

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :

Plaintiff :

v. :

No. 494 M.D. 2012
Argued: July 29, 2013

Ryco, Inc.; Ryco Fire Protection
Services, LP; Ryco Fire Protection
Services, LLC; Ryco Plumbing II,
LLC; Ryco Plumbing II, LP;
Ryco Plumbing, LLC; Ryco
Plumbing, LP; Thomas Sherry Jr.;
Susan E. Sherry and Richard Bosco,

Defendants

BEFORE: HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: August 15, 2013

This case is a civil enforcement action brought by the Commonwealth of Pennsylvania arising out of alleged violations of the Pennsylvania Steel Products Procurement Act (SPPA)¹ on two construction projects. Before the Court are the Commonwealth's Preliminary Objections to New Matter seeking to dismiss or strike new matter asserted in Defendants' Amended Answer and New Matter to the Commonwealth's Amended Complaint. For the reasons set forth below, the Preliminary Objections to New Matter are sustained in part and overruled in part.

¹ Act of March 3, 1978, P.L. 6, No. 3, *as amended*, 73 P.S. §§ 1881-1887.

Defendants are Ryco, Inc., Ryco Fire Protection Services LP, Ryco Fire Protection Services LLC, Ryco Plumbing II, LLC, Ryco Plumbing II, LP, Ryco Plumbing, LLC, and Ryco Plumbing, LP (collectively, the Ryco Entities), and Richard Bosco, the Vice President of Ryco, Inc., who is alleged to have signed the certifications regarding the use of United States steel products on the two projects. On October 1, 2012, the Commonwealth filed a four-count First Amended Complaint (the Complaint) against Defendants and two other individuals, Ryco, Inc. officers Thomas and Susan Sherry. In the Complaint, the Commonwealth alleges that Defendants engage in the business of designing and selling fire protection equipment, such as sprinkler systems, and that their clients include various public entities, such as public schools and state universities. (Complaint ¶¶23-24.) The Commonwealth seeks to enforce provisions of SPPA, the Pennsylvania Corrupt Organizations Act (PCOA)², and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL)³ against Defendants for their alleged use of foreign-made steel products on the two projects, in violation of their statutory and contractual obligations to use only United States-made steel, and for allegedly false certifications concerning the steel products on those projects.

The two projects at issue are the construction of new student housing facilities (the IUP Project) at Indiana University of Pennsylvania (IUP) through a non-profit entity, the Foundation for Indiana University of Pennsylvania (the

² 18 Pa. C.S. § 911.

³ Act of December 17, 1968, P.L. 1224, *as amended*, 73 P.S. §§ 201-1 to 201-9.3.

Foundation), and renovations to the Saltzburg Middle-High School in the Blairsville-Saltzburg School District (the Blairsville Project). In the case of the IUP Project, the Commonwealth alleges that IUP's Ground Leases with the Foundation required the Foundation to require its contractors to include provisions in their subcontracts that mandated compliance with the SPPA. (Complaint ¶¶ 54, 58.) It is alleged that the Foundation and its contractors did so and that Defendants, as subcontractors, were required to comply with the SPPA, failed to do so, and submitted false certifications attesting to their compliance. (Complaint ¶¶72-76, 83-99.) In the case of the Blairsville Project, the contract at issue was directly with the school district and required compliance with the SPPA. The Commonwealth alleges that Defendants failed to comply and submitted false certifications attesting to their compliance. (Complaint ¶¶100-115.)

The Complaint contains four Counts. Count I asserts claims for violations of the SPPA on both projects against Ryco, Inc., Ryco Fire Protection Services, LP, and Ryco Fire Protection Services, LLC, and also alleges that the violations were willful and therefore subject to the penalty of debarment from public contracts. (Complaint ¶¶118-121, 123-124.) Count II alleges violation of the PCOA against Richard Bosco individually and asserts that the Ryco Entities collectively constitute a criminal "Enterprise" under the PCOA that engaged in illegal racketeering activities by committing theft by deception and making unsworn falsifications to authorities when they submitted false certifications that the steel used on both projects was made in the United States. (Complaint ¶¶128-147.) Count III alleges violation of the UTPCPL against Ryco, Inc., Ryco Fire Protection Services, LP, and Ryco Fire Protection Services, LLC based on false

certifications of SPPA compliance on both projects. (Complaint ¶¶151-153.) Count IV seeks to pierce the corporate veil to attach liability for SPPA violations to the Defendants who were not parties to the IUP Project and Blairsville Project contracts and did not perform work or submit certifications on those projects. (Complaint ¶¶157-163.) The Commonwealth seeks the following relief: (1) debarment against all Defendants from submitting bids and supplying materials to any public agency within the Commonwealth for five years; (2) recovery of all payments made to Ryco, Inc., Ryco Fire Protection Services, LP, and Ryco Fire Protection Services, LLC; (3) injunction against future payments to Ryco, Inc., Ryco Fire Protection Services, LP, and Ryco Fire Protection Services, LLC until compliance with the SPPA is established; (4) fees and court costs; (5) civil penalties under the UTPCLP of \$1,000 per each violation; (6) an order against Bosco individually, requiring him to divest of any interest in the Ryco Entities and debarring him personally from owning or participating in any enterprise engaged in public contracting. (Complaint ¶164.)

