

CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
BCD-CV-16-14

CENTRAL MAINE DRYWALL, INC.)
)
 Plaintiff)
)
 v.)
)
)
 PRO CON, INC., et al)
)
)
 Defendant.)

ORDER FOR ENTRY OF
JUDGMENT ON COUNT
III AND COUNT V

BACKGROUND

This matter came on for trial before the Business and Consumer Court on July 21, 2017. Counts remaining for decision by the Court are Count III (Unjust Enrichment) and Count V (Mechanic’s Lien). Plaintiff is represented by Attorney Jon Languet and Pro Con is represented by Attorneys Joseph Talbot and John Hobson. Pro Con entered into a contract to provide design/build services on the construction of the Bangor Residence Inn. Plaintiff Central Maine Drywall (“CMD”) performed work on the project under a written subcontract agreement with Pro Con. Pro Con hired another subcontractor, Porter Building Systems (“PBS”) to do work on the project as well. CMD later in the project entered into a contract with PBS to complete work that was originally within the scope of work PBS had agreed to perform in its contract with Pro Con.

On January 18, 2017, the Court issued an Order granting Partial Summary Judgment in favor of Pro Con on Count V. CMD had obtained a mechanic’s lien against Pro Con in the amount of \$175,352.81 on November 17, 2015, but the Court’s Order reduced that amount to \$15,909.38 because CMD conceded that it had received payment for all but that amount from Pro Con. PBS

had paid CMD for work CMD performed on the project at issue in this case, and soon thereafter filed for bankruptcy protection. CMD thus opposed the reduction of the lien amount to \$15,909.38, arguing that \$73,265.63 of the original lien amount was potentially subject to recovery from the bankruptcy trustee as a “preference” under Section 547 of Title 11 of the United States Code (“Bankruptcy Code”). *See* 11 U.S.C. § 547(b). The Court in its Order on Partial Summary Judgment concluded that there was no evidence in the record that CMD had actually returned any of the \$73,265.63 in payments to the bankruptcy trustee. On the same day that the Court issued its Order, CMD voluntarily agreed to pay the bankruptcy trustee \$37,500.00 for a release of claims from the trustee related to the alleged avoidable transfers from PBS to CMD. CMD then sent the bankruptcy trustee a check in the amount of \$37,500.00 and now seeks to recover that sum from Pro Con, claiming Pro Con has been unjustly enriched in that amount.

Prior to trial, the parties stipulated to judgment on Count I of Plaintiff’s Complaint (Breach of Contract and Violation of Prompt Payment Act) and agreed to dismiss Count IV (Quantum Meruit) in accordance with a stipulation signed by both parties. (Joint Pretrial Statement, Stipulated Facts ¶ 27.) No Count II was brought in the Complaint. In the parties’ Joint Pretrial Statement the parties agreed that at the time PBS filed for bankruptcy it had paid CMD for all the work CMD had performed with the exception of \$15,909.38. At the time of the bankruptcy filing, CMD requested that Pro Con pay that balance. (Joint Pretrial Statement, Stipulated Facts ¶¶ 10-12.) The Court is informed that Pro Con has since paid that amount to CMD. In the Joint Pretrial Statement the parties further agreed that the “only remaining issue for the Court to decide are whether Pro Con is liable to CMD for payment of \$37,500.00 under Count III (Unjust Enrichment) or Count V (Mechanic’s Lien) of CMD’s Complaint.” (Joint Pretrial Statement, Factual and Legal Issues in Dispute.)

The parties filed written post-trial arguments, the last of which was received by the Court on August 18, 2017. The Court has reviewed the evidence admitted at trial, along with the parties' written arguments, and issues this Order for Entry of Judgment on Counts III and V in favor of the Defendant.

FINDINGS AND CONCLUSIONS

The parties agree on a number of facts. (*See* Joint Pretrial Statement, Stipulated Facts.) Pro Con entered into a written contract with BanRes, LLC to provide design/build services and construct the Bangor Residence Inn ("The Project"). (Joint Pretrial Statement, Stipulated Facts ¶ 1.) Pro Con, the general contractor, hired CMD as a subcontractor and entered into a written agreement for installation of cold formed metal framing. (Joint Pretrial Statement, Stipulated Facts ¶ 3.) The original contract between the parties was a fixed price contract for \$84,505.00, but the amounts paid to CMD were subject to additions and deductions for changes as agreed in writing, subject to a retainage of 10% of the amount requisitioned by CMD. (Joint Pretrial Statement Stipulated Facts ¶¶ 4-5.) The scope of work performed by CMD was expanded throughout the Project and CMD performed other work for Pro Con on both a fixed price and time and materials basis. (Joint Pretrial Statement, Stipulated Facts ¶ 15.) Invoices for the additional work were sent by CMD to Pro Con for the additional work. (Joint Pretrial Statement, Stipulated Facts ¶ 16.)

