

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

<b>CHESAPEAKE INDUSTRIES, INC.,</b>	:	
<b>Plaintiff</b>	:	<b>3:CV-99-0769</b>
	:	
<b>v.</b>	:	
	:	<b>(Chief Judge Vanaskie)</b>
<b>THE GARRETT GROUP, L.P., and</b>	:	
<b>EASTERN EQUITIES, INC.,</b>	:	
<b>Defendants.</b>	:	

**ORDER**

**March 20, 2000**

**THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:**

Plaintiff Chesapeake Industries, Inc. (CII) brought this action against defendants, The Garrett Group and Eastern Equities, Inc.,<sup>1</sup> for breach of contract, unjust enrichment and trover and conversion. In November 1991, Chesapeake Bay Engineering (CBE) entered into a written agreement with Garrett whereby CBE agreed to install a prototype rail car dumper at Garrett's premises in Good Spring, Pennsylvania. (Complaint, Dkt. Entry 1, at ¶ 7.) In return for providing the site, Garrett was granted an option to purchase the dumper for \$200,000 within 180 days after the prototype was proven operational. (Id. at ¶ 9.) If Garrett did not exercise the option, CBE could then remove the dumper from Garrett's premises at its own expense. (Id. at ¶ 10.) CBE was also granted the right to enter Garrett's premises, on reasonable notice, to demonstrate the operation of the prototype to potential buyers. (Id. at ¶ 11.) Paragraph 10(c) of the Agreement provided:

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<sup>1</sup>Eastern Equities is a defendant in this lawsuit as the general partner in Garrett Group, which is a limited partnership.

This Agreement shall apply to, and shall be binding in all respects upon, and inure to the benefit of the respective successors, assigns and legal representatives of the parties hereto. The Agreement shall not be assignable without the prior written agreement of the parties.

(Agreement, Exh. "A" to Complaint, Dkt. Entry 1; emphasis added.)<sup>2</sup>

In June 1992, CBE assigned all of its rights in the contract to CII. (Id. at ¶ 8.) CBE did not request prior written consent to the assignment. On November 8, 1994, CII notified Garrett that the prototype had proven operational, and that the 180-day option period would commence as of that date. (Id. at ¶ 13.) At that time, CII also notified Garrett that CBE was now defunct, and that CBE had assigned its interest under the agreement to CII. (Letter, Exh. "B" to Complaint, Dkt. Entry 1.)

On December 21, 1994, Garrett sent a letter to CII, disputing that the prototype was operational and, accordingly, that the 180-day option period had not commenced. (Id. at ¶ 14.) Garrett further noted in the letter that a meeting should be held as soon as possible. (Id.) No comment was made as to the assignment of the contract. On June 10, 1998, CII demanded return of the prototype; Garrett did not respond to the demand and the dumper presently remains on Garrett's premises. (Id. at ¶ 15, 17.)

CII filed a complaint in the Eastern District of Pennsylvania on October 7, 1998, alleging breach of contract and replevin (Verified Complaint, Exh. "A" to Def's Brief in

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<sup>2</sup> Paragraphs 10(b) of the Agreement also provided:

This Agreement may not be modified, rescinded or terminated orally, and no modification, rescission, termination or attempted waiver of any of the terms or provisions or conditions hereof . . . shall be valid unless in writing and signed by the party against whom the same is sought to be enforced.

Reply, Dkt. Entry 23). The complaint was subsequently dismissed.<sup>3</sup> (Order, Exh. “C” to Def’s Brief in Reply, Dkt. Entry 23.) CII filed a complaint in this Court on May 11, 1999. (Complaint, Dkt. Entry 1.) Garrett then filed its motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. (Dkt. Entry 13.)