On November 20, 2012, Defendants and the two other individuals sued by the Commonwealth filed Preliminary Objections to the Complaint (Defendants' Preliminary Objections). Defendants' Preliminary Objections I and II sought dismissal of all of the Commonwealth's claims arising out of the IUP Project for failure to state a claim and lack of capacity to sue on the grounds that the SPPA allegedly could not apply to that project because the Foundation was not a "public agency." Defendants asserted as the bases for Preliminary Objections I and II that the Foundation is an independent, non-profit, charitable corporation and that the IUP Project contracts were not funded with public money, were not bid as

public contracts, and imposed no financial obligations on IUP. (Defendants' Preliminary Objections ¶¶20-48, 53-61.) Defendants' Preliminary Objections also asserted demurrers to the Count II and III PCOA and UTPCPL claims (Defendants' Preliminary Objections VI and VII) and to Count I as a whole (Defendants' Preliminary Objection IX), and challenged the sufficiency of the Commonwealth's claims against Bosco, the other individual defendants and the Ryco Entities who were not parties to the IUP Project and Blairsville Project contracts (Defendants' Preliminary Objections III and IV).

On February 21, 2013, this Court issued an Opinion and Order ruling on Defendants' Preliminary Objections. In this Opinion and Order, the Court overruled Defendants' Preliminary Objections I and II, specifically rejecting all of Defendants' contentions that the SPPA did not apply to the IUP Project. (February 21, 2013 Opinion at 5-12 and Order at 1.) The Court also rejected Defendants' demurrers to the legal sufficiency each of the four counts of the Complaint. (February 21, 2013 Opinion at 12-18 and Order at 1-2.) The Court sustained Defendants' Preliminary Objections only with respect to claims against particular defendants: all claims against individual defendants Thomas and Susan Sherry were dismissed and they are no longer defendants, the Count II PCOA claims against all defendants other than Bosco were dismissed, and the Count III UTPCPL claims against all defendants other than Ryco, Inc., Ryco Fire Protection Services LP, and Ryco Fire Protection Services LLC were dismissed. (February 21, 2013 Opinion at 16-18 and Order at 1-2.)

On March 7, 2013, Defendants filed an Application for Reconsideration with respect to Defendants' Preliminary Objections I and II,

seeking modification of the Court's February 21, 2013 Opinion and Order to permit them to assert the issues raised in those two Preliminary Objections concerning whether the SPPA applied to the IUP Project as factual issues and defenses in this action. On March 28, 2013, the Court denied that Application for Reconsideration.

On March 13, 2013, Defendants filed an answer and new matter to the Complaint. On April 25, 2013, in response to preliminary objections filed by the Commonwealth, Defendants filed the amended Answer and New Matter at issue here. On May 20, 2013, the Commonwealth filed the instant Preliminary Objections to that Answer and New Matter.

Defendants and the Commonwealth have shown little regard for conciseness and judicial economy in these filings. Defendants have pleaded 175 separate paragraphs of New Matter. Many of these paragraphs are factual averments unrelated to any affirmative defense that are nothing more than denials of the Commonwealth's averments in the Complaint. Many of the factual paragraphs that are asserted to support a defense or legal bar are a reassertion of Defendants' unsuccessful Preliminary Objections that the SPPA does not apply to the IUP Project. The Commonwealth, not to be outdone in excessiveness, has filed 21 separate Preliminary Objections to this New Matter, many of them overlapping, seeking to strike all but three of the 175 paragraphs in Defendants' New Matter.

The issues raised by these 21 Preliminary Objections to New Matter are as follows: whether portions of the New Matter are barred by this Court's February 21, 2013 Opinion and Order (Preliminary Objections Nos. 1 and 9); whether certain paragraphs of the New Matter should be stricken as impertinent

because they plead facts that are irrelevant in light of this Court's February 21, 2013 Opinion and Order (Preliminary Objection No. 3); whether Defendants have sufficiently pleaded their affirmative defenses (Preliminary Objections Nos. 2 and 8); whether the SPPA bars affirmative defenses pleaded by Defendants (Preliminary Objections Nos. 4 and 5); whether Defendants are required to attach written contracts on which they base some paragraphs of their New Matter (Preliminary Objection No. 6); whether certain paragraphs of the New Matter are barred by the Parol Evidence Rule (Preliminary Objection No.7); and whether paragraphs of the New Matter should be stricken as improper new matter because they assert no affirmative defenses or other response to the Complaint beyond denial of the Commonwealth's averments (Preliminary Objections Nos. 10 through 21). We address the Preliminary Objections to New Matter in these seven logical groupings.⁴

I. Preliminary Objections Nos. 1 and 9

Preliminary Objection No. 1 seeks to strike Paragraphs 80-84 and 172-175 of Defendants' New Matter on the grounds that these paragraphs assert contentions and defenses that the IUP Project was not subject to the SPPA that

