained substantial damages. Defendant has filed this Motion for Partial Summary Judgment, asserting that it breached no duty to Plaintiff and, therefore, has no liability. For reasons discussed below, the Motion will be granted in part and denied in part.

I. BACKGROUND:

In 1994, Defendant performed an environmental assessment for the Resolution Trust Corporation ("RTC") concerning a property the RTC had acquired, Baldwin Tower, which is located in the Borough of Eddystone, Delaware County,

Pennsylvania. There were major two reports, Phase I, dated October 28, 1994, and Phase II, dated October 3, 1994.¹ Both were prepared by Charles Phillips, an engineer working for Defendant. The cover page of the Phase I report stated:

The report and its contents represent PRIVILEGED AND CONFIDENTIAL INFORMATION. This document should not be duplicated or copied under any circumstances without the express permission of RESOLUTION TRUST CORPORATION (RTC). The purpose of the report is to allow RTC to evaluate the potential environmental liabilities at Baldwin Towers. Any unauthorized reuse of McLaren/Hart's reports or data will be at the unauthorized user's sole risk and liability.

(Mem. Supp. Def.'s Mot. Summ. J. ("Def.'s Mem.") Ex. B. ("Phase I report") face page.)

The RTC commissioned Defendant to identify sources of environmental contamination, especially asbestos, in Baldwin Tower. Defendant undertook to do so, but its assessment stated it could not guarantee that all asbestos material had been identified (id. at 21), and it specified that certain areas had not been inspected:

As required in the RTC Statement of Work, a comprehensive asbestos inspection was conducted of the site buildings. This inspection was conducted only in those areas of the building that were readily accessible. Inspections of areas that required removal or disturbance of structural building components, ceiling panels, fixtures or other building materials were not performed as part of this assessment.

¹The Phase II report bears an earlier date than the Phase I report.

(Id. at 5.)² According to Defendant's estimate, removal of the asbestos in the building was expected to cost \$5,000 to 10,000. (Def.'s Mem. Ex. C ("Phase II report").)

Following the environmental assessment, the RTC negotiated to sell Baldwin Tower to Plaintiff for the nominal sum of \$10.00. (Def's Ex. J. ("Agreement") at ¶ 1.) Plaintiff's chief negotiator was J. Patrick Killian ("Killian"), Plaintiff's Executive Director. (Def.'s Mem. Ex. D, Deposition of J. Patrick Killian ("Killian Dep.") at 102.) On September 14, 1994, Plaintiff passed a Resolution to accept transfer of Baldwin Tower contingent upon receiving appropriate reports from a qualified environmental engineer. (Def.'s Mem. Ex. E.) Plaintiff's purpose in acquiring Baldwin Tower was to resell it to someone

²Plaintiff states that it tried to obtain the "Statement of Work" to which this passage refers from Defendant, who claimed not to have it. Plaintiff claims it would be "inherently unfair and prejudicial to Plaintiff to allow Defendant to rely upon these disclaimers without providing the scope of work for the project." (Pl.'s Resp. Mem. at 8-9.) It asks the Court to draw an adverse inference from Defendant's failure to produce the document that Defendant was required to inspect crawl spaces and pipe chases. It reasons that if Defendant had been required to perform those inspections, then its disclaimers as to inspection of those places in its reports would be ineffective. In order to draw the conclusion Plaintiff seeks, the Court would have to conclude that the document was intentionally destroyed, and not simply lost or misplaced. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 337 (3d cir. 1995). Absent a more complete evidentiary record, the Court declines to do so. Plaintiff does not indicate what steps it took to try to obtain a copy from the RTC, which was equally likely to have had one and which evidently made no attempt to hold Defendant liable for having failed to discover all of the asbestos.

who would develop it. (Killian Dep. at 45, 65-57.) Killian emphasized that the motive was not profit but, rather, development; however, he was very concerned that Plaintiff (and ultimately the taxpayers) not be stuck with a huge bill for environmental remediation, "like spending three million dollars to remediate property [Plaintiff] got for a dollar." (Id. at 68, 59.)

