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 second amended complaint. The following opinion is provided in support of the Court's rulings.

FACTUAL BACKGROUND

In his second amended complaint, Killinger asserted a claim against Hosler Corp. ("Hosler") and Benell, Inc. ("Benell") for breach of contract for public works, a claim against Holser for breach of contract, an action on bond against Hartford Fire Insurance Company ("Hartford"), and a quantum meruit claim against Benell and Hosler.[1] Defendants filed preliminary objections in the form of a demurrer to the quantum meruit claim against Benell, a demurrer to the claims for breach of contract – public works - against Benell, and a demurrer to the action on the bond.

The matter arises out of a construction project. Killinger alleged the following facts.

[1] Killinger filed his original complaint on January 9, 2015. After preliminary objections were granted in part and denied in part, Killinger filed an amended complaint on July 16, 2015. Defendants filed preliminary objections to the amended complaint on August 5, 2016. Without objection, Killinger filed a second amended complaint on November 2, 2015. On November 20, 2015, Defendants filed preliminary objections to the second amended complaint. The Court permitted further briefing and allowed a request for further argument. No request for further argument having been made, the matter was ripe for decision after January 4, 2016.

On or about March 25, 2013, Benell contracted to perform the heating, ventilation and air conditioning ("HVAC") work for the Jersey Shore Elementary School for a total contract price of approximately one million seven hundred thousand dollars. Benell entered into a performance bond and payment bond with Hartford as required under the contract and Pennsylvania law.[2]

At an unknown date and time, Benell contracted with Hosler to perform some or all of the HVAC work that Benell had contracted to perform for Jersey Shore Elementary School. Hosler then contracted with Killinger for Killinger to install duct work and other work for the HVAC system after Killinger submitted a proposal on June 25, 2013. After receiving a verbal acceptance of the proposal, Killinger commenced work on the project on or about July 12, 2013. On August 12, 2013, Hosler and Killinger executed a formal Subcontractor Agreement. Benell was fully aware of the subcontractor agreement between Hosler and Killinger. Benell represented to Killinger that Benell would issue joint checks for Killinger's work for Hosler. Benell received the benefits of labor and materials supplied by Killinger but failed to issue payment by joint checks. Killinger substantially completed the work on or about December 6, 2013. Killinger does not know the last day of work on the site or the last day he supplied materials.

Killinger submitted invoices to Hosler for payment. Hosler made payments on September 27 and October 11 of 2013 but did not pay the full amount invoiced. Upon a dispute as to payments, Killinger made a demand for mediation over the balance owed pursuant to the subcontractor agreement between Hosler and Killinger. Hosler never responded to the demand for mediation. On July 30, 2014, Holser and Killinger met to resolve issues without success.

[2] The Public Works Contractor's Bond Law provides that before a public construction project exceeding five thousand dollars is awarded, the prime contractor shall furnish a performance and payment bond. 8 P.S. 193(a)(1) and (2).

Killinger commenced the instant litigation by complaint on January 9, 2015, seeking $52,800 on the principal contract and $11,322.65 on change orders, totaling $64,122.65.

Killinger did not file suit against the owner, Jersey Shore Area School District (JSASD). It is believed and averred that the owner paid Benell for Killinger's services and materials.

DISCUSSION

Defendants filed preliminary objections in the nature of a demurrer as to three claims. A demurrer tests the legal sufficiency of the complaint. Pa. R.C.P. 1028(a)(4); 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).

The Court will discuss the demurrers in the same order in which they appear in Defendants' preliminary objections.

1. QUANTUM MERUIT CLAIM AGAINST BENELL

Benell demurs to the quantum meruit claim. 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)(citation omitted). "[T]he doctrine of quantum meruit describes the extent of liability on a contract implied-in-law, or quasi-contract, for the labor and materials provided." Limbach Co., LLC v. City of Philadelphia, 905 A.2d 567, 575 (Pa. Cmwlth. 2006). 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; (see also, Shafer Elec., supra, 96 A.3d at 994. (citations omitted)).