⁴ It is well settled that in ruling upon preliminary objections that seek to remove a claim or defense from an action, the Court must accept as true all well-pleaded averments of fact as well and all inferences reasonably deducible therefrom. *McCord v. Pennsylvania Gaming Control Board*, 9 A.3d 1216, 1218 n.3 (Pa. Cmwlth. 2010) (*en banc*); *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 114 (Pa. Cmwlth. 1998) (*en banc*), *affirmed*, 562 Pa. 632, 757 A.2d 367 (2000). Such preliminary objections may be sustained only in cases that are clear and free from doubt. *Common Cause/Pennsylvania*, 710 A.2d at 114. Where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections. *McCord*, 9 A.3d at 1218 n.3; The Court, however, is not required to accept as true conclusions of law, unwarranted inferences from facts, expressions of opinion, or argumentative allegations. *Id.*

were raised in Defendants' Preliminary Objections and rejected as legally invalid in the Court's February 21, 2013 Opinion and Order. Preliminary Objection No. 9 duplicatively seeks to dismiss Paragraph 173 of Defendants' New Matter as barred by the Court's overruling of Defendants' Preliminary Objections.

The Commonwealth is correct that Paragraphs 80-83 and 174-175 all replead the same arguments that the SPPA does not apply to the IUP Project and the Commonwealth lacks the capacity to sue on the IUP Project claims that were asserted in Defendants' Preliminary Objections I and II. This Court addressed and rejected all of those arguments in its February 21, 2013 Opinion. (February 21, 2013 Opinion at 5-12.)

Defendants contend that the overruling of preliminary objections does not preclude raising the same defense in an answer to the complaint and at later stages of the proceeding. It is true that a decision overruling preliminary objections does not bar further litigation of the same issue where the preliminary objections are denied on the ground that averments of the complaint taken as true are sufficient to support a cause of action or overcome a defense. Such a ruling is not a rejection of the defendant's legal argument, and renewing the defense based on evidence that controverts averments that had been taken as true on preliminary objections is completely consistent with the overruling of preliminary objections on that fact-based ground. Here, however, this Court rejected Defendants' arguments that the SPPA does not apply to the IUP Project as legally invalid, not on grounds that the Complaint pleaded sufficient facts to withstand Defendants' arguments at the preliminary objection stage.

This Court held, as a matter of law, in its February 21, 2013 Opinion that “we find that the SPPA is applicable to the IUP Project” and that “the Commonwealth clearly has the capacity to enforce the SPPA.” (February 21, 2013 Opinion at 12.) This Court considered the same assertions that Defendants reiterate in their New Matter and concluded that IUP is a “public agency” under Section 6 of the SPPA, that the IUP Project student housing is a “public work” under Section 6 of the SPPA, and that the SPPA therefore applies to the IUP Project regardless of whether the Foundation is a “public agency.” (February 21, 2013 Opinion at 6-9, 12.) In addition, the Court held that the Foundation is a “public agency” for purposes of the SPPA by virtue of the fact that the IUP Project is a “public work” and the Foundation constructed it at the behest of a “public agency,” IUP. (*Id.* at 11-12.) Both of these rulings were as a matter of law and neither was dependent on any factual averments that Defendants seek to controvert in their Answer and New Matter.

Defendants have not presented any new facts, law, or argument that gives the Court any reason to doubt the correctness of its rulings that the SPPA applies to the IUP Project and that the Commonwealth has the capacity to enforce the SPPA with respect to the IUP Project. Because the defenses and contentions asserted by Paragraphs 80-83 and 174-175 are legally invalid for the reasons set forth in this Court’s February 21, 2013 Opinion, the Court sustains Preliminary Objection No. 1 as to Paragraphs 80-83 and 174-175 of Defendants’ New Matter.

Paragraph 173, which asserts that the Complaint fails to state a claim upon which relief can be granted, is likewise barred by this Court’s February 21, 2013 Opinion and Order. Defendants’ Preliminary Objections asserted demurrers

challenging all claims in all four counts of the Complaint. (Defendants' Preliminary Objections I, II, VI, VII, IX.) This Court's overruling of those demurrers necessarily held that the Commonwealth had stated valid causes of action in all counts of the Complaint. Contrary to Defendants' assertions (Defendants' Brief at 17-18), striking this paragraph does not prevent Defendants from contesting the factual support for the Commonwealth's claims or the sufficiency of the Commonwealth's evidence. The Court therefore sustains Preliminary Objection No. 9 and sustains Preliminary Objection No. 1 as to Paragraph 173 of Defendants' New Matter.

The Court does not agree, however, that the remaining two Paragraphs of Defendants' New Matter challenged by Preliminary Objection No. 1, Paragraphs 84 and 172, are barred by its ruling on Defendants' Preliminary Objections. Paragraph 84 pleads lack of knowledge that the SPPA applied to the IUP Project, not inapplicability of the SPPA, and Paragraph 172 asserts a claim that Defendants' IUP Project subcontracts allegedly bar some or all of the Commonwealth's claims. Neither of these issues was addressed in the Court's February 21, 2013 Opinion. Accordingly, the Court overrules Preliminary Objection No. 1 as to Paragraphs 84 and 172 of Defendants' New Matter.

II. Preliminary Objection No. 3

Preliminary Objection No. 3 seeks to strike Paragraphs 18-28, 42-45, 47-51, 55-58, 64, 66-67, and 77-78 of Defendants' New Matter on the grounds that these paragraphs relate solely to Defendants' arguments that the SPPA does not apply to the IUP Project. Averments in a pleading that are immaterial and inappropriate to the proof of any claim or issue in the action may be stricken as

scandalous or impertinent matter. *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998) (*en banc*), *affirmed*, 562 Pa. 632, 757 A.2d 367 (2000).