Plaintiff did not want to spend the money to hire its own environmental expert. (Id. at 74-75.) It thought it could rely on the assessment the RTC had commissioned from Defendant, and it obtained Defendant's Phase I and Phase II reports from the RTC. (Id. at 75, 78-79, 97.) A few days before closing, Plaintiff hired Joseph McGovern ("McGovern"), an attorney experienced in environmental law, to make sure that Plaintiff's exposure to liability for environmental remediation was limited. (Pl.'s Resp. Mem. Ex. G, Killian Aff.)

At his deposition, McGovern testified that he was concerned with the import of the language on the face of the assessment report, quoted above, "that only the Resolution Trust Corporation could rely on the report and . . . the county wanted to have some relationship with McLaren Hart. To defeat that specific reservation on the report." (Pl.'s Resp. Ex. A, Deposition of Joseph McGovern ("McGovern Dep.") at 55-56.)

McGovern reported that he had spoken to Phillips at McLaren/Hart, and that Phillips

had no problem with entering into a relationship with the county, that he would be happy to do something in writing for us to document that McLaren/Hart would allow the county to rely, essentially to rely on the findings of the documents that McLaren/Hart produced. And that, to the best of his information, there was no reason to suspect that the conditions at the time we were talking on the phone, were any different than what was reflected in the October '94 report.

Q. Did you specifically tell Charlie [Phillips] that you wanted to create a relationship with McLaren/Hart so that [Plaintiff] could rely on their reports?

A. If it wasn't the first sentence out of my mouth, it would have been the second.

Q. And what was Charlie's response to that?

A. No problem.

(Id. at 61.)

Following this conversation, Phillips sent a 2-page letter to McGovern concerning the Baldwin Tower reports.³ The letter opened by stating, "As you requested, and as authorized by [the RTC], McLaren/Hart . . . has prepared this letter summarizing the results of our Phase I and II Environmental Site Assessments conducted at [Baldwin Tower]." (Def.'s Mem in Supp. Ex. A.) The last paragraph of the letter stated, "This letter

³Defendant states McGovern's law firm paid approximately \$200 for the letter, and Plaintiff does not contest that figure. (See Def.'s Mem. at 5.)

summarizes the conclusions of our Phase II study. Detailed discussion regarding the results of our studies are included in our Phase I and Phase II reports. Should you have any questions, please do not hesitate to contact the undersigned" (Id.) McGovern thought that Phillips' letter might have done more than merely summarize the reports in that, in response to a question from McGovern, Phillips went into more analysis on groundwater and volatile organic compounds than did the Phase I and II reports Defendant had sent to the RTC. In any case, McGovern testified that Phillips assured him the report was still current. (McGovern Dep. at 61.) Killian testified he never had direct contact with Defendant; all communication was through McGovern. (Killian Dep. at 97.)

The closing for Baldwin Tower was December 15, 1994. As part of the agreement, Plaintiff, the grantee, was to remediate certain environmental conditions, as set forth in Defendant's reports. The cost of that remediation was to be shared equally between Plaintiff and the RTC, and Plaintiff's share was not to exceed \$25,000. (Agreement at ¶ 3a, b.) With respect to other "losses" that matured after closing, Plaintiff's liability to indemnify the RTC would be "limited to the amount of [Plaintiff's] share of the Resale Profits under the Recapture Agreement." (Id. at ¶ 10b.) That agreement specified that Plaintiff and the RTC were to share the profits from the resale

of Baldwin Tower equally. Guy Messick ("Messick"), who represented Plaintiff at the closing, explained the profit-sharing arrangement:

A. Pat [Killian] . . . related to me that RTC had indicated that they had sold a property some time ago unrelated to this and they were embarrassed when it was turned around and a windfall profit was obtained for the nonprofit agency or governmental authority. And so from then on they have been requested to enter into these recapture agreements to share in the profit.

Q. 50-50 deals?

A. I think those were the outlines of previous deals with the RTC.

Q. So your impression was that the RTC didn't want to get embarrassed again?

A. Well, if in fact, it was a success, which it was, they wanted to make sure that they were able to recoup some of their loss.