The issue before the Court is whether CII has standing to sue in light of CBE’s assignment of the contract to CII without the written consent of the defendant, notwithstanding the contract’s express provision requiring such consent. When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff bears the burden of persuasion. NMC Homecare, Inc. v. Shalala, 970 F. Supp. 377, 382 (M.D. Pa. 1997). In reviewing such a motion, the court can consider not only the pleadings, but any additional evidence made available to the court. Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1987). Unlike a Rule 12(b)(6) motion, under a 12(b)(1) motion to dismiss, “no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material fact will not preclude the trial court from evaluating for itself the merits of the jurisdictional claim.” Robinson, 107 F.3d at 1021 (citing Mortensen v. First Federal Savings and Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)). A complaint may be dismissed for lack of subject matter jurisdiction on a 12(b)(1) motion only if it appears to a certainty that a colorable claim cannot be asserted. Smith v. Social Security Administration, Civ. A. No. 97-CV-3406, 1999 U.S. Dist. LEXIS 9677, at \*3 (E.D. Pa. June 29, 1999.)

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<sup>3</sup> The breach of contract action was dismissed by the court without prejudice, with the right to refile if plaintiff qualified to do business in Pennsylvania and could make a sufficient claim of ownership of the contract rights in question. (Order, Exhibit “B” to Def’s Brief in Reply, Dkt Entry 23.) The court denied CII’s motion for reconsideration. (Order, Exh. “F” to Def’s Brief in Reply, Dkt. Entry 23.)

The contract in this case contained language which stated that the Agreement was not assignable without the written consent of the parties. The parties here do not contest that prior written consent of the assignment was lacking. CII alleges, however, that Garrett's conduct subsequent to the assignment resulted in a waiver of its rights under the no-assignment-without-written-consent clause.

Under Pennsylvania law, absent an express provision against assignment, the rights and duties under an executory bilateral contract can be assigned without the consent of the other party so long as it does not materially alter the other party's duties and responsibilities. See Smith v. Cumberland Group, Ltd, 455 Pa. Super. 276, 687 A.2d 1167, 1172 (1997). However, even when an assignment is invalid, a party can waive its rights or otherwise ratify the assignment by words or conduct.<sup>4</sup> See, e.g. National Liberty Corp. v. Wal-Mart Stores Inc., 120 F.3d 913 (8<sup>th</sup> Cir. 1997)(party waived its right to require written consent to assignment by corresponding to assignee, sending commission checks, and attending meetings); Board of Trustee of Michigan State University v. Research Corp., 898 F. Supp. 519, 522 (W.D. Mich. 1996) (even if the contract was non-assignable, MSU ratified the assignment by its conduct, which included acceptance of payments, treating assignee as though it were a party to the contract, and notifying assignee that it was terminating the contract); Smith, 687 A.2d at 1173 (plaintiff ratified the contractor's

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<sup>4</sup>In Pennsylvania, waiver is essentially a matter of intent, and can be either expressed or implied. Implied waiver applies only to situations involving circumstances equivalent to estoppel, and the person claiming waiver must show that he was misled or prejudiced thereby. National Data Payment Systems Inc v. Meridian Bank, No. Civ. A. 97-6724, 1998 WL 647279, at \*4 (E.D. Pa. Sept. 22, 1998); Wyatt v. Mount Airy Cemetery, 209 Pa. Super. 250, 224 A.2d 787, 791 (1966); Brown v. City of Pittsburgh, 409 Pa. 357, 186 A.2d 399, 401 (1962).

assignment of his construction contract by having a meeting with the assignee-contractor, corresponding directly with the assignee and making comments to the assignee).

The facts show that Garrett was explicitly notified of the assignment by letter dated November 8, 1994. Following notification, Garrett sent a letter to CII, which stated:

After we are comfortable that the dumper is fully operational, we will advise of its permanent location and work out a schedule for your submission of fully detailed foundation drawings, our construction of same and your subsequent installation of the dumper on the permanent foundation. I suggest we have a meeting . . . as soon as possible.  
(Letter, Exh. "B" to Complaint, Dkt. Entry 1.)

