

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

DOCKETED

CLEARWATER CONCRETE & MASONRY, : July Term 2010
INC., :
Plaintiff, : No. 882
v. :
BOND CONSTRUCTION, LLC, : COMMERCE PROGRAM
Defendant/Cross-claim Defendant, :
v. : Control Number 11092390
WESGOLD, LLC, :
Defendant/Cross-claim Plaintiff. :

JAN 20 2012
CLERK
CIVIL ADMINISTRATION

ORDER

AND NOW, this ^{20th} day of January 2012, upon consideration of Defendant/Cross – Claim Plaintiff, WesGold, LLC’s Motion for Summary Judgment against Plaintiff Clearwater Concrete & Masonry, Inc and Partial Summary Judgment against Defendant Cross /Claim defendant Bond Construction, LLC’s and Plaintiff’s response in opposition, it hereby is **ORDERED** that the Motion for Summary Judgment is **granted in part** and counts I (breach of contract) and III (detrimental reliance/promissory estoppel) are dismissed. All other aspects of the motion are **denied**.

It is further **ORDERED** that the partial motion for summary judgment is **granted** as to Bond Construction, LLC.

BY THE COURT,


ARNOLD L. NEW, J.

Clearwater Concrete & M-ORDOP



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CLEARWATER CONCRETE & MASONRY, INC.,	:	July Term 2010
	:	
Plaintiff,	:	No. 882
	:	
v.	:	
BOND CONSTRUCTION, LLC, Defendant/Cross-claim Defendant,	:	COMMERCE PROGRAM
	:	
v.	:	Control Number 11092390
WESGOLD, LLC, Defendant/Cross-claim Plaintiff.	:	

OPINION

In this action Clearwater Concrete & Masonry, Inc. (hereinafter “Clearwater”), a subcontractor, seeks payment from defendants WesGold, LLC (hereinafter “WesGold”), the developer/owner of the Project, and Bond Construction, LLC (hereinafter “Bond”), the general contractor, for labor and materials provided on a construction project.

On or about December 26, 2006, WesGold entered into a written contract (hereinafter “the Trade Contract”) with Bond. The written contract outlined WesGold’s and Bond’s rights and obligations to one another on the Project and included provisions relating to payment and indemnification. The Trade Contract included an indemnity provision under which Bond agreed to indemnify WesGold for all losses incurred in connection with the Trade Contract and/or Bond’s work on the Project.

The written contract permitted WesGold to pay Bond via joint check. Annexed to the Trade Contract was a form Joint Check Agreement (“JCA”) which further outlined the terms under which WesGold would issue joint checks on the project.

The Trade Contract also provided that there would be no third party right to payment created by WesGold's issuance of a joint check and that Bond was obligated to make prompt payment to all parties furnishing labor, materials or equipment supplied to it on the Project.

On February 12, 2007, Bond entered into an agreement with Clearwater whereby Clearwater agreed to provide materials and perform labor to install concrete curbing at the Project. Clearwater supplied labor and materials to the Project pursuant to the Subcontract and invoices were submitted by Bond to WesGold for payment. Bond failed to pay Clearwater in full for its work. Clearwater never submitted any invoices to WesGold.

Prior to filing this action, Clearwater filed two mechanics' lien claim actions in connection with the work performed on the Project against owners of the Property. The respective defendants filed motions for summary judgment contending the liens were invalid and therefore unenforceable. On April 21, 2010 and June 11, 2010, this court granted the defendants' respective motions for summary judgment and the liens were dismissed.

On July 12, 2010, Clearwater filed the instant action against WesGold for breach of contract, violation of the Contractor and Subcontractor Payment Act, 73 P.S. section 501 ("CASPA"), detrimental reliance/promissory estoppel and unjust enrichment. WesGold filed preliminary objections to Clearwater's CASPA claims. On September 22, 2010, the preliminary objections were sustained and Clearwater's CASPA claims as to WesGold only were dismissed with prejudice. On October 15, 2010, WesGold filed an answer to Clearwater's complaint with new matter and a cross claim against Bond for Indemnification and Contribution.

On January 14, 2011, WesGold sent a Notice of Intent to Take a Default Judgment to Bond. Bond failed to respond to the notice. WesGold has now moved for summary judgment

against Clearwater on all remaining counts against WesGold and moved for partial summary judgment against Bond on the issue of liability.

DISCUSSION

I. Motion for Summary Judgment against Clearwater.

WesGold moves for summary judgment on the claims for count I (breach of contract), count III (promissory estoppel) and count V (unjust enrichment) in the complaint. In count I of the complaint, Clearwater purports to state a claim for breach of contract against WesGold. However, a review of the record clearly demonstrates the lack of a written contract obligating WesGold to pay Clearwater for the labor and materials provided on the project. The only written contracts of record are the Trade Contract entered into between WesGold and Bond and the subcontract agreement between Bond and Clearwater.

In an attempt to salvage its breach of contract claim, Clearwater argues the existence of an implied contract with WesGold. Clearwater argues that WesGold was responsible to pay the subcontractors on the project by joint check even absent a formal written joint check agreement between the parties. A joint check agreement is an instrumentality specific to the construction industry, in which one contractor enters into an agreement calling for it to write a check jointly payable to two other contractors. Pursuant to the agreement, one of the contractors then takes from the check only so much to pay his labor costs and dedicates the remainder of the check to pay for supplies obtained by the other contractors.¹

WesGold's issuance of a joint check to Bond and Clearwater for labor and material provided on the project on occasion does not create an implied contract. An executed joint check agreement authorizing payment via joint check by WesGold to Bond and Clearwater has not

¹ Diener Brick Co. v. Mastro Masonry Contr., 885 A.2d 1034 (Pa. Super. 2005).

been produced. As such, no written contract exists in the record placed before the court obligating WesGold to pay Bond and Clearwater via joint check.