(Def.'s Reply Mem. Ex. B, Deposition of Guy Messick at 42.)

On February 21, 1995, Plaintiff entered into a contract to sell Baldwin Tower to Preferred Real Estate Investments, Inc. ("Preferred") for \$1.5 million. (Killian Dep. at 142-44; Def.'s Mem at 6.) Before the closing, significant additional amounts of asbestos were found in Baldwin Tower, and as a result, the closing was delayed from April 1, 1995 until July 7, 1995. The estimated clean-up costs were \$900,000, and Plaintiff and the RTC agreed to credit Preferred with that amount at closing. (Killian Dep. at 149-50.) After the credit, Plaintiff received \$351,597.14 and the RTC received \$258,216.40 for the sale of

Baldwin Tower. (Killian Dep. at 171; Def.'s Mem. in Supp. Ex. H, 12/28/95 letter Messick to RTC attorney.)

If Defendant's report had identified all the asbestos in Baldwin Tower, Killian testified that Plaintiff probably would have

either backed off or told the RTC we had to figure out some sort of a better way to proceed on this.

Q. You mean that if the Authority had known of all the asbestos that was eventually found in the building it might not have entered into this project?

A. That's absolutely right.

Q. What if the Authority knew how much it was eventually going to cost to remediate the building, \$900,000 or so, but yet that was still less than Preferred Properties paid for the building, would the authority still have gone through with the project?

A. . . . Whether or not the Authority would have gone through with the project is the ultimate decision of the authority. I mean, they vote. I don't have a vote. And this is conjecture on my part but I would probably have recommended that the Authority not proceed. . . . If you're going to find that much to begin with, there is a great fear you will find something in the groundwater and God knows what else you will find there. So, I would probably have felt comfortable in recommending that the Authority not proceed, and that it's a fair assumption to me if I had made that recommendation, although I don't have the vote, the Authority probably would have voted to agree with me just by past practice.

(Killian Dep. at 85-86.)

In answers to interrogatories, and in an affidavit Killian signed after Defendant had filed its Motion for Partial

Summary Judgment, Plaintiff insisted that it would have revised, rather than refused, the agreement. However, Killian's deposition and Plaintiff's responses to interrogatories indicate that it would have considered both options. In response to Defendant's interrogatory, Plaintiff stated:

Throughout negotiations, [Plaintiff], through its Executive Director, J. Patrick Killian, advised the RTC that the amount and extent of environmental problems would be determinative as to whether [it] would go forward with the transaction. Had [Plaintiff] known of the true extent of [asbestos contamination], it never would have gone forward with the deal. This point was made clear to the RTC by [Plaintiff,] specifically through J. Patrick Killian.

Based upon the McLaren/Hart report, the amount of [asbestos] appeared to [Plaintiff] to be insignificant in relation to the overall transaction. Because of the McLaren/Hart report, [Plaintiff] believes that it could have negotiated a better split of the remediation costs, particularly in light of the time constraints placed upon the RTC by the government and the RTC's overwhelming desire to rid itself of the property. [Plaintiff] is still in the process of locating and contacting RTC employees who would be in a position to support [its] position. [Plaintiff] reserves the right to supplement this response should it successfully locate and contact relevant RTC employees.

(Def.'s Mem. in Supp. Ex. I at 2.)

In its Complaint, Plaintiff alleged that, under its agreement with the RTC, it had expected to get half of the \$1,500,000 Preferred bid for Baldwin Towers. (Compl. at ¶ 22.) After deducting the \$900,000 cost of removing the asbestos Defendant has missed from the purchase price, the sale price was only \$600,000. (Id. at ¶ 25.) "Thus the revenue realized by

[Plaintiff] was reduced from \$750,000 to \$300,000." (Id. at ¶ 26.) Plaintiff also claims that the discovery of the defective performance by Defendant delayed closing, resulting in out-of-pocket costs in excess of \$20,000 and that Plaintiff was forced to incur other costs associated with the discovery of Defendant's mistakes in excess of \$55,000. (Id. at ¶¶ 27, 28.) Plaintiff contends that, "[h]ad McLaren/Hart properly discovered and advised [Plaintiff] and RTC of the true extent of [asbestos] removal costs, [Plaintiff] would have been in a superior bargaining position and would have been able to negotiate a more favorable split of both the [asbestos] removal costs and the split of the purchase price. As a result, [Plaintiff] lost up to \$300,000 or more in revenue." (Id. at ¶¶ 24-29.)