Paragraphs 18-28, 42-45, 47-51, 55-58, 64, 66-67, and 77-78 all relate solely to the issue whether the IUP Project meets the SPPA requirements of a "public agency" and "public work." Paragraphs 18-28 plead facts concerning the Foundation's status as a non-profit corporation separate from IUP. Paragraphs 42, 47, 51, 55, 66-67 and 77-78 plead non-compliance with public contracting requirements on the IUP Project. Paragraphs 43-45, 48-50, and 56-58 plead that the IUP Project contracts were entered into by the Foundation and private parties and not by IUP. Paragraph 64 pleads that Defendants' IUP Project subcontract does not state that it is subject to Department of General Services (DGS) regulations.

None of these facts are relevant or probative with respect to any issue other than the applicability of the SPPA to the IUP Project. Indeed, these paragraphs are all expansions of assertions made in Defendants' Preliminary Objections I and II as the bases for Defendants' arguments that the SPPA does not apply to the IUP Project and the Commonwealth lacks the capacity to assert IUP Project claims. (*Compare* Defendants' Preliminary Objections ¶¶21, 24-26, 30, 34, 43-45, 58.) Contrary to Defendants' assertions (Defendants' Brief at 9-10), Paragraphs 18-28, 42-45, 47-51, 55-58, 64, 66-67, and 77-78 are not relevant to Defendants' knowledge or state of mind. The paragraphs in which Defendants plead lack of knowledge that the SPPA applied to the IUP Project and facts supporting that contention are Paragraphs 59-63, 65 and 84 of Defendants' New

Matter, and this Preliminary Objection does not seek dismissal of Paragraphs 59-63, 65 or 84.

Because Paragraphs 18-28, 42-45, 47-51, 55-58, 64, 66-67, and 77-78 of Defendants' New Matter are relevant only to Defendants' claims that the SPPA does not apply to the IUP Project and those claims are barred by this Court's February 21, 2013 Opinion, these paragraphs are all immaterial and inappropriate to the proof of any claim or defense remaining in this action. The Court therefore sustains Preliminary Objection No. 3.

III. Preliminary Objections Nos. 2 and 8

In Preliminary Objection No. 2, the Commonwealth seeks to strike the defenses set forth in Paragraphs 168-175 of Defendants' New Matter on grounds of insufficient specificity, arguing that Defendants have not pleaded any facts on which those defenses are based. Preliminary Objection No. 8 also seeks to dismiss Paragraph 168 of Defendants' New Matter, which asserts the defense of estoppel as to the IUP Project claims, on the grounds that Defendants have not pleaded the elements of that defense.

The Rules of Civil Procedure require Defendants to plead the material facts on which their defenses are based. Pa. R.C.P. No. 1019(a); *United Refrigerator Co. v. Applebaum*, 410 Pa. 210, 213, 189 A.2d 253, 255 (1963). These factual averments must be sufficiently specific to enable the Commonwealth to know what defenses are being raised and to respond to those defenses, but need not plead evidentiary details. *United Refrigerator Co.*, 410 Pa. at 213, 189 A.2d at 255; *Unified Sportsmen of Pennsylvania v. Pennsylvania Game Commission*, 950 A.2d 1120, 1134 (Pa. Cmwlth. 2008). In determining whether particular

paragraphs in Defendants' New Matter are stated with the necessary specificity, those paragraphs must be read in context with the other averments in the New Matter. *Unified Sportsmen of Pennsylvania*, 950 A.2d at 1134-35.

Contrary to the Commonwealth's contentions, Defendants have pleaded sufficient material facts on which the defenses asserted in Paragraphs 169-172 are based. Defendants have pleaded as supporting facts for Paragraph 169, which asserts impossibility of performance as a defense to the Blairsville Project claims, that steel products required on the Blairsville Project were not available in the United States, that suppliers represented that the Blairsville Project steel was made in the United States and that Defendants did not have an opportunity to inspect or replace the fittings. (New Matter ¶¶88-95.) Paragraph 170 pleads that the defense of justification is based on lack of intent or knowledge and unavailability of domestic product, and Defendants have pleaded in other paragraphs of their New Matter lack of notice that the IUP Project was subject to the SPPA, that suppliers represented that the Blairsville Project steel was American and that domestic product was not available for the Blairsville Project. (New Matter ¶¶59-63, 65, 84, 88-92, 170.) Paragraph 171 pleads as a defense "conduct of the Owners, other contractors, project developers, design professionals, contract administrators, owners representatives' and/or project managers on the IUP and Blairsville Projects." (New Matter ¶171.) Defendants have averred in other paragraphs of their New Matter conduct of another contractor on the IUP Project, that the general contractor on the IUP Project did not reference the SPPA in its subcontracts with Defendants or provide copies of the contracts that did reference the SPPA, and conduct of others on the Blairsville Project, representations that

steel was made in the United States and denial of opportunity to inspect and replace fittings. (New Matter ¶¶59-63, 65, 88-91, 93-95.) With respect to Paragraph 172, which asserts that claims are barred by the terms of Defendants' IUP Project subcontracts, Defendants have identified the writings on which that defense is based. (New Matter ¶52.)

