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

LIMBACH COMPANY LLC and LIMBACH COMPANY LLC/PARKER ASSOCIATES, a JOINT VENTURE,	:	March Term 2003
	:	No. 2936
Plaintiffs,	:	
v.	:	Control Nos. 091654, 051854, 102364
CITY OF PHILADELPHIA, PHILADELPHIA AUTHORITY FOR INDUSTRIAL DEVELOPMENT, and US AIRWAYS, INC.	:	Commerce Program
Defendants.	:	

ORDER

AND NOW, this 29th day of June, 2005, upon consideration of Plaintiffs Limbach Company LLC and Limbach Company LLC/Parker Associates, a Joint Venture's Motion for Reconsideration (Control No. 091654) and Defendants' Response, Defendants City of Philadelphia and Philadelphia Authority for Industrial Development's Motion for Summary Judgment (Control No. 051854), Plaintiffs' Reply, Defendants' Reply Brief, Plaintiffs' Supplemental Response, and Defendants' Supplemental Reply Brief, and Defendants City of Philadelphia and Philadelphia Authority for Industrial Development's Motion for Partial Summary Judgment (Control No. 102364), Plaintiffs' Response, and Plaintiffs' Supplemental Memorandum, and in accordance with the attached memorandum, it is hereby **ORDERED** and **DECREED** as follows:

1) Plaintiffs' Motion for Reconsideration is **DENIED** and Counts I and II of the Complaint remain **DISMISSED**;

2) Defendants' Motion for Summary Judgment is **GRANTED** and all remaining Counts of the Complaint are **DISMISSED**; and

3) Defendants' Motion for Partial Summary Judgment is **DISMISSED** as **MOOT**.

BY THE COURT,

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C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

Presently before the court are three motions. The Motion for Summary Judgment of Defendants City of Philadelphia ("City") and Philadelphia Authority for Industrial Development ("PAID"), the Motion for Partial Summary Judgment of Defendants, and the Motion for Reconsideration of Plaintiffs Limbach Company LLC ("Limbach") and Limbach Company LLC/Parker Associates, a Joint Venture ("Limbach/Parker").

BACKGROUND

This litigation originates in the construction of two new terminals, Terminal One and Terminal F[1], at the City-owned Philadelphia International Airport, Compl., at ¶12, (the "Project"). The City owned the land on which the terminals were to be constructed, id., at ¶16, and leased this land to PAID, pursuant to a Ground and Improvements Lease (the "Ground Lease"), id., at ¶18. PAID, in turn, entered into a Development Lease (the

[1] Plaintiffs have dropped their claims for relief with respect to the construction project on Terminal F. Pls. Br., App. A, at n. 8.

"Development Lease") with US Airways, Inc. ("US Airways") to construct the new terminals. Id., at ¶19.

The Project was financed through funds raised by bonds issued by PAID (the "Bond Funds"). Id., at ¶17. The Bond Funds are held by a trustee. Compl., Ex. A, at §5.2. Under the Development Lease, PAID owns the Project. Id., at ¶20. The Ground Lease gives the City a right of reversion in and to the Project. Id., at ¶20.

On October 26, 1999, US Airways entered into a contract with Williard, Inc.[2] to perform the electrical work on the Project. Also, on October 26, 1999, US Airways entered into a contract with Williard, Inc./Parker Associates, a joint venture, to perform the HVAC/mechanical work on the Project. These two contracts (each, a "Contract"), except for the description of the work, are identical in all material respects. Defs. Mem., at n.7; Pls. Br., App. A, at n.9. The Contracts identify US Airways as the owner of the Project. Pls. Ex. A, at Art. 1. Plaintiffs provided performance bonds and executed lien waivers to the benefit of Defendants. Pls. Br., App. A, at ¶17.

During the course of the Project, all payments to Plaintiffs came from the Bond Funds. Pls. Br., App. A, at ¶22. On May 29, 2002, US Airways notified Plaintiffs that it was terminating the Contracts for convenience. Compl., ¶¶30, 38. Subsequently, on August 11, 2002, US Airways filed for protection under Chapter 11 of the United States Bankruptcy Code. Pls. Br., App. A, at ¶31. Plaintiffs participated in the bankruptcy proceeding in an attempt to recover the amounts outstanding under the Contracts. Pls.

[2] Limbach is the successor in interest to Williard, Inc., Compl., at ¶¶1, 3, and all references to Limbach shall refer to either party, as appropriate. Limbach also holds Williard, Inc.'s interests in the Williard, Inc./Parker Associates joint venture, id., at ¶¶2, 5, and all references to Limbach/Parker shall refer to either joint venture, as appropriate.