Plaintiff has sued Defendant for negligence (Count I), breach of the contract between Plaintiff and Defendant, which grew out of McGovern's efforts (Count II), and breach of the contract between Defendant and the RTC, of which Plaintiff claims to be a third party beneficiary (Count III).

II. LEGAL STANDARDS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "showing -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

III. DISCUSSION

A. Negligence Action

Defendant contends that its duty toward Plaintiff, if any, was based on a contract to provide professional services, and that Plaintiff's negligence claim therefore should not be allowed to go forward. Plaintiff, in Count I of its Complaint, alleges that its monetary losses were caused "directly and proximately" by "a failure of McLaren/Hart to render its services in a professional and competent manner; b. failure to adequately review and advise [Plaintiff] of the true extent of the [asbestos] at the Property; and c. otherwise failing to exercise prudent and professional judgment." (Compl. at ¶ 32.) Defendant asserts that if it had any duty to Plaintiff, such duty was based on a contractual undertaking to provide professional services, and therefore Plaintiff cannot pursue a torts claim for economic losses allegedly due to its professional negligence.

This Court reviewed the different approaches taken under Pennsylvania law in analyzing whether a cause of action arising from a contractual relationship can be brought in tort in Sun Co., Inc. (R&M) v. Badger Design & Constructors, Inc., 939 F. Supp. 365 (E.D. Pa. 1996). The first approach, called the

"misfeasance/nonfeasance approach," allows a tort claim for breach of contract where there was an improper failure to perform a contractual obligation (misfeasance) rather than a complete failure to perform (nonfeasance). Id. at 371 (quoting Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 208 (3d Cir. 1995) (citing Rabb v. Keystone Ins. Co., 412 A.2d 638, 639 (1979))).

The second approach, called the "economic loss doctrine," prohibits plaintiffs from recovering economic losses in tort where their entitlement flows only from a contract. Sun Co., 939 F. Supp. at 371 (citing Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995)). The rationale of this rule is that tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. Id. Under the economic loss doctrine, in order to recover in negligence, "'there must be a showing of harm above and beyond disappointed expectations evolving solely from a prior agreement.'" Id. (quoting Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 1271 (M.D. Pa. 1990)).

The Third Circuit has also identified a third approach in Pennsylvania law, which depends on the nature of the wrong ascribed to the defendant. Id. at 208 n.5 (quoting Grode v. Mutual Fire, Marine, and Inland Ins. Co., 623 A.2d 933, 935 (Pa. Cmwlth Ct. 1993)). "[I]f the harm suffered by the plaintiff

would traditionally be characterized as a tort, then the action sounds in tort and not in contract." Id. (quoting Valhal Corp. v. Sullivan Assoc., Inc., 44 F.3d 195 (3d Cir. 1995)).

Defendant claims that Plaintiff is alleging nonfeasance, but clearly it is not. Defendant did not completely fail to identify asbestos in Baldwin Tower. It did inspect the building and it did identify some asbestos; it simply missed a significant amount. The question then becomes which of the various doctrines is the appropriate one, given the facts of this case. The Court concludes that, in this case, as in Sun Company, the economic loss approach is better tailored to the facts. Plaintiff's Complaint, like that in Sun Company and in East River S.S. Corp v. Transamerica Delaval, 476 U.S. 858 (1986), alleges only economic losses: the loss of expected profits, delay costs and incidental costs. There is no claim that environmental contamination or personal injury or property damage was due to Defendant's performance. The claimed wrong is of a kind that traditionally sounds in contract rather than tort. Had Defendant's alleged misfeasance resulted in injury of a kind more akin to traditional tort injury, the claim might have proceeded in negligence. Because it did not, the Court will grant Plaintiff's Motion with respect to Plaintiff's negligence claim.