"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. (citation omitted) "The doctrine is based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby." Department of Environmental Resources v. Winn, 597 A.2d 281, 284 n. 3 (Pa. Cmwlth. 1991). "To avoid such unjust enrichment, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract between the parties." Id.

The Court concludes that Killinger failed to allege sufficient facts against Benell to support his quantum meruit claim because Killinger failed to allege that Benell retained a benefit without payment of value. Killinger's claims for quantum meruit centered on Benell's promise and failure to issue joint checks to Hosler and Killinger for all payments to Hosler for Killinger's work. *Complaint,* ¶ 60. Killinger averred that, with full knowledge of the subcontractor agreement between Hosler and Killinger, Benell represented to Killinger that Benell would issue joint checks for Killinger's work for Hosler. *Complaint*, ¶ 57-58. Benell received the benefits of labor and materials supplied by Killinger but **failed to issue payment by joint checks**. *Complaint*, ¶ 59 (emphasis added). Significantly, Killinger did not directly aver that Benell

failed to pay Hosler in full. Instead, Killinger alleged that Benell made ***payment in full*** to Hosler for the labor and materials provided by Killinger. *Complaint*, ¶ 63. As such, the Court concludes that there is no unjust retention of a benefit without payment of value by Benell such that would render the circumstances inequitable.[3]

2. **BREACH OF CONTRACT – PUBLIC WORKS - AGAINST BENELL**

Benell demurs to the claim for a contract for public works under the Pennsylvania's Contractor and Subcontractor Payment Act, 62 Pa.C.S. § 3901, *et. seq*., ("Act"). The Act applies to governmental contracts secured "through competitive sealed bidding or competitive sealed proposal." 62 Pa.C.S. § 3901(a). The purpose of the Act is to create "a uniform and mandatory system governing public contracts[.]" 62 Pa.C.S. § 3901(b). The Act regulates the bidding process, payment schedules and obligations, good faith withholding of payments and penalties.

The Act specifically provides the following. "Performance by a subcontractor in accordance with the provisions of a contract shall entitle the subcontractor to payment **from the contractor with whom the subcontractor has contracted.**" 62 Pa.C.S. § 3931(b) (emphasis added). 62 Pa.C.S. § 3933(a) provides the following.

> Performance by a subcontractor in accordance with the provisions of the contract **shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted.** For purposes of this section, the contract between the contractor and subcontractor is presumed to incorporate the terms of the contract between the contractor and the government agency. 62 Pa.C.S. § 3933(a)(emphasis added.)

[3] The Court need not reach the more difficult question of whether a quantum meruit claim exists in the construction setting against a prime contractor (not an owner) for the value of materials and services (not the contract price) when (1) there was neither misleading conduct or directions to perform the work by the prime contractor (2) an action on the bond is barred and (3) the prime contractor was paid in full but failed to pay his subcontractor, who then failed to pay the subcontractor seeking relief.

In his brief, Killinger contends that he reasonably and justifiably relied upon Benell's representation to issue joint checks and that such representation induced Killinger to enter into the subcontract with Hosler. Such allegations sound more in estoppel than quantum meruit. In his brief, Killinger raises the issue that that if Benell failed to pay Hosler Benell would be unjustly enriched. But Killinger alleges in his complaint that Benell paid Hosler in full.

The present case arose from a public works contract for construction of the Jersey Shore Elementary School, with Benell being the primary contractor. Benell secured Hosler as a subcontractor who in turn secured Killinger as a subcontractor. 62 Pa.C.S. § 3931(b) and § 3933 (a) provide for payments directly from the contractor with whom the subcontractor has contracted. Therefore, Killinger's claim for payments directly from Benell – as opposed to the contractor with whom Killinger has contracted (Hosler) – falls outside the Act.

3. **ACTION ON THE BOND - AGAINST HARTFORD**

Hartford demurs to the action on the bond because Killinger failed to bring the action within the one year limitation period and failed to comply with the statutory notice requirements of the Bond Law and the bond itself. The Court concludes that Killinger cannot maintain an action on the bond because Killinger failed to comply with the strict notice requirements of the Bond Law.

