

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

<b>KINBACK CORPORATION,</b>	:	
<b>Plaintiff</b>	:	<b>No. 3:00cv1941</b>
	:	
v.	:	
	:	<b>(Judge Munley)</b>
<b>QUAKER CONSTRUCTION</b>	:	
<b>MANAGEMENT, INC.,</b>	:	
<b>Defendant</b>	:	

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**MEMORANDUM**

\_\_\_\_\_ Before the court for disposition is the defendant’s motion to dismiss the plaintiff’s complaint in this case involving a contract dispute. The plaintiff is Kinback Corporation, (hereinafter “Kinback”), a private corporation in the business of electrical construction and maintenance work, and the defendant is Quaker Construction Management, Inc., (hereinafter “Quaker”), a general trades contractor. The matter has been fully briefed and is ripe for decision.

**Background**

According to the plaintiff’s complaint, the facts are as follows: The Tamaqua Area School District invited sealed bids for the construction of a middle school in March 1999. On May 6, 1999, Quaker and Kinback were awarded the general trades contract and the electrical contract respectively.

Kinback could perform a substantial portion of its electrical work only after other trades had completed certain portions of their work. The construction project began to

experience delays as a result of Quaker being unable to meet any of its construction deadlines. The project began to operate out of sequence. Electrical work could not be installed in a productive manner until the building structure was reasonably complete; therefore, the other contractors had to substantially complete their work before Kinback could begin its primary work. Because of the delays caused by Quaker, Kinback had to accelerate staffing levels and work overtime in order to complete designated areas for the owner's occupancy. As a result of the delays caused by Quaker, Kinback incurred substantial additional costs by not being able to complete the project by its final completion date. These additional costs include labor and material surcharges in excess of \$250,000.00.

Accordingly, plaintiff instituted the instant action against Quaker. The complaint contains two counts. First is a breach of contract count. This count alleges that Quaker breached its contract with Tamaqua Area School District by not meeting its construction deadlines. As a result of this breach, Kinback, an alleged third party beneficiary to the deadlines set forth in the contract between Quaker and the school district, suffered injury.

The complaint's second count alleges tortious interference with contractual relations. Plaintiff claims that the defendant knew or should have known that other contractors, including Kinback, relied upon the defendant to complete its contract in a timely manner so that they could also complete their contracts in a timely manner. Plaintiff alleges that Quaker intentionally, wilfully with reckless disregard for the consequences and/or with deliberate indifference failed to complete its work in a timely manner so as to improperly interfere with Kinback's contractual obligation to complete its construction requirements in a timely

manner.

Defendant has filed a motion to dismiss the plaintiff's complaint based upon Federal Rule of Civil Procedure 12(b)(6). Defendant claims that Count I of the complaint fails to state a claim upon which relief can be granted because, as a matter of law, there is no privity between the plaintiff and the defendant and the plaintiff was not a third party beneficiary of Quaker's contract with the Tamaqua Area School District. Defendant further contends that Count II should be dismissed because Pennsylvania does not recognize plaintiff's claim for tortious interference with contractual relations. The plaintiff concedes this argument, and Count II will be dismissed. After a careful review of the case, and for the reasons that follow, we find that the motion to dismiss should be granted with regard to Count I as well.

#### **Standard of review**

When a 12(b)6 motion is filed, the sufficiency of a complaint's allegations are tested. The issue is whether the facts alleged in the complaint, if true, support a claim upon which relief can be granted. In deciding a 12(b)6 motion, the court must accept as true all factual allegations in the complaint and give the pleader the benefit of all reasonable inferences that can fairly be drawn therefrom, and view them in the light most favorable to the plaintiff.

Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

Because we are sitting in diversity, the substantive law of Pennsylvania shall apply to the instant case. Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

#### **Discussion**

The first issue raised by the defendant is that it and the plaintiff never had a contract with each other. Therefore, a cause of action for breach of contract between the two of them cannot be sustained. The defendant argues that if the defendant was injured, to recover damages they must sue the school.

The plaintiff contends it can sue under the contract between the defendant and Tamaqua Area School District. Its argument is that it is an intended third party beneficiary to the time limits set forth in the contract between the defendant and the school district. Therefore, the case should not be dismissed.

Pursuant to general contract law, an action on a contract cannot be maintained against a person who is not a party to the contract unless the plaintiff is a third party beneficiary under the contract or the suit is for product liability or breach of warranty. Commonwealth of PA v. Quandel, 585 A.2d 1136, 1140 (Pa. Commw. 1991).

To be a third party beneficiary, both parties must so intend and must indicate that intention in the contract. Id. at n. 11. A promisor cannot be held liable to an alleged beneficiary unless that beneficiary is within his contemplation at the time the contract was entered into and such liability was intentionally assumed by him in his undertaking. Id. The contract must create a duty to the third party, and it must appear in the contract itself. Id.

In addition, the Pennsylvania Supreme Court has adopted the Restatement (Second) of Contracts § 302 (1979) which provides as follows:

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 intentions of the parties and either:

- (a) the performance of the promise will satisfy any 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.

Restatement (Second) of Contracts § 302 (1979) quoted in Scarpitti v. Weborg, 609 A.2d 147, 149-50 (Pa. 1992).

The Pennsylvania Supreme Court has further explained the law as follows:

[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 *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 circumstance indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti, 609 A.2d at 152.