Br., App. A, at ¶32. On June 7, 2004, Limbach received an award for $1,543,468 and Limbach/Parker received an award for $999,375. Id.; Pls. Ex. H.

Thereafter, Plaintiffs filed suit against Defendants and defendant US Airways, asserting eight causes of action in their Complaint. Limbach seeks approximately $8.8 million and Limbach/Parker approximately $5.9 million for their work on the Project. Compl., at ¶¶35, 44. On December 18, 2003, this court issued two Orders. One Order dismissed US Airways, Inc. from the action. The other Order dismissed two claims, one by each Plaintiff, against PAID seeking relief as a third party beneficiary of the Development Lease (Counts I and II). Limbach's surviving claims are brought against PAID for *quantum meruit* (Count III) and constructive trust (Count VII) and against the City for *quantum meruit* (Count V). Limbach/Parker asserts the same causes of action against the same parties (Counts IV, VIII, and VI).

DISCUSSION

Plaintiffs' Reconsideration Motion

Plaintiffs seek to have the court reconsider its Order of December 18, 2003, dismissing Counts I and II of the Complaint. In these two counts, Plaintiffs sought relief as third party beneficiaries of the Development Lease. Under Pennsylvania law, a party must satisfy a strict two part test in order to be considered a third party beneficiary. As put forth in Cardenas v. Schober, 783 A.2d 317, 322 (Super. Ct. 2001) (emphasis added), "(1) The recognition of the beneficiary's right must be 'appropriate to effectuate the intention of the *parties*,' and (2) the performance must 'satisfy an obligation of the

promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'"

The parties to the Development Lease are US Airways and PAID. Plaintiffs present no evidence, discovered since the Order was issued, to demonstrate that either US Airways or PAID intended to benefit Plaintiffs in the Development Lease. Instead, Plaintiffs rely upon City-generated documents to demonstrate that Plaintiffs were the intended beneficiaries of the Development Lease. Although Plaintiffs attempt to minimize the independence of PAID and infer that the City is the true "party" to the Development Lease, Pls. Mem., at 6-7, Plaintiffs do not establish that PAID that is not independent of the City. Plaintiffs' motion is denied.[3]

Defendants' Summary Judgment Motion

Pursuant to Pa. R.C.P. 1035.2, a party may move for summary judgment when (1) there is no genuine issue of material fact as to a necessary element of the cause of action or defense or (2) an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense. The court must review the entire record in the light most favorable to the nonmoving party and resolve all genuine issues of material fact against the moving party. Basile v. H & R Block, Inc., 563 Pa. 359, 365, 761 A.2d 1115, 1118 (2000).

Defendants assert that the Sovereign Immunity statute, 42 Pa. C.S. §§8521 *et seq*., and the Political Subdivision Tort Claims Act, 42 Pa. C.S. §§8541 *et seq*., protect both PAID and the City from this lawsuit. Created pursuant to the Economic Development Financing Law, 72 P.S. §§371, *et seq*., PAID is a public instrumentality of the

[3] This resolution makes it unnecessary for the court to consider whether collateral estoppel applies to these two Counts.

Commonwealth of Pennsylvania. Compl., ¶ 8. The City is a City of the First Class in the Commonwealth of Pennsylvania. Compl., ¶ 7; 53 P.S. §101. Plaintiffs cite numerous cases to demonstrate the viability of their claims. Nonetheless, Defendants state "not one of the cases [Plaintiffs] cite addresses the issue of sovereign and/or governmental immunity." Defs. Reply Br., at 3. The court directs Defendants to JHE, Inc. v. Southeastern Pennsylvania Transportation Authority, 2002 Phila. Ct. Com. Pl. Lexis 78 (2002) (upholding *quantum meruit* and discussing sovereign immunity), and Bernstein v. Shapiro, 50 Pa. D&C.3d 649 (Lehigh County 1988) (upholding constructive trust against sovereign immunity defense). Since courts analyze sovereign immunity and governmental immunity in the same fashion, see, e.g., Walsh v. City of Philadelphia, 526 Pa. 227, 237, 585 A.2d 445, 450 (1991), the immunity-based arguments of Defendants fail.