Defendant also argues that Plaintiff's negligence claim fails because there is no "but for" causation; Plaintiff cannot show damages that resulted from Defendant's conduct. Defendant argues that, had Plaintiff known the true extent of the asbestos in the building, it would not have purchased Baldwin Tower. It then would have made no profit at all rather than the hundreds of thousands of dollars in profit it did make. Because Plaintiff's Negligence claim will not go forward, the Court need not address Defendant's argument here. The argument applies equally well to the damages Plaintiff seeks in the other counts of its Complaint, and it will be considered later in this Memorandum.

B. Breach of Contract

1. Plaintiff's Contract with Defendant

Defendant does not move to dismiss Count II of Plaintiff's Complaint, which asserts that Defendant breached a contract between the parties for use of Defendant's environmental assessment report. Instead, it seeks to limit the damages Plaintiff can seek. As noted, that issue will be discussed below.

2. Third Party Beneficiary

In Count III of the Complaint, Plaintiff claims that it was a third party beneficiary of the contract between Defendant

and the RTC. It alleges that Defendant "should have known that the purpose of its contract with the RTC to conduct an environmental assessment of Baldwin Tower was to assist the RTC in determining the nature and extent of the environmental problems with the Property so that the Property could be sold." (Compl at ¶ 39.) It further alleges that Defendant "knew or should have known that the RTC and the subsequent purchaser of the Property would rely upon the findings contained in its environmental report." (Id. at ¶ 35.)⁴ Defendant contends that judgment should be entered in its favor as to Court III of the Complaint because Plaintiff was not a third party beneficiary of the contract.

The Pennsylvania Supreme Court has expanded the category of third party beneficiary over the years. An early case, Spires v. Hanover Fire Ins. Co., 70 A.2d 828 (Pa. 1950) took a very restrictive view. It stated:

To be a third party beneficiary entitled to recover on a contract it is not enough that it be intended by one of the parties to the contract and the third person that the latter should be a beneficiary, but both parties to the contract must so intend and must indicate that intention in the contract; in other words, a promisor cannot be held liable to an alleged beneficiary of a contract unless the latter was within his contemplation at the time the contract was entered into and such liability was intentionally assumed by him in his undertaking; the obligation to the third

⁴This citation refers to the second paragraph 35 in the Complaint. The numbered paragraphs proceed as follows: 34, 35, 36, 37, 38, 39, 35, 36, 37, 38.

party must be created, and must affirmatively appear, in the contract itself.

Id. at 830-31. Spires was a case in which the plaintiffs were the lessors of a tract of land which contained an airport. The lessee agreed to insure against fire any buildings that were then on the property or that she would erect in the future and to keep all runways and hangars in good condition, at her own expense. The lessee and her partner obtained an insurance policy from the defendant insuring all the buildings on the property. After a fire destroyed both the original hanger and other buildings which lessee and her partner had erected themselves, they made a claim for their own property, but refused to institute any action against the defendant for the loss of the original building belonging to the plaintiffs. The plaintiffs tried to collect from the insurance company, claiming they were intended beneficiaries of the contract which had required the lessee to insure against fire. The Supreme Court held that they were not intended beneficiaries for reasons quoted above.

The Supreme Court softened the hard line taken in Spires and overruled that case in Guy v. Liederback, 459 A.2d 744 (Pa. 1983), "to the extent that it states the exclusive test for third party beneficiaries." Id. at 751. In Guy, a named beneficiary of a will who was also named executrix was directed by the attorney who drafted the will to witness it, by which action she voided her entire legacy and her appointment as

executrix. The beneficiary sued the attorney as a third party beneficiary. In limiting Spires, the court noted:

Under the Spires analysis, a beneficiary of a will would be a third party beneficiary with standing only if the testator and the attorney had a written contract to write a will, and the contract indicated the intention of both parties to benefit the legatee. The fact that the beneficiary is named in the will is not relevant to third party status. The will is not the contract, but rather that which is contracted for. Furthermore, even if the naming of the legatee in the will is taken as indicating the testator's intent to benefit the legatee, it cannot be taken to indicate that the drafting attorney intended to confer any benefit. . . . Thus it is very unlikely that a beneficiary could ever bring suit under the Spires requirements.