Assuming *arguendo*, an executed joint check agreement does exist authorizing payment via joint check by WesGold to Bond and Clearwater in the form agreed to by WesGold and Bond, the language contained within said agreement does not create an obligation on the part of WesGold to pay Clearwater for any monies allegedly due for the project. The form JCA agreed to by WesGold and Bond specifically provides as follows:

Nothing in this Agreement (Joint Check Agreement) shall be construed as a guarantee by Owner (WesGold) to fulfill any obligation owed by Trade Contractor (Bond) to Supplier or as creating a third-party beneficiary relationship between Supplier (Clearwater) and Owner (WesGold) relative to the Trade Contract.²

Based on the foregoing language contained within the form JCA as well as the language contained within the Trade Contract wherein no third party right to payment was created by WesGold's issuance of a joint check, it is clear that WesGold had no intent to create a direct right of payment to Clearwater or any other subcontractor. As such any payment made by WesGold via joint check to Clearwater and Bond does not create an implied contract between WesGold and Clearwater. Consequently, WesGold's motion for summary judgment to count I (breach of contract) is granted and the count is dismissed.

In count III of the complaint, Clearwater purports to state a claim for promissory estoppel. In order to state a claim for detrimental reliance/promissory estoppel, a plaintiff must prove that: (1) the promisor made a promise that would reasonably be expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained

² Joint Check Agreement.

from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.³

Conspicuously absent from the record is any evidence of a promise by WesGold to pay Clearwater for its services. Clearwater merely relies upon its own “understanding” as to how payment was to be made on the project rather on a promise made by WesGold to pay. Kenneth J. Griffin, Secretary/Treasurer of Clearwater Concrete & Masonry, Inc. in an affidavit states:

Clearwater and I understood, prior to agreeing to perform work on this project, that subcontractors on the Project were to be paid by joint check from WesGold, LLC (“WesGold”) even absent a formal, written Joint Check Agreement between the parties. It was based on this understanding that Clearwater agreed to perform the work despite Bond’s financial distress. We would not have entered into the Subcontract without this understanding.⁴

Clearwater’s “understanding” on how payment was to be made and who was responsible for payment does not create a promise to pay. Based on the foregoing, since the record fails to evidence a promise to pay on the part of WesGold, the motion for summary judgment is granted and the claim for promissory estoppel is dismissed.

Lastly, in count V of the complaint Clearwater purports to state a claim for unjust enrichment against WesGold. A claim for unjust enrichment arises from a quasi-contract which “imposes a duty, not as a result of any agreement, whether expressed or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another.”⁵ In a case where a subcontractor has provided services and chattels to an owner who had no direct contractual relationship to the subcontractor, any benefit conferred must, for

³ Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000).

⁴ Exhibit “A” to Plaintiff’s response in opposition to Defendant’s Motion for Summary Judgment -Sworn Affidavit of Kenneth J. Griffin paragraph 3.

⁵ Stoekinger v. Presidential Financial Corp. of Delaware Valley, 2008 PA Super 95, 948 A.2d 828, 833 (Pa. Super. 2008).

purposes of recovery on an unjust enrichment theory, be measured by the value of the benefit to the owner, not by the value of the invoice submitted by the subcontractor; and owner's retention of the benefit without paying any compensation to the subcontractor would not be unjust if the owner did not contract directly with or mislead the subcontractor.⁶

WesGold argues summary judgment is appropriate on the unjust enrichment claim since Clearwater cannot show that WesGold was unjustly enriched since Bond was paid in full. The evidence relied upon by WesGold, however, fails to demonstrate that Bond was paid in full.⁷ As such, the court finds that a genuine issue of material fact exists as to whether WesGold was unjustly enriched.

II. Motion for Summary Judgment against Bond.⁸

WesGold also moves for partial summary judgment against Bond on the cross claim. Specifically, in count I of the cross claim, WesGold seeks indemnification and/or contribution from Bond on Clearwater's cause of action. Under the terms of the Trade Contract, Bond is obligated to indemnify WesGold for any all claims arising from the Trade Contract. As such, WesGold's motion for summary judgment on its cross claim against Bond is granted.

CONCLUSION

Based on the foregoing, Defendant WesGold, LLC's motion for summary judgment against Plaintiff Clearwater Concrete & Masonry, Inc.'s claims is granted as to count I (breach of contract) and III (detrimental reliance/promissory estoppel) and denied as to count V (unjust

⁶ D.A. Hill Co. v. CleveTrust Realty Investors, 524 Pa. 425, 432, 573 A.2d 1005, 1009 (1990).

⁷ See WesGold's Motion for Summary Judgment ¶¶99, 106 and Exhibit 11 to Wes Gold's Defendant's Motion for Summary Judgment – Transcript dated October 27, 2009 p. 28-30.

⁸ WesGold's motion for summary judgment against Bond is uncontested.

enrichment). Defendant WesGold LLC's motion for partial summary judgment against Bond Construction, LLC is granted.

BY THE COURT,


ARNOLD L. NEW, J.