Each of Plaintiffs' remaining claims (Counts III, IV, V, VI, VII, and VIII) requires an initial finding of unjust enrichment. *Quantum meruit* is the form of restitution made by a defendant to a plaintiff when unjust enrichment exists. Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 98, 666 A.2d 327, 328-29 (1995). A constructive trust arises when a defendant holds title to property and unjust enrichment would result if the defendant were permitted to retain it, subjecting the defendant to an equitable duty to convey it to the plaintiff. Kimball v. Barr Township, 249 Pa. Super. 420, 424, 378 A.2d 366, 368 (1977).

In this matter, Plaintiffs claim that Defendants were unjustly enriched by Plaintiffs' work on the Project. According to Plaintiffs, once US Airways filed for bankruptcy, payments were no longer disbursed to Plaintiffs. Defendants, however,

retained the benefit of Plaintiffs' work on the Project. Therefore, Plaintiffs assert, the City and PAID, as owners of the Project, should compensate them for their efforts. Plaintiffs assert that the constructive trust arises from the Bond Funds which are controlled by PAID and should be disbursed to them for the work they completed on the Project.

In the construction context, Pennsylvania has specific case law governing unjust enrichment claims. As initially established in Meehan v. Cheltenham Township, 410 Pa. 446, 189 A.2d 593 (1963), and reaffirmed in D.A. Hill Co. v. Clevetrust Realty Investors, 524 Pa. 425, 573 A.2d 1005 (1990), a subcontractor may use an unjust enrichment theory to seek relief from the property owner in certain instances in which the contractor failed to pay the subcontractor. Briefly, a subcontractor must first demonstrate that it had a direct contractual relationship with the owner, that the owner misled the subcontractor, or that the owner requested the subcontractor's performance. D.A. Hill, at 432, 434, at 1009, 1010. In addition, the subcontractor must establish that the value of the benefit received by the owner justifies relief under equitable principles. D.A. Hill, at 433-34, at 1009-10. The benefit is measured from the perspective of the owner. D.A. Hill, at 431, at 1009.

A subcontractor may have a viable claim for unjust enrichment if it entered into a contract with the owner.[4] D.A. Hill, at 432, at 1009. Neither Plaintiff meets this standard with either Defendant. Limbach/Parker did not have a contract with the City, Pls. Ex. D, at ¶9, or PAID, id., at ¶10, for its work on the Project. Limbach did not have a contract with the City, Pls. Ex. C, at ¶14, or PAID, id., at ¶16, for its work on the Project.

[4] Typically, unjust enrichment exists in the absence of a contract. See, e.g., Styer v. Hugo, 422 Pa. Super. 262, 268, 619 A.2d 347, 350 (1993). Thus, it appears the purpose of the contract is to establish a direct connection between the subcontractor and owner which otherwise would not exist.

Alternatively, a subcontractor may use an unjust enrichment theory to seek relief from the owner if the owner misled the subcontractor into giving its performance. D.A. Hill, at 432, at 1009. Defendants, viewing this concept narrowly, assert that recovery is limited to those instances in which the owner conveys a falsehood to the subcontractor. Under this reading, Plaintiffs could not support their claims because Defendants said nothing untrue to Plaintiffs. Pls. Ex. C, at ¶¶22, 24; Pls. Ex. D, at ¶¶13, 14. This method of establishing unjust enrichment, however, also applies to situations in which the owner induces the subcontractor's performance. See Meehan, at 451, at 596 ("Appellee in no way *induced* appellant to enter into this relationship.") (emphasis added). Nonetheless, Plaintiffs cannot establish their right to relief under this broader standard.

The core of Plaintiffs' argument that Defendants misled them involves the Bond Funds used to compensate Plaintiffs for their work on the Project. According to Plaintiffs, they "believed," Pls. Br., at 24, prior to the Project, that US Airways was merely a "straw party" whose financial stability was irrelevant to the Project and that Defendants actually controlled the Project funds and owned the Project. Mere belief is not equivalent to inducement by Defendants. Cf. Ravin v. First City Co., 692 A.2d 577 (Super. Ct. 1997) (owner's confirming tenant allowance to subcontractor not inducement).