An action upon any payment or performance bond must be commenced within one year. 42 Pa.C.S. § 5523(3). The Pennsylvania Supreme Court has held that the one year period runs from the date of the statutory ninety day waiting period. Invensys Bldg. Sys. v. Zurich N. Am. Sur., No. 04-11034 (Delaware Co. Feb. 16, 2006), *affirmed without opinion by* Invensys Bldg. Sys. v. Zurich North American, 911 A.2d 193 (Pa. Super. 2006), *citing,* Centre Concrete Co. v. AGI, Inc, 559 A.2d 516, 518-519, 522 Pa. 27, 31-32 (Pa. 1989). The Public Works Contractors' Bond Law of 1967, 8 P.S. § 191, et. seq. ("Bond Law") provides as follows.

> (a) Subject to the provisions of subsection (b) hereof, **any claimant who has performed labor or furnished material in the prosecution of the work provided for in any contract for which a payment bond has been given**, pursuant to the provisions of subsection (a) of section 3 of this act, and who has not been paid in full therefor **before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the last of such materials** for which he claims payments, **may bring an action on such payment bond** in his own name, in assumpsit, to recover any amount due him for such labor or material, and **may prosecute such**

> **action** to final judgment and have execution on the judgment. 8 P.S. § 194(a) (emphasis added).

The Pennsylvania Supreme Court concluded that this section requires the claimant to wait ninety days after not being paid before the claimant may bring an action on the bond against the surety, thereby extending the limitation period to one year and 90 days. Centre Concrete Co. v. AGI, Inc., 559 A.2d 516, 517 (Pa. 1989).

In the present case, Killinger filed an action on the bond within one year and 90 days of the date of substantial completion of work. Killinger alleged he substantially completed the work on or about December 6, 2013. Ninety days following the substantial completion date is roughly March 6, 2014. One year following that date is March 6, 2015. Therefore Killinger filed the suit (January 9, 2015) within one year and ninety days limitation period and the action on the bond is not barred by the one year limitation period.[4]

The remaining question is whether Killinger complied with the statutory notice requirements under the Bond Law and the bond itself. When a claimant does not have a contractual relationship with the primary contractor, the bond law requires that claimant provide written notice to the primary contractor within ninety days of the date he last provided labor or materials.[5] Oral notice does not satisfy the written notice requirement. Leezer Cash & Carry, Inc. v. Aetna Insurance Co., 371 Pa. Super. 137, 537 A.2d 857, 865 (Pa. Super. 1988).

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[4] The last date work was performed or materials supplied would most likely be after the last date of substantial completion. Since the matter was filed within one year and 90 days from that date, the Court need not reach the factual issue of whether a later date was the last date work was performed or materials were supplied.

[5] Specifically, the Bond Law provides the following.

> Any claimant who has a direct contractual relationship with any subcontractor of the prime contractor who gave such payment bond or other financial security **but has no contractual relationship**, express or implied, with such **prime contractor may bring an action on the payment bond** or other financial security **only if** he has given **written notice** to such contractor **within ninety days** from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.

In the present case, Killinger never provided written notice to Benell as required under the Bond Law. Killinger did not allege that he provided the written notice to Benell. Therefore Killinger failed to allege a condition precedent to maintaining an action on the bond. *See, e.g.*, Leezer,

The Court concludes that Killinger's contentions as to compliance with the notice requirements are without merit. First, the Court rejects Killinger's argument that notice under the Bond Law is excused because Killinger did not have knowledge of the name and address of the bond company. As noted above, the Bond Law requires notice to the **primary contractor**, which in this case is Benell. Killinger alleged his knowledge of Benell when he alleged that Benell promised Killinger that it would pay Hosler by joint checks. The Court cannot agree that Killinger's lack of knowledge of the name and address of the bond company excused his obligation to provide notice to a known primary contractor such as Benell.