While some or all of the defenses asserted in Paragraphs 169-172 of Defendants' New Matter may ultimately prove after discovery to be factually unsupported or legally invalid, Defendants have pleaded sufficient facts to enable the Commonwealth to respond. There is therefore no basis to require further pleading of these defenses. To the extent that the Commonwealth feels that it needs additional factual detail, it may obtain that information through discovery.

Preliminary Objection No. 2 is moot with respect to Paragraphs 173-175 of Defendants' New Matter because this Court has stricken these paragraphs as barred by the Court's February 21, 2013 Opinion and Order. The Court notes, however, that the Commonwealth's claim of insufficient specificity is without merit as to these paragraphs. Paragraphs 173-175 assert that the Commonwealth has failed to state a claim upon which relief can be granted and that the IUP Project claims are barred because the SPPA allegedly does not apply to that project. Defendants have pleaded in detail the factual bases for their contentions that the IUP Project is not subject to the SPPA and that the IUP Project claims therefore do not state a claim upon which relief can be granted. (*See* New Matter ¶¶14-52, 55-78.)

Accordingly, the Court overrules Preliminary Objection No. 2 as to Paragraphs 169-175 of Defendants' New Matter.

In contrast, Defendants have not merely failed to plead facts supporting their assertion in Paragraph 168 that the IUP Project claims are barred by estoppel, but have completely failed to set forth a legally sufficient defense. The essential elements of estoppel are "1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; 2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel; and 3) the lack of a duty to inquire on the party asserting the estoppel." *Chester Extended Care Center v. Department of Public Welfare*, 526 Pa. 350, 355, 586 A.2d 379, 382 (1991). Defendants' New Matter does not aver any of these elements.

Defendants do not aver anywhere in their New Matter any representation or conduct of the Commonwealth, IUP or the owner of the IUP Project, the Foundation, on which they acted, or any reliance on any representations or conduct with respect to the IUP Project. The only allegedly misleading conduct that Defendants aver with respect to the IUP Project consists of failure of a different party, the general contractor, to reference the SPPA or provide copies of other contracts (New Matter ¶¶59-63, 65), not any representations or conduct by or on behalf of a party against whom the estoppel is asserted. The only averments in Defendants' New Matter of representations or conduct that could be construed as by or on behalf of an owner, and the only averments of reliance, are made solely with respect to the Blairsville Project (New Matter ¶¶88-95), as to which Defendants do not assert estoppel.

Moreover, the deficiency in Defendants' estoppel defense cannot be remedied by discovery or further pleading. The facts underlying estoppel are

matters that must necessarily be within Defendants' knowledge without discovery, as Defendants must have known of the misleading representation or conduct in order to have relied on it. Defendants do not contend in their Brief and did not represent at oral argument that they can aver any misleading representation or conduct of the Commonwealth, IUP or the Foundation with respect to the IUP Project or that they relied on any such representation or conduct.

The Court therefore sustains Preliminary Objection No. 8 and overrules Preliminary Objection No. 2 as to Paragraph 168 of Defendants' New Matter as moot.

IV. Preliminary Objections Nos. 4 and 5

In Preliminary Objection No. 4, the Commonwealth seeks to dismiss Paragraphs 168-171 of Defendants' New Matter, which plead affirmative defenses of estoppel, impossibility of performance, justification and conduct of others, contending that common law defenses do not apply to an action for violation of the SPPA. Preliminary Objection No. 5 also seeks to dismiss three paragraphs that plead impossibility of performance and supporting facts, Paragraphs 87, 92, and 169, on the ground that they do not satisfy requirements for an impossibility defense under the SPPA.

Under Section 4(b) of the SPPA, use of foreign steel on the projects at issue here was permissible only where the "head of the public agency, in writing, determines that steel products as herein defined are not produced in the United States in sufficient quantities to meet the requirements of the contract." 73 P.S. §

1884(b).⁵ The Commonwealth argues that because Section 4(b) is the only statutory exception to provisions of the SPPA, all other defenses are necessarily barred.

The Court does not agree that the language of the SPPA precludes all common law defenses in this action. The SPPA contains no language prescribing or limiting defenses to an enforcement action. No inference can be drawn from the language of Section 4(b) that the legislature intended to bar all other defenses. Section 4(b) provides that “[t]his section shall not apply,” and thus limits exceptions only with respect to Section 4 of the SPPA, which governs required contract provisions and when foreign steel may be used. 73 P.S. § 1884. Enforcement actions are governed by Section 5 of the SPPA, which contains no such express exception or other language suggesting an intent to bar otherwise permissible defenses. 73 P.S. § 1885.

Moreover, not all of the Commonwealth’s claims are brought under the SPPA. The Complaint also asserts causes of action for violation of the PCOA and UTPCPL. The Commonwealth has not shown that there is anything in either of those statutes which supports limiting defenses or bars any of the particular affirmative defenses pleaded by Defendants.

Preliminary Objection No. 4 is therefore overruled.

