IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CHOICE FUELCORP, INC.,	:	
Plaintiff	:	**NO. CV-21-0156**
	:	
vs.	:	
	:	**CIVIL ACTION - LAW**
BRYAN E. LINEMAN,	:	
tbda BRYAN E. LINEMAN & SONS,	:	
Defendant	:	

ORDER

AND NOW, this **22nd** day of **August**, **2022**, before the Court is a Motion for Summary Judgment filed by Plaintiff on December 21, 2021, with regard to Defendant's Counterclaim filed on May 6, 2021.

Background

This litigation arises from a Complaint filed by Choice Fuelcorp, Inc. ("Plaintiff"), on March 9, 2021. The suit alleges that Bryan E. Lineman, tdba Bryan Lineman & Sons ("Defendant") sent Plaintiff a proposal for tank repair work in January of 2020. In response, Plaintiff sent Defendant a check in the amount of $7,300. The suit further alleges that Defendant retained Plaintiff's check despite Defendant neither performing the work set forth in the proposal nor providing Plaintiff with any materials described in the proposal. Plaintiff's Complaint alleges that Defendant's failure to perform any services or provide any materials in accordance with his its proposal is a breach of the contract between Plaintiff and Defendant for those goods and services; alternatively, Plaintiff alleges that Defendant's failure to refund the $7,300 paid by Plaintiff unjustly enriches Defendant under the theory of constructive contract, thereby entitling Plaintiff to recovery of same.

On May 6, 2021, Defendant filed an Answer and Counterclaim against the Plaintiff, alleging that the Plaintiff and Defendant reached an agreement on February 3, 2020, regarding what work needed done to have Plaintiff's tanks API certified and the process/schedule to complete the repair of the Plaintiff's four (4) tanks. Defendant received the $7,300 check referenced in the Complaint on February 13, 2020, by which time Defendant had already expended $10,400 to fabricate materials for the initial tank. Defendant's Counterclaim alleges that Defendant did not receive the balance of the down payment, but instead received a call from Plaintiff requesting Defendant revise the Agreement by reducing the Defendant's charges for the materials and labor for the employees of the Defendant who would be dispatched to the Plaintiff's business location for four (4) weeks to perform the necessary repair work. Defendant later learned that Plaintiff hired another company to perform the tank repair and certification project. Defendant's Counterclaim alleges that the materials Defendant fabricated for Plaintiff's project are not available for use by Defendant on another project; however, Defendant was able to utilize a portion of the materials valued at $2,000. The Defendant's Counterclaim alleges that the Defendant has been damaged in the amount of $23,020 as follows:

a. The sum of $1,100 being the net loss for the expenditure of the materials and labor necessary to fabricate the first of four (4) tanks, after giving credit to the Plaintiff of the $7.300 paid by Plaintiff toward the initial installment due;
b. $17,120 for the loss and damages sustained by the Defendant, being the aggregate of the expenses for the wages of the employees of the Defendant that were paid for four (4) weeks that said employees were

idled while Defendant awaited the agreed upon down payment of $17,200 from the Plaintiff for the labor costs attendant to completion of the project;

c. The sum of $4,800 for the Defendant's loss of profits pertaining to the project; and

d. Costs of suit.

Plaintiff filed a Response to Defendant's Counterclaim on May 14, 2021. On December 21, 2021, Plaintiff filed a Motion for Summary Judgment on the basis that Defendant failed to state a claim as to employee wages. Defendant's response thereto was filed on February 28, 2022. Argument was held on August 9, 2022, with Lindsay Scheller, Esquire, appearing on behalf of the Plaintiff and William Cisek, Esquire, participating by telephone on behalf of the Defendant.

Standard of Review

"A court may enter summary judgment after the close of the relevant pleadings if the court determines that there is no dispute as to material fact or if the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense." *Petrina v. Allied Glove Corp.*, 46 A.3d 795, 798 (Pa. Super. 2012). "In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001). However, the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but must file a response to the motion for summary judgment within thirty days identifying: "(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or; (2) evidence in

the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." Pa.R.C.P. 1035.3(a)(1)-(2). The Court will only grant summary judgment "where the right to such judgment is clear and free from all doubt." *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

Analysis

In its Motion for Summary Judgment, the Plaintiff alleges (1) the Defendant does not set forth any legal authority to support its claim for entitlement to $17,120.00 in damages for wages paid to employees during the four (4) weeks they did not work and (2) alternatively, Defendant is precluded from collecting any amount for wages paid to its employees because Defendant failed to take any measures to mitigate damages.

With regard to Plaintiff's argument that the Defendant does not set forth any legal authority to support its claim for $17,120.00 in damages for wages paid to its employees for four (4) weeks, the Court finds that the Counterclaim alleges that there was an agreement between the parties for labor and materials, and Plaintiff was to make a minimum down payment in the sum of $24,500.00 to start the project, but only $7,300.00 was received. The Counterclaim further alleges that the Agreement indicated that the necessary labor would take 8 to 11 weeks at $7,200 per week for the Defendant's 4 man crew. Defendant's Counterclaim seeks damages only for the weeks that it was not working and not being paid pursuant to the Agreement until it discovered that Plaintiff had hired another company to perform the labor. Reviewing the record in the light most favorable to the Defendant as the non-moving party, the Court finds that Defendant has pled sufficient evidence of facts to make out a *prima facie* cause of action.

Plaintiff's alternative argument that Summary Judgment is warranted because Defendant failed to take any measures to mitigate damages and is therefore precluded from collecting any amount for wages paid to its employees is without merit. Although a party has a duty to mitigate damages, "[w]hether the [party] properly mitigated damages is a factual determination to be made by the fact-finder." Merrell v. Chartiers Valley School District, 51 A.3d 286, 298 (Pa. Commw. Ct. 2012).

Reviewing the record in the light most favorable to the non-moving party, this Court finds that the evidence presented in the pleadings is sufficient to overcome the Motion for Summary Judgment. Based on the allegations in the Defendant's Counterclaim, there is an issue of fact which establishes a basis upon which the finder of fact may impute liability upon Plaintiff.

Conclusion

After careful consideration of the Motion for Summary Judgment, the response thereto, and the argument of counsel, Plaintiff's Motion for Summary Judgment is **DENIED**.

BY THE COURT,

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Ryan M. Tira, Judge

RMT/jel

CC: Lindsay Scheller, Esquire
William Cisek, Esquire
Gary Weber, Esquire
Jennifer Linn, Esquire