Second, the Court does not agree that the subcontract agreement between Hosler and Killinger stayed the notice requirements under the Bond Law. In C.M. Eichenlaub Co. v. Fidelity & Deposit Co. of Maryland, 293 Pa. Super. 11, 437 A.2d 965, 966-967 (Pa. Super. 1981) the Superior Court held that provisions of a contract between a subcontractor and a general contractor modified the statutory limitations period for the action on the bond against the surety. Since it was unclear whether the owner had ever paid the general contractor, the contract provision providing that the general contractor was required to pay only when paid meant that the cause of action could not accrue until the general contractor was paid. There was a factual dispute as to when that was.

Notice shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business or served in any manner in which legal process may be served in the manner now or hereafter provided by law for the service of a summons, except that such service need not be made by a public officer. 8 P.S. § 194(b)(emphasis added).

In the present case, Killinger asserts that the stay provisions in ¶ 10.3(d) of the subcontract agreement between Killinger and Hosler stayed the notice requirements of the Bond Law and the bond itself and thereby extended the date the cause of action accrued. The Bond Law requires 90 days' notice from the last date work was performed or materials supplied, not from when a cause of action accrued. Therefore, Killinger's contention that the subcontract agreement stayed the date that the cause of action accrued does change when the 90 day period begins to run – which was from the last date work was performed or materials supplied.

In addition, the subcontract agreement did not toll the notice period because it only stayed disputes between the Contractor and Subcontractor. ¶ 10.3(d) of the subcontract agreement states the following: "[**d]isputes between Contractor and Subcontractor** shall be stayed pending conclusion of **any dispute resolution between Owner and Contractor**." ¶ 10.3(d) of the subcontract agreement, attached to the second amended complaint as Plaintiff's Exhibit "D" (emphasis added). ¶ 10.3(d) does not stay disputes against Benell and Hartford because they are not the Contractor or Subcontractor. Moreover, the stay only applies when Hosler has not been paid.[6] Killinger has not alleged any dispute between the owner, Jersey Shore School District, and Hosler or Benell. Therefore, under the facts alleged, the Court does not believe ¶ 10.3(d) of the subcontract agreement effectuated a stay on the notice requirements.

Even if the notice requirements were stayed pending dispute resolution, Killinger would be required under the Bond Law to provide written notice to Benell within 90 days from the July 30, 2014, when the dispute resolution concluded with an unsuccessful meeting. Killinger did not allege that it provided written notice to Benell until the commencement of suit (January 9, 2015), well beyond 90 days after the unsuccessful meeting. For the reasons stated above, the Court

[6] The subcontract agreement lists Killinger as the subcontractor and Hosler as the Contractor. Id., at 1. The owner is the Jersey Shore School District.

concludes that Killinger is time-barred from bringing an action on the bond for failure to comply with the notice requirements under the Bond Law.

In light of the Court's ruling as to the Bond Law, the Court need not reach the issue of the notice requirements under the bond itself.

Accordingly, the Court enters the following order.

ORDER

AND NOW this **12th** day of **May, 2016** it is ORDERED and DIRECTED as follows.

1. The demurrer to the quantum meruit claim against Benell is SUSTAINED; the quantum meruit claim against Benell is dismissed.
2. The demurrer to the breach of contract – contract for public works claim – against Benell is SUSTAINED; the breach of contract – contract for public works claim against Benell is dismissed.
3. The demurrer to the action on bond claim against Harford is SUSTAINED; the claim against Hartford is dismissed;
4. Plaintiff shall have 30 days to file an amended complaint consistent with this opinion. If not amended complaint is filed, Defendants shall file an Answer to the Complaint within 20 days from that 30 day period.

5. This matter has been placed on the October-November 2016 trial term; the scheduling **order entered April 20, 2016 is amended** to reflect that the pre-trial conference is scheduled in Courtroom **No. 2** (not 3), before the Honorable Dudley N. Anderson. The Scheduling Order otherwise remains in full force and effect.

BY THE COURT,

May 12, 2016
Date

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Richard A. Gray, J.

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April McDonald, CST (as to ¶ 5 of the Order)