⁵ Subsequent to the contracts here and after this action was brought, Section 4 of the SPPA was amended, effective December 24, 2012, to add an alternative procedure for governmental designation of unavailability of domestic steel, Section 4(b)(2), 73 P.S. § 1884(b)(2), and the quoted language of Section 4(b) was renumbered as Section 4(b)(1), 73 P.S. § 1884(b)(1). Act of October 24, 2012, P.L. 1284, No. 159 §1. Those changes, however, do not apply to this action.

It is a closer question whether Defendants' impossibility defense is barred as conflicting with Section 4(b)'s limitation on use of foreign steel and Section 5's authorization of recovery of payments from contractors who have not complied with Section 4 of the SPPA. To the extent that Defendants are claiming that the mere fact that domestic product was unavailable constitutes an impossibility that excuses use of foreign steel, even though the public agency determination required by Section 4(b) was not obtained, that would conflict with Section 4(b) and therefore cannot constitute a valid defense in this action. Because Paragraph 87 of Defendants' New Matter asserts the defense that foreign steel may be used simply because domestic steel was unavailable, it conflicts with Section 4(b) of the SPPA and is therefore barred.

Paragraphs 92 and 169 of Defendants' New Matter, however, could also support a claim that it was impossible to comply with the SPPA because suppliers represented that the steel was domestic and Defendants were prevented inspecting and replacing foreign steel (*see* New Matter ¶¶88-91, 93-95), or that domestic steel was unavailable and Defendants were prevented from seeking and obtaining the public agency determination required by Section 4 by supplier representations that the steel was domestic product. (*See* New Matter ¶¶88-92.) Neither of those defenses would necessarily conflict with Section 4(b) of the SPPA. Because, on these Preliminary Objections, all inferences and doubts must be resolved in Defendants' favor, *McCord v. Pennsylvania Gaming Control Board*, 9 A.3d 1216, 1218 n.3 (Pa. Cmwlth. 2010) (*en banc*), the Court cannot conclude that Defendants as a matter of law cannot assert any impossibility defense in this

action or that Paragraphs 92 and 169 are barred or irrelevant to the issues in this action.

Accordingly, the Court overrules Preliminary Objection No. 5 as to Paragraphs 92 and 169 of Defendants' New Matter, but sustains this Preliminary Objection as to Paragraph 87 of Defendants' New Matter.

V. Preliminary Objection No. 6

Preliminary Objection No. 6 seeks to strike Paragraphs 52-64 and 172 of Defendants' New Matter for failure to attach a copy of the writings on which these paragraphs are based, as required by Rule of Civil Procedure 1019(i). The Commonwealth argues that these paragraphs are based on a document that Defendants refer to as the "RFPSLP Subcontract" and that no RFPSLP Subcontract is attached to the Answer and New Matter.

This Preliminary Objection is without merit. Defendants' Answer and New Matter states that the documents that it defines as the "RFPSLP Subcontract" are the documents attached to the Complaint as Exhibits K and L. (New Matter ¶52.) Although the Commonwealth does not agree with Defendants' characterization of those documents as contracts to which only Ryco Fire Protection Services LP is a party, the documents are clearly identified, are in the Commonwealth's possession and are already part of the pleadings in this case. The purpose of Rule 1019(i) is to provide notice of the precise writings on which claims and defenses are based and ensure that the opposing party has a copy of those writings, *Narcotics Agents Regional Committee, Fraternal Order of Police Lodge No. 74 v. American Federation of State, County and Municipal Employees*, 780 A.2d 863, 869 (Pa. Cmwlth. 2001), not to require that parties refer to

documents by a particular label or attach duplicative copies of documents already in the record. Because Defendants have identified the writings on which their defenses and assertions are based and those documents are in the record as Exhibits to the Complaint, Defendants have fully complied with Rule 1019(i) and nothing additional need be attached to the New Matter.

Preliminary Objection No. 6 is therefore overruled.

VI. Preliminary Objection No. 7

Preliminary Objection No. 7 seeks to dismiss Paragraphs 59-65 and 79-84 of Defendants' New Matter on the grounds that those paragraphs allegedly assert an affirmative defense barred by the Parol Evidence Rule. The Commonwealth argues that the contracts here are unambiguous, integrated, written contracts and that Defendants therefore are barred from introducing extrinsic evidence to interpret or modify those contracts. The issue on these Preliminary Objections to New Matter, however, is not merely whether the Parol Evidence Rule applies to these contracts, but whether the New Matter in question asserts a claim or defense that is barred by the Parol Evidence Rule.

Paragraphs 59-64 and 79-83 of Defendants' New Matter do not plead any fact or defense that seeks to vary the terms of any contract by extrinsic evidence. Paragraphs 59-64 assert factual averments that Defendants' IUP Project contracts do not themselves expressly refer to the SPPA and DGS regulations or designate the IUP Project as a "public works" project. Paragraphs 79-83 assert legal conclusions that the IUP Project is not a "public works" project owned by a "public agency," that the IUP Project is not subject to the SPPA and that the Commonwealth therefore can have no causes of action against Defendants with

respect to the IUP Project. As such, all of these paragraphs are pleaded in support of Defendants' legal argument that the SPPA cannot apply to the IUP Project because the IUP Project is allegedly not a "public works" project for a "public agency." In addition, the facts pleaded in Paragraphs 59-63 of Defendants' New Matter could be relevant as support for Defendants' contentions that they did not act willfully and that the Commonwealth therefore is not entitled to the remedy of debarment under Section 5(b) of the SPPA, 73 P.S. § 1885(b). While this Court has ruled as a matter of law that the SPPA applies to the IUP Project, and Paragraphs 64 and 79-83 of Defendants' New Matter therefore have been or are subject to being stricken as barred by this Court's February 21 Opinion, the Parol Evidence Rule is not a basis for dismissing or striking any of these paragraphs.