Plaintiffs use several documents to show they were misled by Defendants, but the evidence does not support their argument. Plaintiffs' work on the Project was governed by the Contracts. As it applies to Plaintiffs, the payment system for the Project is described in each Contract. Pls. Ex. A., at Art. 15. Specifically, each Contract states that US Airways "shall pay or cause the [trustee holding the Bond Funds] to pay the amount

otherwise due on any payment application." Id., at Art. 15.2.1. Although the Contract mentions the Bond Funds, the Contract clearly states that US Airways exercises control over the source of payment. As with other sections of the Contract that mention either Defendant, the Plaintiffs could not be misled by Defendants through the Contract language because neither Defendant is a party to any Contract, Pls. Ex. A, and cannot be held responsible for the content. Plaintiffs also highlight the Development Lease as the source of Defendants' misleading them. Plaintiffs cannot rely upon the Development Lease because they are neither signatories nor third party beneficiaries of this document. Compl., Ex. A.; Order of December 18, 2003. Furthermore, neither Plaintiff saw the Development Lease prior to executing its Contract. Zemnick Test., 7/28/04, at 93-94. Plaintiffs also assert that several government documents related to the Project support their contention that Defendants misled them. Assuming *arguendo* that these documents prove that Defendants knew that Plaintiffs would be working on the Project, Plaintiffs fail to establish that Defendants conveyed this information to them through the documents. The government documents were first encountered by Plaintiffs subsequent to the filing of this action. Pls. Supp. Br., at 2 ("However, the discovery obtained since the Brief was filed has provided an abundant supply of testimonial and documentary evidence which supports Plaintiffs' claims."). With all of the documentary evidence, Plaintiffs are operating from hindsight and offer nothing to demonstrate that these materials were used by Defendants to mislead Plaintiffs either prior to or during the Project. Therefore, Plaintiffs cannot use these materials to demonstrate that Defendants misled them.

In addition to the documentary evidence, Plaintiffs assert that Defendants' agents and representatives informed them that Defendants were the real source of payment for

the Project. These alleged agents are US Airways, Burns & McDonnell Corporation ("Burns & McDonnell"), and Turner Construction Company ("Turner"). Pls. Ex. C, at 5; Pls. Ex. D, at 4. Plaintiffs present no evidence apart from the unsupported assertions in their answers to Defendants' interrogatories, Pls. Ex. C, at ¶22; Pls. Ex. D, at ¶13, that these three parties are agents of the Defendants. To be an agent of a government entity, the entity must authorize the agent to act in this capacity. Commonwealth v. Bellis, 484 Pa. 486, 492, 399 A.2d 297, 400 (1979). The Development Lease precludes US Airways from being "an agent or representative of PAID or City for any purpose." Compl., Ex. A, at Art. 23.15. No contract or other authorization of agency connects Burns & McDonnell to the City or PAID. McCartney Ver., at ¶¶6, 7; Baxter Ver., at ¶¶2, 3. Similarly, there is no contract or other authorization of agency tying Turner to the City or PAID. McCartney Ver., at ¶¶6, 7; Barton Ver., at ¶¶2, 3. Therefore, Plaintiffs' belief that they were misled by Defendants cannot be supported in this manner.

Finally, although disputed by Defendants, an unjust enrichment theory may provide relief to a subcontractor in situations in which the owner "requested the benefit" of the subcontractor's performance. D.A. Hill, at 434, at 1010; see also Meehan, at 450, at 595 ("The construction of these improvements was not performed at appellee's *request*.") (emphasis added). Although "request" is not precisely defined, certain parameters of this method of supporting an unjust enrichment claim can be established. The basic definitions of request are: "1. To express a desire for, ask for. 2. To ask (a person) to do something." American Heritage Dictionary 1533 (3d ed. 1992). These definitions undercut Plaintiffs' suggestion that some unspecified "level of involvement," Pls. Supp. Br., at 22, is equivalent to a request. Further meaning can be imparted to

"request" by comparing it to the other two methods used to support a claim for unjust enrichment in the construction context. In each case – the subcontractor having a contract with the owner or being misled by the owner – there must be a direct connection between the owner and the subcontractor. Consistency demands that the owner must directly make a request of the subcontractor. To eliminate this connection would transform an owner's contract with a party into a request to everyone hired by that party. In addition, a request is subject to the limitation that portions of the construction project covered by an agreement must be considered part of that agreement. Without this limitation, a subcontractor could bring a claim for unjust enrichment against any party connected to the construction project, irrespective of the contractual arrangements, thus insulating the subcontractor from its own decisions and making the other parties its insurer, D.A. Hill, at 432.