The parties also agree that Pro Con hired PBS as a subcontractor on the Project for construction and installation of wood walls, floor and roof trusses, wood stairs, sheathings, air barriers, anchor tie down systems, and installation of windows. (Joint Pretrial Statement, Stipulated Facts ¶ 2.) The written agreement between Pro Con and PBS was a fixed price contract for \$960,212.00. (Trial Exh. G.) PBS was paid by Pro Con when PBS submitted monthly payment

applications to Pro Con which included representations by PBS regarding the percentage of completion of the PBS Scope of Work. (Trial Exh. S.)

Pro Con paid in full the first four payment applications submitted by PBS based upon the completion percentages represented in the applications. (Trial Exhibits S, O.) The fourth application was for work performed up to December 22, 2014. According to Daniel Messier, Senior Vice President of Pro Con, at the end of December PBS had only completed 60-65% of their Scope of Work even though they represented that the work was 82.66% completed in the fourth application. Mr. Messier testified that he believed PBS had “front loaded” its payment applications to Pro Con which would mean that PBS was paid by Pro Con for work that it had not actually completed.

On December 8, 2014, CMD contracted with PBS to help it complete its scope of work obligations under PBS’s contract with Pro Con. According to Kaleb Violette, Project Manager for CMD, in December of 2014 Ken Juthe, Pro Con’s Project Manager, contacted Mr. Violette to ask if CMD could provide carpenters to Pro Con on an hourly basis to assist PBS in fulfilling its contract. When PBS became aware that Pro Con intended to use CMD’s workers to perform on-site work and back-charge PBS for the cost, Mr. Violette testified that PBS contacted him to ask that CMD provide carpenters directly to PBS. PBS agreed to pay CMD \$37.50 per man-hour and CMD was supposed to be paid by PBS within two weeks of the date of billing. (Joint Pretrial Statement, Stipulated Facts ¶ 6.) CMD provided carpenters to PBS from December 9, 2014 until February 26, 2015 when PBS left the Project. Article X ¶ 4 of the contract between Pro Con and PBS prohibited PBS from subcontracting any of its work without written permission of Pro Con. (Trial Exh. G.) The parties seem to agree that Pro Con assented to and supported CMD’s agreement with PBS even though no written permission was given by Pro Con to PBS.

Up until February 26, 2015, the date PBS left the job, CMD had been paid according to the terms of their contract with PBS with the exception of \$15,909.38 (Trial Exh. B; Joint Pretrial Statement, Stipulated Facts ¶ 11.) Mr. Violette testified that upon receipt of payments from PBS, CMD deposited the funds into its bank account and no liens or encumbrances were placed on the funds.

On March 12, 2015, PBS filed for bankruptcy, and according to Mr. Messier, approximately 20% of PBS's Scope of Work remained unfinished as of that date. Pro Con then asked CMD to complete PBS's Scope of Work, which CMD agreed to do on a time and materials basis. CMD submitted invoices for labor, materials, and equipment to complete the work, which Pro Con approved and incorporated into formal change orders to the CMD Subcontract. (Joint Pretrial Statement, Stipulated Facts ¶14; Trial Exh. R8-10, R13-15, R17-22, R24-31.) Mr. Messier testified that payments on the change orders came to \$302,136.31 and that Pro Con had to pay additional sums to other subcontractors, and to material and equipment suppliers, in order to complete work PBS had agreed to do in its scope of work. CMD states in its written arguments that Pro Con paid CMD at most \$274,431.34 for work attributable to the Pro Con/PBS subcontract. CMD also asserts there is insufficient evidence in the record to support Pro Con's belief that it had to pay other contractors approximately \$450,000.00 over and above the \$713,375.00 it had already paid PBS under the contract as of the time PBS left the Project.

On June 10, 2015, CMD received a notice from the bankruptcy trustee that he would be seeking to recover payments made by PBS to CMD during the 90 days prior to the date PBS filed for bankruptcy. In response to the notice, CMD raised the defenses of "subsequent new value" and "ordinary course of business" under § 547(c) of the Bankruptcy Code. (Joint Pretrial Statement, Stipulated Facts ¶ 18.) *See* 11 U.S.C. § 547(c)(2)(4). Ultimately, CMD withdrew those defenses

and reached a voluntary agreement with the bankruptcy trustee to pay \$37,500.00 to settle the trustee's claim. (See Trial Exh. P.) CMD paid that amount to the Trustee on January 18, 2017. (Joint Pretrial Statement, Stipulated Facts ¶ 24).