The remaining two Paragraphs of Defendants' New Matter that are the subject of this Preliminary Objection aver that none of the Defendants saw the IUP Project development consultant and general contractor contracts and that they did not know that the IUP Project was subject to the SPPA. (New Matter ¶¶65, 84.) The Commonwealth argues that these averments contravene provisions of Defendants' IUP Project contracts that required them adhere to the same terms as the general contractor contracts and represented that Defendants had examined those contracts. (See Complaint Exhibits K at 1-2 §§2.1-2.3, L at 1-2 §§2.1-2.3.) Paragraphs 65 and 84 could, however, also be construed as averments of lack of actual knowledge, relevant to support Defendants' contentions that they did not act willfully. Because on these Preliminary Objections, all doubts must be resolved in favor of Defendants, *McCord*, 9 A.3d at 1218 n.3, and these paragraphs could be relevant to an issue other than Defendants' obligations under the IUP Project

contracts, they cannot be dismissed at this stage of the proceedings as barred by the Parol Evidence Rule.

Preliminary Objection No. 7 is therefore overruled.

VII. Preliminary Objections Nos. 10 through 21

Preliminary Objections Nos. 10 through 21 seek to strike a total of 161 paragraphs of Defendants' New Matter on the ground that they allegedly plead nothing beyond denying averments of the Complaint and are therefore improper new matter. These twelve Preliminary Objections all assert this same legal issue and differ only in the paragraphs of Defendants' New Matter at which they are directed.⁶

Rule 1030(a) of the Pennsylvania Rules of Civil Procedure limits new matter to affirmative defenses and "any other material facts which are not merely denials of the averments of the preceding pleading." Pa. R.C.P. No. 1030(a). Averments which do not set forth any affirmative defense or any facts beyond the denial of the averments in the prior pleading are not proper new matter. Pa. R.C.P. No. 1030(a); *Kine v. Forman*, 404 Pa. 301, 304-305, 172 A.2d 164, 167 (1961); *Watson v. Green*, 331 A.2d 790, 792 (Pa. Super. 1974). This limitation on new

⁶ The paragraphs of Defendants' New Matter to which these Preliminary Objections relate are as follows: Preliminary Objection No. 10 – New Matter ¶¶1-7 and 11-13; Preliminary Objection No. 11 – New Matter ¶¶14-40; Preliminary Objection No. 12 – New Matter ¶¶41-51; Preliminary Objection No. 13 – New Matter ¶¶52-63 and 65; Preliminary Objection No. 14 – New Matter ¶¶68-76; Preliminary Objection No. 15 – New Matter ¶¶77-84; Preliminary Objection No. 16 – New Matter ¶¶85-95; Preliminary Objection No. 17 – New Matter ¶¶96-133; Preliminary Objection No. 18 – New Matter ¶¶134-149; Preliminary Objection No. 19 – New Matter ¶¶150-161; Preliminary Objection No. 20 – New Matter ¶¶162-164; Preliminary Objection No. 21 – New Matter ¶¶165-167.

matter is not a mere technicality. Factual averments in new matter, unlike denials in answer paragraphs, require a response. While the opposing party is not required to answer improper new matter, *Watson*, 331 A.2d at 791-92, as a realistic matter, parties will feel compelled to err on the side of answering any paragraph in new matter to avoid the risk of being held to have admitted those averments. Repetition of denials of the averments of the complaint in new matter thus leads to an additional cycle of duplicative, unnecessary pleading. Accordingly, if Defendants' "averments under new matter do not add new facts, extrinsic to those in the complaint, but are just an elaboration of their previous denials in the answer," such averments may be stricken on preliminary objections. *Northumberland County v. West End National Bank*, 73 Pa. D. & C.2d 689, 692 (C.P. Northumberland Co. 1975).

The Commonwealth is correct that 74 of the paragraphs which are the subject of these Preliminary Objections are mere denials of the averments of the Complaint. Paragraphs 1-7, Paragraphs 134-149, Paragraphs 150-154, 157, and 159, Paragraph 164, and Paragraphs 165-67 are all reiterations of Defendants' denials in their answers to various paragraphs of the Complaint. (*See, e.g.*, Answer ¶¶126, 158-159; Answer ¶¶123, 155; Answer ¶¶126, 128, 132, 136, 138, 141, 143, 146-147, 157, 160-163; Answer ¶155; Answer ¶¶160-163.) Paragraphs 85-86, 96-102 and 119-130, which plead only the identity of the Ryco entity that worked on the Blairsville Project and IUP Project, Paragraphs 103-118 and 133, denying that Defendants made intentional, material misrepresentations or intentionally deceived, and Paragraphs 162-163, which deny that Defendants used deceptive acts or representations, likewise add nothing to Defendants' denials of the

Commonwealth's claims, as they merely deny averments in the Complaint and elements of the Commonwealth's claims and neither assert any affirmative defense nor plead any additional facts.