Id. at 750. The court adopted the Restatement (Second) of Contracts § 302 (1979),⁵ and allowed the legatee to recover. It stated the rule of section 302 as follows:

⁵The Restatement(Second) of Contracts § 302 (1979) states:

§ 302. Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

There is thus a two part test for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to any money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Id. at 751. Applying the test to the case before it, the court found that Guy was a third party beneficiary:

In the case of a testator-attorney contract, the attorney is the promisor, promising to draft a will which carries out the testator's intention to benefit the legatees. The testator is the promisee, who intends that the named beneficiaries have the benefit of the attorney's promised performance. The circumstances which clearly indicate the testator's intent to benefit a named legatee are his arrangements with the attorney and the text of his will.

Id. at 752.

In a more recent case, Scarpitti v. Weborg, 609 A.2d 147 (Pa. 1992), the Pennsylvania Supreme Court clarified the relative positions of Spires and Guy in the rule of third party beneficiaries:

[W]e hold that a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, Spires, supra, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Id. at 150-51. In Scarpitti, purchasers of lots in a residential subdivision were required by subdivision restrictions of public record to have their house construction plans reviewed and approved by an architect retained by the subdivision developer. The court held they were third party beneficiaries of the implied contract between the developer and the architect and could sue the architect for breach of contract after the architect had enforced deed restrictions prohibiting three-car garages against plaintiffs but subsequently allowed other purchasers to build three-car garages. The court reasoned that the purpose of the contract between the architect and the developer

was to make the lots more attractive to prospective purchasers by assuring that other homeowners in the subdivision would be required to abide by the recorded subdivision restrictions. The third party beneficiary relationship, therefore, was within the contemplation of the promisor and the promisee at the time of contracting, [and that] recognition of a right to uniform enforcement of the deed restrictions in [plaintiffs] is appropriate to effectuate the intention of the parties.

Id. at 151.

Plaintiff contends that this case is analogous to Scarpitti. It states that it made known to the RTC its "grave concern" over environmental conditions and partly in response to its concern, the RTC retained McLaren/Hart to conduct an environmental assessment of the property. Therefore, it concludes, "the third party relationship was within the contemplation of the promisor and the promisee at the time of the

contracting." (Pl.'s Resp. Mem. at 27-28.) While the logic of this argument seems to miss a step, there is some support for Plaintiff's position in the wording of the limitations clause on the face of the report. At the same time the clause declares that the contents of the report are privileged and confidential, it acknowledges that the RTC may make the report available to others: "This document should not be duplicated or copied under any circumstances without the express permission of RESOLUTION TRUST CORPORATION (RTC)." (Phase I report, face page.) And while stating that the purpose of the report is to benefit the RTC, it disclaims only the unauthorized use of the report by others: "The purpose of the report is to allow RTC to evaluate the potential environmental liabilities at Baldwin Towers. Any unauthorized reuse of McLaren/Hart's reports or data will be at the unauthorized user's sole risk and liability." Id. Reading the ambiguity in the clause in favor of Plaintiff for purposes of this Motion, the clause does not, by implication, disclaim all liability of Defendant with respect to authorized reusers. (Id.) Defendant does not contest that the RTC provided Plaintiff with its environmental assessment. The disclaimer seemed to contemplate that the RTC would authorize use of the assessment by some third parties and that the third parties might want to rely on it. The clause dates from the time the assessment was completed rather than the time the contract for it was made;

however, there being no evidence to the contrary, the Court will assume for purposes of this Motion that Defendant knew of such potential uses of its assessment from the start.