The letter made no mention of the assignment, and, instead, demonstrates that Garrett intended to proceed to work with CII to get the dumper operational. An affidavit from the President of CII, J. Kai Lassen, further states that since 1994, Garret granted CII permission to enter its premises in order to conduct demonstrations of the prototype dumper for prospective customers, with the most recent demonstration occurring on October 22, 1997. (Lassen Affidavit, Exh. "A" to Pl's Brief in Response, Dkt. Entry 20.)

The record also includes correspondence between Ron Lickman, the President of Eastern Equities, and CII prior to the official notification of the assignment which discusses the status of the work on the dumper and CII's actions to ensure its operability. (Letter, Exh. "B" to Pl's Brief in Response, Dkt. Entry 20.) Based on this conduct by Garrett subsequent to the assignment, as well as Garrett's admission in its reply brief that it is seeking performance under the agreement, there is sufficient evidence to support a colorable claim that Garrett waived its rights under the Agreement to require prior written consent, and

ratified the assignment.<sup>5</sup> Thus, it cannot be said at this stage of the case that CII would be unable to show that Garrett waived enforcement of the no-assignment-without-consent clause. Accordingly, Garrett's motion to dismiss will be denied.<sup>6</sup>

**THEREFORE, for the foregoing reasons, IT IS HEREBY ORDERED THAT:**

1. Defendants' Motion to Dismiss under 12(b)(1) (Dkt. Entry 13) is **DENIED**.
2. A telephonic scheduling conference will be conducted on April 19, 2000 at

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<sup>5</sup>As pointed out by CII, Garrett's argument have pertinence only with respect to CII's reliance on the Agreement. CII, however, has also asserted claims of unjust enrichment and conversion. Neither of these claims depends upon CII acquiring CBE's contract rights. Thus, even if CII ultimately cannot prove either that CBE assigned its contract rights to CII or that Garrett waived failure to secure written consent to the assignment, CII would have standing to pursue Counts II and III of its Complaint.

<sup>6</sup>Garrett also argues in its reply brief that CII's claims must be dismissed because of claim preclusion. The facts show that CII filed a complaint in the Eastern District of Pennsylvania, also alleging breach of contract. The Court dismissed the breach of contract claim "without prejudice." A motion for reconsideration was also denied. According to Garrett, CII presented the same waiver argument in its motion for reconsideration as it is presenting now in this Court. Because the Eastern District did not reconsider CII's claim based on that waiver argument, Garrett contends that CII is precluded from rearguing that same issue here. To invoke claim preclusion, Pennsylvania law requires that the prior determination be "on the merits." Jonas v. Wiesmeth Construction Co., 360 Pa. Super. 173, 520 A.2d 40, 42 (1987) The law is clear that a dismissal without prejudice does not determine the merits of the case. Fannie v. Chamberlain Manufacturing Corp., 445 F. Supp. 65, 74 (W.D. Pa. 1977); see also Jonas, 520 A.2d at 42 ("when [the phrase 'without prejudice'] appears in a decree it shows that the judicial act done is not intended to be res judicata of the merits of the controversy"). In its Order denying CII's motion for reconsideration, the Eastern District of Pennsylvania stated "we made it clear that plaintiff may pursue its breach of contract rights and refile this action with a new complaint." Moreover, the dismissal of CII's contract claim was also predicated on the fact that CII had not established that it was qualified to do business in Pennsylvania. The Motion for Reconsideration filed by CII indicated that it had not yet secured its Certificate of Authority from the Secretary of the Commonwealth of Pennsylvania. The Eastern District's denial of the reconsideration motion does not indicate whether this impediment to suit had been removed. Since the court obviously did not intend to bar CII from pursuing subsequent litigation, neither claim nor issue preclusion is appropriate.

8:30 a.m. Counsel for the plaintiff will be responsible for placing the call to (570) 207- 5720 and all parties shall be ready to proceed before the undersigned is contacted.

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Thomas I. Vanaskie - Chief Judge  
Middle District of Pennsylvania

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