The Court therefore sustains Preliminary Objections Nos. 18, 20 and 21 and sustains Preliminary Objections Nos. 10, 16, 17 and 19 as to Paragraphs 1-7, 85-86, 96-130, 133, 150-154, 157, and 159 of Defendants' New Matter. This ruling in no way prejudices Defendants, as all of the facts pleaded in the stricken paragraphs are at issue in this action by virtue of Defendants' denials in their Answer.

The remaining 87 paragraphs of New Matter challenged in Preliminary Objections Nos. 10 through 21, however, do not appear to be mere denials of the averments of the Complaint.

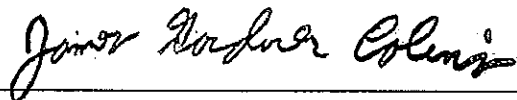
Paragraphs 14-63, 65, and 68-84 all either plead legal conclusions that SPPA does not apply to the IUP Project or plead additional facts concerning the IUP Project to support Defendants' arguments that the SPPA does not apply to that project or Defendants' contentions that they did not act willfully because they did not know that the IUP Project was subject to the SPPA. They therefore are not mere denials of the Commonwealth's claims. While many of these averments have been stricken under Preliminary Objections Nos. 1 and 3 because they are barred or immaterial as a result of this Court's ruling on Defendants' Preliminary Objections, all of these paragraphs are in conformity with Rule 1030(a)'s limitations on new matter.

Paragraphs 11-13, 87-95, 131-132, 155-156, 158, and 160-161 also appear to plead "material facts which are not merely denials of the averments of

the prior pleading.” Pa. R.C.P. No. 1030(a). Paragraphs 11-13 plead additional facts beyond denial of the Commonwealth’s averments concerning the Ryco Entities and their independence from each other, relevant to Defendants’ contentions that they are separate entities, not an “enterprise,” and that the requirements for piercing the corporate veil are not satisfied. Paragraphs 87-95, averring that suppliers represented that the Blairsville Project steel was American, that domestic product was not available, and lack of opportunity to inspect, plead facts to support of Defendants’ affirmative defenses. Paragraphs 131-132, asserting that claims are barred by lack of willfulness and absence purpose to gain monetary benefit, appear to plead a purported defense and additional facts, rather than mere denials. Paragraphs 155-156, 158, and 160-161 also appear to allege some additional facts beyond denial of the Commonwealth’s averments.

The Court therefore overrules Preliminary Objections Nos. 11, 12, 13 14 and 15 and overrules Preliminary Objections Nos. 10, 16, 17 and 19 as to Paragraphs 11-13, 87-95, 131-132, 155-156, 158, 160 and 161 of Defendants’ New Matter.

An appropriate order follows.



JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 494 M.D. 2012
	:	
Ryco, Inc.; Ryco Fire Protection	:	
Services, LP; Ryco Fire Protection	:	
Services, LLC; Ryco Plumbing II,	:	
LLC; Ryco Plumbing II, LP;	:	
Ryco Plumbing, LLC; Ryco	:	
Plumbing, LP; Thomas Sherry Jr.;	:	
Susan E. Sherry and Richard Bosco,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 15th day of August, 2013, upon consideration of the Commonwealth's Preliminary Objections to Defendants' Amended Answer and New Matter to Commonwealth's Amended Complaint, the briefs of the parties with respect thereto, and oral argument held on July 29, 2013, it is hereby ordered:

- (1) Preliminary Objections Nos. 3, 8, 9, 18, 20 and 21 are SUSTAINED;
- (2) Preliminary Objections Nos. 1 and 5 are SUSTAINED as to New Matter Paragraphs 80-83, 87, and 173-175, and Preliminary Objections Nos. 10, 16, 17 and 19 are SUSTAINED as to New Matter Paragraphs 1-7, 85-86, 96-130, 133, 150-154, 157, and 159;
- (3) In accordance with the above rulings, New Matter Paragraphs 1-7, 18-28, 42-45, 47-51, 55-58, 64, 66-67, 77-78, 80-83, 85-87, 96-130, 133-154, 157, 159, 162-168 and 173-175 are STRICKEN from Defendants' Amended Answer and New Matter to Plaintiff's Amended Complaint;

(4) Preliminary Objections Nos. 1 and 5 are OVERRULED as to New Matter Paragraphs 84, 92, 169 and 172, and Preliminary Objections Nos. 10, 16, 17 and 19 are OVERRULED as to New Matter Paragraphs 11-13, 87-95, 131-132, 155-156, 158, and 160-161; and

(5) Preliminary Objections Nos. 2, 4, 6, 7, 11, 12, 13, 14, and 15 are OVERRULED.

The Commonwealth shall file a Reply to the remaining Paragraphs 8-17, 29-41, 46, 52-54, 59-63, 65, 68-76, 79, 84, 88-95, 131-132, 155-156, 158, 160-161, and 169-172 of Defendants' New Matter within thirty (30) days of this Order.



JAMES GARDNER COLINS, Senior Judge