The limitations clause in the report does not satisfy the first test for a third party beneficiary under Scarpitti, that "both parties to the contract express an intention to benefit the third party in the contract itself;" however, on the basis of the evidence before it, particularly the limitations clause in the report, the Court cannot rule out the possibility that "recognition of the beneficiary's right is appropriate to effectuate the intention of the parties," and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the benefit of the promised performance." Scarpitti, 609 A.2d at 150-51. There remain genuine issues of material fact as to whether Plaintiff was intended to be a third party beneficiary to the contract between Defendant and the RTC.

C. Lost Profits

Defendant argues that summary judgment should be granted in its favor as to Plaintiff's damages because Plaintiff suffered no loss as a result of Defendant's alleged breach. Where a party alleges a breach of contract, the appropriate measure of damages is the amount that would place the injured party "as nearly as possible in the same position he would have

occupied had there been no breach." Harman v. Chambers, 57 A.2d 842, 845 (Pa. 1948). The Plaintiff must show it suffered a loss as a result of the breach. Empire Properties, Inc. v. Equireal, Inc., 674 A.2d 297, 304 (Pa. Super. Ct. 1996). While the mere possibility that the aggrieved party might have made a profit but for the breach will not sustain an award of damages, Massachusetts Bonding & Ins. Co. v. Johnson & Harder, 22 A.2d 709, 714 (Pa. 1941), there are certain circumstances in which lost profits are recoverable in a breach of contract action. In Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243 (Pa. Super. Ct. 1983), the Pennsylvania Superior Court stated:

It is well settled law in Pennsylvania that loss of profits are recoverable both in contract and in tort. The general rule of law applicable . . . in both contract and tort actions allows such damages where (1) there is evidence to establish them with reasonable certainty; (2) there is evidence to show that they were the proximate consequence of the wrong; and in the contract actions, that they were reasonably foreseeable.

Id. at 1258 (citations omitted).

Defendant's position is that Plaintiff has admitted that, if Defendant had not breached its contractual duty and the true extent of the asbestos in Baldwin Tower had been known to Plaintiff, Plaintiff would not have purchased the building from the RTC. It would then have realized no profit at all instead of the several hundred thousand dollars in profit it did realize.

Defendant refers to the deposition testimony of Killian, quoted above:

If you're going to find that much [environmental contamination] to begin with, there is a great fear you will find something in the groundwater and God knows what else you will find there. So, I would probably have felt comfortable in recommending that the Authority not proceed, and that it's a fair assumption to me if I had made that recommendation, although I don't have the vote, the Authority probably would have voted to agree with me just by past practice.

(Killian Dep. at 86.) In its response to Defendant's Motion, Plaintiff submitted an affidavit from Patrick Killian in which he stressed negotiation of a new deal, rather than abandonment of the project. Killian stated:

9. Had I known of the true extent of the [asbestos] at Baldwin Towers prior to December 15, 1994, I would have not have recommended that [Plaintiff] go forward with the transaction based upon the 50-50 split.

10. I would have negotiated either a better split or would have demanded that [Plaintiff's] damages be capped and would have recommended that the deal go forward on that basis.

11. Based upon the RTC's expressed desire to rid itself of the property, to mitigate losses, to avoid further costs, the RTC's unsuccessful efforts to transfer the property in the past and the fact that the RTC was to be abolished by Congress, I believe that I could have negotiated a better split or capped [Plaintiff's] exposure.

(Killian Aff.)

Defendant objects to this affidavit, suggesting it is not credible because it was generated in response to Defendant's argument and intended to defeat its Motion; however, Plaintiff

had previously mentioned the possibility of negotiating a better deal in its response to one of Defendant's interrogatories. There, Plaintiff stated it "believe[d] that it could have negotiated a better split of the remediation costs, particularly in light of the time constraints placed upon the RTC by the government and the RTC's overwhelming desire to rid itself of the property." (Def.'s Mem. Ex. I at 2.) Drawing all reasonable inferences in favor of Plaintiff, it is still not possible to adopt Plaintiff's position to the exclusion of Defendant's. The interpretation of the evidence most favorable to Plaintiff is that Killian believed he could have negotiated a better deal had he known the true extent of asbestos contamination, not that he in fact could have done it; and if he had been unable to do so, the evidence is that he probably would have recommended that Plaintiff not proceed with the project.

