

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

STEVEN KILLINGER d/b/a	:	
KILLINGER CUSTOM SHEET METAL,	:	
Plaintiff,	:	
	:	
vs.	:	CV- 15-00,050
	:	
HOSLER CORP., BENELL, INC., and	:	
HARTFORD FIRE INSURANCE COMPANY,	:	
Defendants	:	PRELIMINARY OBJECTIONS

OPINION AND ORDER

Before the Court are the Defendants’ preliminary objections to Plaintiff, Steven Killinger, d/b/a/ Killinger Custom Sheet Metal, (“Killinger”)’s complaint. The Court sustains the demurrer to the breach of contract claims against Benell, Inc. (“Benell”), and Hartford Fire Insurance Company (“Hartford”). The Court sustains in part the demurrer to the third party beneficiary claim on the insurance bond and grants leave to Killinger to amend the complaint to bring an action on the payment bond in his own name. Finally, the Court sustains in part and overrules in part the demurrer to the quantum meruit claims. The following opinion is provided in support of the Court’s rulings.

Procedural Background

On January 9, 2015, Killinger filed a complaint containing 3 counts against all of the Defendants: breach of contract, third party beneficiary to a performance and payment bond, and quantum meruit. On February 3, 2015, Defendants, Hosler Corp. (“Hosler”), Benell and Hartford, filed preliminary objections to the complaint. Killinger filed a response to the objections on February 20, 2015. An application for continuance of the argument date was granted. Defendants filed their brief in support of their objections on March 25, 2015. Killinger filed his brief on April 1, 2015. Argument was held April 8, 2015.

Factual Background

The matter arises out of a construction project for the Jersey Shore Elementary School. Benell was the prime contractor to perform the heating, ventilation and air conditioning (“HVAC”) work. As the primary contractor, Benell entered into a performance bond and payment bond with Hartford as required under The Public Works Contractor's Bond Law, 8 P.S. 193(a) since the work involved construction, reconstruction, alteration or repair of a public building in excess of five thousand dollars. These bonds typically ensure payment to subcontractors and suppliers and to ensure completion of the work. Benell contracted with Hosler to perform some or all of the HVAC work it had contracted to perform for Jersey Shore Elementary School.

Hosler entered a subcontract with Killinger for Killinger to install duct work and other work for the HVAC system at the Jersey Shore Elementary School. Complaint ¶¶8-9, Preliminary Objections ¶5. Answer. After a verbal acceptance of Killinger’s proposal by Hosler, Killinger commenced work on or about July 12, 2013. On August 12, 2013, Hosler entered into a formal subcontract agreement accepting Killinger’s proposal to be a subcontractor for the installation of ductwork in the sum of \$96,000. Killinger substantially completed work on or about December 6, 2013. Killinger had four change orders for additional sums. Killinger avers that it was not fully paid for the work it performed. Killinger claims a balance due and owing from the project, including outstanding change orders, in the amount of \$64,122.65. Killinger also seeks interest, penalties and reasonable attorney’s fees and costs. In accordance with the contract, Killinger demanded Hosler to go to mediation over the balance due. Upon no response, Killinger commenced the instant suit.

Legal Standards

Preliminary Objections

A party may file preliminary objections based on the legal sufficiency or insufficiency of a pleading (demurrer) pursuant to Pa. R.C.P. 1028(a)(4). A demurrer tests the legal sufficiency of the complaint. Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 714 (Pa.Super. 2005). When reviewing preliminary objections in the nature of a demurrer, the court must “accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts.” Thierfelder v. Wolfert, 52 A.3d 1251, 1253 (Pa. 2012), *citing*, Stilp v. Commonwealth, 940 A.2d 1227, 1232 n.9 (Pa. 2007). In deciding a demurrer “it is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit a recovery. If there is any doubt, it should be resolved by the overruling of the demurrer.” Melon Bank, N.A. v. Fabinyi, 650 A.2d 895, 899 (Pa. Super. 1994) (citations omitted). “Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are **clear and free from doubt**.” Bower v. Bower, 611 A.2d 181, 182 (Pa. 1992)(emphasis added).