Plaintiffs contend that Defendants requested Plaintiffs' performance on the Project in a variety of different ways. According to Plaintiffs, the chain of contracts – Contract, Development Lease, and Ground Lease – underlying the Project is equivalent to a request by Defendants. In support of their position, Plaintiffs assert the Defendants concocted the chain of contracts to avoid public bidding requirements and to avoid making payments to subcontractors while maintaining control and ownership of the Project. Pls. Supp. Br., at 24-25. As a result, according to Plaintiffs, US Airways was irrelevant to the Project and Defendants were directly connected to Plaintiffs. Since this method of organizing the Project is legal, see Basehore v. Hampden Indus. Dev. Auth., 433 Pa. 40, 248 A.2d 212 (1968), there is no reason to consider each document as merely a link in the chain of agreements rather than as an independent contract. Neither

Defendant is a party to a Contract. Pls. Ex. A. Plaintiffs are neither parties to nor third party beneficiaries of the Development Lease or Ground Lease. Compl., Ex. A.; Order of December 18, 2003; Compl., at ¶18. Therefore, Defendants have not communicated directly with Plaintiffs and Plaintiffs cannot establish any request by Defendants. Also, according to Plaintiffs, each change order approved by Defendants is tantamount to a request. The change orders are not the responsibility of Defendants because they were issued by US Airways. Pls. Ex. J. If Defendants were involved with any request through the change orders, it was as a recipient of a request by US Airways that they concur in the change. Id. Furthermore, the change orders are governed by the Contract, Pls. Ex. A, at Art. 14, to which Defendants are not a party.

Turning to the various Project activities engaged in by Defendants, Plaintiffs note that Defendants were "monitoring the work, checking on the progress of the work, and receiving oral requests for adjustments to the contract prices" and participating in "meetings," Pls. Ex. C, at 5; Pls. Ex. D, at 4. Plaintiffs mention only these broad categories, but provide no specific instances of any requests by Defendants in these situations. These activities simply show that Defendants were involved in the Project. In addition, Plaintiffs contend that Defendants[5] made a request of Plaintiffs by directing work on the Project. Neither Limbach/Parker nor Limbach had contact with PAID on the Project in this context. Miller Test., 7/29/04, at 22, 29; Heise Test., 7/29/04, at 117-19. Limbach/Parker presents no evidence that either Defendant directed it to perform work on the Project apart from its Contract. Limbach/Parker's project manager testified that the City's agents did no more than sit in on meetings or engage in social conversation.

[5] The Inter-Governmental Agreement appoints the City as PAID's agent for certain duties under the Development Lease, Pls. Ex. U, at ¶9. Therefore, any direction by the City in these circumstances applies to both Defendants.

Miller Test, 7/29/04, at 19-20, 37. Limbach/Parker required Turner Construction, the construction manager on the Project and US Airways' agent, Pls. Ex. A, at Arts. 1, 2, to approve any directions for work on the Project that it received from others, Miller Test, 7/29/04, at 23-24, demonstrating that any such directions fell within the aegis of the Contract. Similarly, other than a single exception,[6] Limbach cannot establish that either Defendant directed it to perform work on the Project apart from its Contract. Limbach's project manager testified that the City and its agents acted on the Project as representatives of US Airways. Heise Test., 7/29/04, at 98, 104, 107, 115. More broadly, Limbach understood that anyone involved with "the design, the management, and the execution of" the Project was a representative of US Airways. Id., at 96-97. Limbach also knew that all changes ordered on the Project went through Turner. Id., at 104-05. Thus, Plaintiffs fail to establish that Defendants made a request of them on the Project.

In conclusion, Plaintiffs have failed to establish that the current matter fits within the categories established by D.A. Hill and Meehan to support a claim for unjust enrichment against Defendants. This outcome eliminates the need for the court to determine the level of benefit, if any, conferred upon Defendants. Summary judgment is granted to Defendants on Counts III, IV, V, and VI of the Complaint. Furthermore, since the imposition of a constructive trust requires an initial finding of unjust enrichment, Kimball v. Barr Township, 249 Pa. Super. 420, 424, 378 A.2d 366, 368 (1977), Plaintiffs cannot support these claims and summary judgment is granted to Defendants on Counts VII and VIII of the Complaint.

[6] The sole exception is an emergency unrelated to the Project. Heise Test., 7/29/04, at 106. Since the exception is unrelated to the Project, it is not part of the Complaint, Compl., at ¶¶ 66, 70, 74, and 78, and the PAID bond funds are not applicable, Pls. Ex. M.

Defendants Motion for Partial Summary Judgment

Defendants seek to limit the amount of damages that Plaintiffs may collect pursuant to their claims in this matter based on the damages awarded them in the bankruptcy action. Since summary judgment is being granted in Defendants' favor on all counts in the Complaint, Defendants' motion is moot.

BY THE COURT,

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C. DARNELL JONES, II, J.