The parties also agree on what must be proven in order for the Plaintiff to prevail on a claim for unjust enrichment. A party must prove (1) that it conferred a benefit on the other party; (2) that the other party had "appreciation or knowledge of the benefit;" and (3) that the "acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." *Howard & Bowie, P.A. v. Collins*, 2000 ME 148, ¶ 13, 759 A.2d 707 (citing *June Roberts Agency v. Venture Properties*, 676 A.2d 46, 49 (Me. 1996)). In addition, the Law Court has held that "the most significant element of the doctrine of [unjust enrichment] is whether the enrichment is unjust." *Howard & Bowie*, 2000 ME 148, ¶ 14, 759 A.2d 707 (citing *Styer v. Hugo*, 422 Pa. Super. 262, 619 A.2d 347, 350 (1993)). Although not an essential element to recovery under an unjust enrichment theory, the Court may consider the defendant's misconduct, or lack thereof, as relevant to the issue of whether the enrichment was unjust. *A.F.A.B Inc. v. Town of Old Orchard Beach*, 610 A.2d 747, 750 (Me. 1992). See also Horton & McGehee, *Maine Civil Remedies* §7-5(b) at 179 (4 ed. 2004).

The Law Court has also stated that "the remedy of unjust enrichment describes recovery for the value of the benefit retained *when there is no contractual relationship*, but when on the grounds of fairness and justice, the law compels the performance of a legal and moral duty to pay." *Nadeau v. Pitman*, 1999 ME 104, ¶14, 731 A.2d 863 (emphasis added). Therefore, the existence of a contractual agreement "precludes recovery on a theory of unjust enrichment." *June Roberts Agency, Inc. v. Venture Properties, Inc.*, 676 A.2d 46, 49 n. 1 (Me. 1996). Substantial Law Court authority repeats this principle. See, e.g., *In re Wage Payment Litig. v. Wal-Mart Stores, Inc.*, 2000

ME 162, ¶ 9, 759 A.2d 217; *Lynch v. Ouelette*, 670 A.2d 948, 950 (Me. 1996); *A.F.A.B. Inc. v. Town of Old Orchard Beach*, 639 A.2d 103, 105 n.3 (Me. 1994). *See also* Horton & McGehee, *Maine Civil Remedies* §7-3(a) at 176 (4 ed. 2004).

The Court could find no language from the Law Court explaining this rule, but presumably it is because the aggrieved party's remedy would be in breach of contract and courts should not be responsible for providing a remedy for a party that failed to adequately contract for its own interests. In this case it is undisputed that the parties entered into a written contract that was modified by agreement through change orders, and then ultimately in a separate contract after PBS filed for bankruptcy protection. The Court would note that CMD cannot point to any provision in any of these contracts where Pro Con agreed to protect or indemnify CMD from the kind of loss at issue in this case.¹

Even if cause could be articulated to create an exception to the general principle in this case, the Court has concluded that any enrichment that may have occurred under these circumstances was not unjust. Pro Con either honored its obligations to CMD under any contract the parties formed, or else has stipulated to imposition of remedies against it in favor CMD for breach of contract and under Maine statutory law. This is not a case where a defendant seemingly ignored its obligations to a plaintiff, as in *A.F.A.B. Inc. v. Old Orchard Beach*, 610 A.2d 747 (Me. 1992). In that case, neither the defendant Town nor the stadium owner paid the plaintiff contractor

¹ *In Fed. Ins. Co. v. Me. Yankee Atomic Power Co.*, 183 F. Supp. 2d 76, 84 (D. Me. 2001) the U.S. District Court for the District of Maine provided a caveat to this general principle, stating that “[i]t is reasonable to understand the Law Court’s pronouncement, therefore, as stating that a contract covering the *same subject matter* forecloses an unjust enrichment claim” (emphasis added). The contracts between Pro Con and CMD cover the same subject matter, namely the BanRes project. The First Circuit also cautioned against allowing a party to succeed in an “impermissible end run around the voluntary structuring of relationships and their consequences.” *Id.* at 85.

anything for renovations to a ballpark that the Town intended to sell to the stadium once renovations were completed. *Id.* at 749. In the case at bar, CMD was paid significant sums of money, both by PBS before it went bankrupt and by Pro Con. Whatever injustice was experienced by CMD was a direct result of the bankruptcy process and business decisions made by CMD in that process, and was not the result of any conduct or business decisions made by Pro Con.

Because the Court has concluded that this case does not present circumstances where any benefit conferred by CMD or retained by Pro Con was unjust, the Court declines to consider the parties' arguments as to whether Pro Con was actually "enriched" or how to quantify whatever benefit may have been conferred in light of the multiple and substantial payments made by Pro Con to CMD.

The entry will be:

On Count III, Judgment is entered for the Defendant Pro Con on the claim of Unjust Enrichment. On Count V, the findings previously made in the Court's Order granting Partial Summary Judgment to Pro Con on January 18, 2017 are incorporated herein by reference, the Mechanic's Lien claim is denied, and Judgment on Count V is entered for Pro Con. Counsel for CMD may petition the Court for consideration of an award of counsel fees on Count I as previously agreed by the parties in their Stipulated Judgment dated July 21, 2017.

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

DATE August 31, 2017

/S
M. Michaela Murphy
SUPERIOR COURT JUSTICE
BUSINESS AND CONSUMER COURT