Quantum Meruit

Our Supreme Court has explained that quantum meruit is essentially an implied contract in which the plaintiff is entitled to the value of the benefit conferred upon the defendant. Shafer Elec. & Constr. v. Mantia, 96 A.3d 989, 994 (Pa. 2014) *citing* Durst v. Milroy General Contracting, Inc., 2012 PA Super 179, 52 A.3d 357, 360 (Pa. Super. 2012). To establish a claim for quantum meruit, the plaintiff must prove the following:

- (1) [the] benefits conferred on defendant by plaintiff;
 - (2) appreciation of such benefits by defendant;
 - and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.
- Id.

“In determining if the doctrine applies, our focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.” *Id.* (quoting Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 666 A.2d 327, 328 (Pa. Super. 1995) (internal citations omitted)).

Equitable contractual claims, such as quantum meruit, are unavailable where the parties’ relationship is governed by an express contract. See, e.g., Diener Brick Co. v. Mastro Masonry Contr., 2005 PA Super 355, 895 A.2d 1250 (Pa. Super. 2005); Lackner v. Glosser, 2006 PA Super 14, 892 A.2d 21 (Pa. Super. 2006).

Equitable Contract Claims Plead in the Alternative

Pennsylvania Courts have repeatedly held that breach of contract and unjust enrichment may be plead as separate counts as alternative causes of action under Pa.R.C.P. 1020(c). Lugo v. Farmers Pride, Inc., 2009 PA Super 5, 967 A.2d 963 (Pa. Super. 2009), *citing*, Pa.R.C.P. 1020(c); STANDARD PENNSYLVANIA PRACTICE, § 16:59; Rollinson v. Clarke-DeMarco, 83 Pa. D. & C.4th 467, 2007 WL 4593471 (Pa.Com.Pl., Mercer Co., 2007); DTK Ventures, L.P. v. Russo, 2006 Pa. Dist. & Cnty. Dec. LEXIS 570, 2006 WL 2988463 (Pa.Com.Pl., Lackawanna Co., August 21, 2006); Kerkel v. SPD Elec. Systems, 2003 Phila. Ct. Com. Pl. LEXIS 42, 2003 WL 23005010 (Pa.Com.Pl., Philadelphia Co., December 9, 2003). *See, also*, Shafer Elec. & Constr. v. Mantia, 2013 PA Super 111, 67 A.3d 8, 2013 Pa. Super. LEXIS 722 (Pa. Super. 2013)(“Courts in this Commonwealth have continually recognized that a litigant may advance alternative or conflicting theories of recovery, including causes of action for breach of contract and quantum meruit/unjust enrichment.”) Some Federal Courts interpreting Pennsylvania law have required that equitable contract claims may only be asserted in the alternative to an express

breach of contract claim where the validity of the contract is disputed.¹ However, this Court is compelled to follow the Pennsylvania Superior Court and is persuaded by its sister Common Pleas Courts in this regard.

Discussion

The Court will discuss the demurrers in the order of the counts to which they object.

Breach of Contract

The first count, against all defendants is based upon breach of contract for failure to pay the balance due on the contract. In Plaintiff's Answers to Preliminary Objections of Defendants Hosler, Corp, Benell, Inc and Hartford Fire Insurance Company, filed February 20, 2015 ("Answer to POs") Killinger admits that it has no breach of contract claim against Benell or Hartford. ¶48 ¶ 58, Plaintiff's Answers to Preliminary Objections of Defendants Hosler, Corp, Benell, Inc and Hartford Fire Insurance Company, filed February 20, 2015 ("Answer to POs"). Accordingly, the demurrers to the breach of contract count as to Benell and Hartford are sustained.

Third Party Beneficiary

The second count is Killinger's claim as a third party beneficiary to the performance bond between Benell and Hartford. Defendant Benell demurs to the third party beneficiary claim under the bond, asserting that there is no such action under a bond. At most, Killinger could have filed a claim under the bond. This Court agrees that Killinger's third party beneficiary claim must take the form of an action on the payment bond as the method of recovery on the bond. As such, Killinger shall file an amended complaint which contains an action on the bond

¹ Grudkowski v. Foremost Ins. Co., 556 Fed. Appx. 165, 170 n.8 (3rd Cir. 2014); Montanez v. HSBC Mortg. Corp. (USA), 876 F. Supp. 2d 504, 516 (E.D. Pa. 2012); Gallo v. PHH Morg. Corp., 916 F.Supp. 2d 537, 553 (D.N.J. 2012);

setting forth the factual predicates for an action upon the bond, including averring pertaining to notice and timeliness.