What is fatal to Plaintiff's claim of lost profits is that it presents no admissible evidence that the RTC actually would have been willing to give Plaintiff better terms, and no evidence at all as to what those terms would have been. Killian stated in his affidavit, "I believe that I could have negotiated a better split or capped [Plaintiff's] exposure."⁶ (Killian

⁶In fact, Plaintiff's exposure was capped at its profits. As stated above, the agreement between Plaintiff and the RTC specified that, with respect to "losses" that matured or arose after closing, Plaintiff's liability to indemnify the RTC would be "limited to the amount of [Plaintiff's] share of the Resale

Aff.) Killian's affidavit is not adequate evidence of anything other than his state of mind. The United States Court of Appeals for the Third Circuit stated that "an opposing affidavit must set forth such facts as would be admissible in evidence" Hurd v. Williams, 755 F.2d 306, 308 (3d Cir. 1985). Neither Killian's affidavit nor Plaintiff's answers to interrogatories would be admissible as evidence of what the RTC would have done had Plaintiff tried to negotiate a better deal for itself. Plaintiff has presented no evidence from the RTC other than hearsay, and the only figures Plaintiff cites for lost profits are based on what it expected to receive had Defendant's assessment been correct, not on the terms it believes it could have negotiated had Defendant identified all of the asbestos. As the Supreme Court stated in Celotex Corp. v. Catrett, 477 U.S. at 325, 106 S. Ct. at 2554 (1986), where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." That is what Defendant has done.

As a matter of law, the Court concludes that Killian's belief, based on facts not in evidence as to the RTC's desires, is not sufficient to allow an action for lost profits to go forward under Delahanty. Killian merely opined that he could

Profits under the Recapture Agreement." (Agreement at ¶ 10b.)

have gotten a more favorable split (presumably of profits or of remediation costs or both). That is far too speculative to allow for the calculation of lost profits with any "reasonable certainty," as required by Delahanty. Thus, Plaintiff has failed to demonstrate that there are genuine issues of material fact with respect to its lost profits.

Lost profits are not the only damages Plaintiff seeks for Defendant's alleged breach of contract. It also seeks out-of-pocket costs in excess of \$20,000 resulting from the delay in its closing with Preferred and other expenses in excess of \$55,000 associated with the discovery of Defendant's mistakes. (Compl. at ¶¶ 27, 28.) The case will proceed to trial on these claims.

IV. CONCLUSION

For reasons discussed above, Defendant's Motion will be granted in part and denied in part. Plaintiff's negligence count will be dismissed. The two breach of contract claims will go forward. Plaintiff has failed to provide any genuine evidence supporting its claim that it suffered lost profits as a result of Defendant's alleged misdeeds; therefore, it will not be allowed to seek lost profits at trial. Plaintiff may seek out of pocket expenses it claims resulted from an alleged breach of one or both of the contracts.

An appropriate Order follows.

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

DELAWARE COUNTY : CIVIL ACTION
REDEVELOPMENT AUTHORITY :
 :
 v. :
 :
MCLAREN/HART ENVIRONMENTAL :
ENGINEERING CORPORATION : No. 97-3315

O R D E R

AND NOW, this day of April, 1998, upon
consideration of Defendant's Motion for Partial Summary Judgment
(Doc. No. 11), Plaintiff's Response (Doc. No. 15), Defendant's
Reply (Doc. No. 17), and all the exhibits and submissions
thereto, **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED**
IN PART AND DENIED IN PART, and more specifically:

1. Defendant's Motion is **GRANTED** with respect to
Count I of Plaintiff's Complaint, and that Count
is **DISMISSED**;

3. Defendant's Motion is **DENIED** with respect to
Count III of Plaintiff's Complaint, and that Count
will go forward; and

2. Defendant's Motion is **GRANTED** with respect to
Plaintiff's demand for lost profits, and
Plaintiff's claim for lost profits is **DISMISSED**.

BY THE COURT:

JOHN R. PADOVA, J.