In the instant case, plaintiff claims that the following language from the contract's general and supplementary conditions for construction indicate that they were intended third party beneficiaries:

8.4 Add the following new paragraph: "Any delay attributable to the lack of coordination and cooperation by and between the separate Contractors among themselves or their sub-contractors will not be recognized by the Owner as the basis for any claim for increase in any Contract Sum but shall be settled as provided in Paragraph 6.2 of the General and Supplementary Conditions."

In pertinent part, paragraph 6.2 reads as follows:

"6.2.3 Costs caused by delays or by improperly timed activities or defective

construction shall be borne by the party responsible therefor.”

We note that this language does not explicitly confer third party beneficiary status upon the plaintiff, and we are unconvinced by the plaintiff’s argument that it does so provide. Because the contract itself does not specifically provide third party beneficiary status, we must determine whether 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 circumstance indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Scarpitti, supra.

We can assume for the purposes of argument that the first element is met, that is, the circumstances are so compelling that recognition of the beneficiary’s right is appropriate to effectuate the intention of the parties. It only remains for us to determine whether the performance satisfies an obligation of the promisee to pay money (which it does not) or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. We find that it did not. The benefit in the instant case is for the construction to be completed in a timely manner, the benefit thus runs to Tamaqua Area School District, not to the plaintiff.

Generally the Pennsylvania courts appear to strictly apply the law with regard to third party beneficiary status. For example, in Deeter v. Dull Corp., Inc., the Pennsylvania Superior Court addressed the issue of whether employees had third party beneficiary status to a lease contract that provided that all employees working on the leased premises had to be

covered by worker's compensation. Deeter v. Dull Corp. Inc., 617 A.2d 336 (Pa. Super. Ct. 1992). The court found that the employees were not third party beneficiaries because the intention of the lessor in placing that clause in the lease was to ensure that he would not be sued directly if an employee were injured on the job and tried to sue him directly. Id. at 341. Therefore the contract was intended to benefit the lessor, not the employees.

\_\_\_\_ Likewise in Looby v. Local 13 Productions, 751 A.2d 200 (Pa. Super. Ct. 2000), the Pennsylvania Superior Court held that victims of an automobile accident were not third party beneficiaries of contract between party promoters and a hall in which a "rave" party took place. The driver who caused the accident consumed alcohol and drugs at the party. Id. at 221. The contract between the hall and promoter enjoined illegal behavior and required the hiring of security personnel. Id. at 222. The court held that this contract was not intended to be a benefit to victims of the automobile accident. Id. at 223.

The instant case is akin to Commonwealth of PA v. Quandel, 585 A.2d 1136, 1140 (Pa. Commw. 1991). In that case, a prime contractor (the "impacted contractor") sued the owner to recover damages allegedly caused by another prime contractor.<sup>1</sup> The owner alleged that it could not be sued by the plaintiff and that the plaintiff should bring suit against the other prime contractor directly. The Pennsylvania Commonwealth Court disagreed. It held that in order to sue the other prime contractor, plaintiff would have had to have been a third

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<sup>1</sup>In Quandel, the plaintiff sought to recover the cost of providing temporary heating for the construction proceeding after the responsibility for providing it had passed to a second prime contractor. Quandel, 585 A.2d at 1138-39.

party beneficiary of the contract between the impacted contractor and the owner. Id. at 1140. In that case, the contract did not provide third party beneficiary status in that it was not created or affirmatively appear in the contract. Id. The plaintiff could only look to the party with whom it was in privity to recover the damages caused by the other contractor's delay. Id. Therefore, the impacted contractor could seek recovery directly from the owner.

The United States District Court for the Western District of Pennsylvania addressed a similar issue in Higgins Erectors and Haulers, Inc. v. E.E. Austin & Son, Inc., 714 F. Supp. 756 (1989). In that case, the owner contracted with a general contractor to perform some work. The general contractor hired a subcontractor to complete a portion of the job. Id. The owner and the subcontractor did not have a contract with each other. The owner, however, attempted to sue the subcontractor for not completing its tasks on time. Id. at 760. The owner claimed that it was third party beneficiary to the contract between the general contractor and the sub-contractor. Applying Pennsylvania law, the court concluded that no third-party beneficiary status existed. Id. at 760-61.

As in Higgins and Quandel, we are faced with a situation involving several construction contracts. The plaintiff is attempting to sue another prime contractor with whom it does not have a contract. Accordingly, there is no privity of contract between the plaintiff and the defendant. We can find no indication that the time limits placed in the contract between the defendant and Tamaqua Area School District were meant to benefit the plaintiff. The benefit was to go to the school district in that the project would be completed in a timely manner. Accordingly, based on the law set forth above, the plaintiff cannot claim



third party beneficiary status and the complaint's contract claim, Count I, will be dismissed.

In conclusion we find that the plaintiff cannot base a cause of action on the contract entered into between the defendant and the non-party school district. Count I of the complaint will thus be dismissed. The motion to dismiss also deals with Count II of the complaint, but the plaintiff concedes that Count II should be dismissed. The complaint is comprised of only these two counts; therefore, it will be dismissed in its entirety. An appropriate order follows.

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<b>Defendant</b>	:	

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**ORDER**

**AND NOW**, to wit, this 16th day of October 2001, the defendant's motion to dismiss the amended complaint [10-1] is hereby **GRANTED**. The Clerk of Court is directed to close this case.

**BY THE COURT:**

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**JUDGE JAMES M. MUNLEY**  
**United States District Court**

Filed: October 16, 2001.