Quantum Meruit

The third and final count is a quantum meruit claim against all Defendants. Quantum meruit requires: “(1) [the] benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.” Shafer Elec. & Constr. v. Mantia, *supra* 96 A.3d at 994. (citations omitted). In the complaint, Killinger avers only that it performed services and supplied materials which Benell and Hosler contracted to perform and for which Hartford executed a performance bond. As such, the Court sustains the objections in part, treating them as a request for a more specific pleading. Killinger shall file an amended complaint within twenty days averring facts in support of each of the required elements as to Hosler and Benell.²

As to Hosler, Defendants demur on the grounds that the relationship between Hosler and Killinger is governed by contract, precluding relief under a quantum meruit theory. Hosler objects to the quantum meruit claim against it because Killinger pleaded that an express subcontract exists. Hosler argues that – since an express subcontract exists – Killinger cannot recover under a quantum meruit theory. The Court agrees that Killinger may not recover under both breach of an express contract and under quantum meruit. However, at this stage in the proceedings, Killinger may plead quantum meruit as an alternative to breach of an express

² While not in the complaint, the Answer avers that Benell was unjustly benefited to the extent it did not pay Hosler for the work performed. ¶ 23, Answer to POs.

contract. Accordingly, the Court OVERRULES the objection by Hosler to the quantum meruit claim against it without prejudice.³

Benell & Hartford

Benell demurs to the quantum meruit count on the grounds that Killinger failed to aver the elements that there was unjust retention or misleading by Benell to obtain the benefits alleged. Hartford demurs to the quantum meruit count on the grounds that Hartford retained no benefit and any retention would not be unjust. Defendants cite D.A. Hill Co. v. Clevertrust Realty Investors, 524 Pa. 425, 573 A.2d 1005 (Pa. 1990), for the proposition that where a non-party to a contract receives benefits pursuant to that contract, the third party is not unjustly enriched unless that party mislead others to receive the benefit. D.A. Hill Co. v. Clevertrust Realty Investors, 524 Pa. 425, 573 A.2d 1005 (Pa. 1990). Instead, D.A. Hill, provides that *restitution* under the contract is only available if the party mislead others with respect to the contract. An equitable claim for the value of the labor and materials is still available where the party retains the benefit and retention of the benefit is unjust. D.A. Hill, *supra*. No doubt, the mere retention of a benefit does not give rise to a quantum meruit claim, the benefit must be unjustly retained. In the present case, Killinger may potentially plead sufficient facts to establish an unjust retention of benefits by Benell, such as if Benell failed to pay Hosler for the work performed and if Benell was paid. As such, the demurrer as to Benell is overruled.

While not in the complaint, Killinger's Answer avers that Hartford received the benefits of its premium without making payment for the services upon Killinger's failure to be paid. This averment is more properly an action on the bond itself, and not quantum meruit.

³ It appears that the quantum meruit claim will most likely fall at the time of dispositive motions.

ORDER

AND NOW this 1st day of July, 2015, it is ORDERED and DIRECTED as follows.

1. The demurer to the breach of contract count as to Benell is SUSTAINED; the breach of contract count is dismissed as to Benell.
2. The demurrer to the breach of contract count as to Hartford is SUSTAINED; the breach of contract count is dismissed as to Hartford.
3. The Defendants' demurrer to the third party beneficiary contract claim based upon the bond is SUSTAINED in part and OVERRULED in part without prejudice. The Defendants' objections are sustained in part as requiring a more specific pleading. Killinger shall **file an amended complaint within twenty days** setting forth the factual predicates for an action upon the bond, including averring facts regarding the requisite notice and timeliness. Leave to amend the complaint is without prejudice to Defendants' claims of untimeliness and lack of notice.
4. Hartford's demurrer to the quantum meruit count is SUSTAINED. Count 3 is dismissed as to Hartford.
5. Benell and Hosler's demurrer to the quantum meruit claims are SUSTAINED in part and DENIED in part. The objections are sustained in part to require a more specific pleading of the elements of quantum meruit. Killinger shall file an amended complaint within 20 days setting forth the facts in support of the elements for quantum meruit as to Benell and Hosler.

6. This matter is placed on the Court's April 2016 Trial Term. A separate scheduling Order will be issued this date.

BY THE COURT,

July 1, 2015
Date

Richard A. Gray, J.

cc: Lee H. Roberts, Esq. for Plaintiff
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