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

| | | |
|---|---|---|
| JOHN J. DOUGHERTY & SONS, INC., | : | FEBRUARY TERM, 2010 |
| Plaintiff, | : | NO. 02846 |
| v. | : | COMMERCE PROGRAM |
| McKENNA AMERICAN, LLC, et al., | : | Control Nos.: 12051864,12062045 |
| Defendants. | : | |



**ORDER**

**AND NOW**, this 6th day of August, 2012, upon consideration of plaintiff's Motion for Post Trial Relief, the briefs in support and opposition, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** that plaintiff's Post-Trial Motion is **DENIED**.

**BY THE COURT:**

**GLAZER, J.**

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

| | | |
|---|---|---|
| JOHN J. DOUGHERTY & SONS, INC., | : | FEBRUARY TERM, 2010 |
| Plaintiff, | : | NO. 02846 |
| v. | : | COMMERCE PROGRAM |
| McKENNA AMERICAN, LLC, et al., | : | Control Nos.: 12051864,12062045 |
| Defendants. | : | |

**OPINION**

Plaintiff, John J. Dougherty & Sons, Inc. ("Dougherty"), filed a Post-Trial Motion in which it objected to the following decisions by the court:

1. To grant defendant Wilmington Trust FSB's (the "Bank") Motion in Limine to Preclude Plaintiff From Asserting a New Theory of Liability;
2. Not to allow Dougherty to Amend its Complaint;
3. To grant the Bank's Motion in Limine to Preclude Evidence Related to Dismissed Claims; and
4. To grant a non-suit on Dougherty's remaining claims.

For the reasons that follow, Dougherty's Motion is denied.

Defendant McKenna American, LLC ("McKenna") contracted with Stadium Complex Parking Venture ("SCPV") to perform snow removal work at several Philadelphia sports arenas during the 2009-2010 winter season. McKenna sub-contracted with Dougherty to perform the snow removal work. Dougherty removed snow in December, 2009 and January, 2010, for which it billed McKenna almost $1 million pursuant to the subcontract.

SCPV paid McKenna and McKenna paid Dougherty approximately $169,000. McKenna's creditor, the Bank, demanded the remaining approximately $800,000 of the money due to McKenna for Dougherty's work, and SCPV paid it to the Bank. The Bank acted pursuant to a perfected security interest it held in McKenna's accounts receivables as a result of McKenna's default on a loan the Bank previously made to McKenna.

Dougherty filed this action against McKenna and a related entity and person, (the "McKenna Parties") and against the Bank. Dougherty obtained default judgments against the McKenna Parties. In its First Amended Complaint, Dougherty asserted claims against the Bank for: civil conspiracy, marshaling, tortious interference, unjust enrichment and constructive trust. At the summary judgment stage, the court dismissed the claims for conspiracy, tortious interference and marshalling.[1] On the eve of the jury trial in this action, the court took the actions of which Dougherty now complains, which ultimately resulted in a non-suit as to Dougherty's remaining claims.

The reason for the court's complained of decisions is simple: viewing all of Dougherty's proffered evidence in the light most favorable to Dougherty, Dougherty cannot prove any legally cognizable claim against the Bank. The two claims Dougherty asserted, unjust enrichment and constructive trust, are really one claim and a remedy.[2] In order to succeed on its claim for unjust enrichment against the Bank, Dougherty had to produce evidence to support each element of the claim.

> The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and

[1] The prior judge did not write an Opinion in support of his summary judgment rulings.

[2] *See* Commerce Bank v. First Union Nat'l Bank, 911 A.2d 133, 144 (Pa. Super. 2006) ("A 'constructive trust' is defined as a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.")

> retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. The most significant element of the doctrine is whether the enrichment of the defendant is unjust; the doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff.[3]

The Bank was indirectly enriched by Dougherty; if Dougherty had not performed the snow removal, SCPV would not have paid McKenna pursuant to their contract, and there would have been no money for the Bank to seize. However, there is no evidence that the Bank's retention of the money was unjust, since it had a valid security interest in McKenna's receivables. By seizing the funds, the Bank was legitimately mitigating its own damages arising from McKenna's default on the Bank's loan.

Dougherty argues that the money seized by the Bank was not a receivable of McKenna's and, therefore, the Bank had no right to it. In Dougherty's view, McKenna breached its contract with SCPV by subcontracting with Dougherty and having Dougherty perform the snow removal work. As Dougherty points out, the contract between McKenna and SCPV requires McKenna to perform the work itself and prohibits subcontracting without SCPV's permission. However, there are several problems with Dougherty's argument:

1. As Dougherty is neither a party to the SCPV-McKenna Contract, nor an intended third party beneficiary of it, Dougherty does not have standing to complain of any alleged breach of the contractual prohibition against subcontracting.
2. The only parties to that contract, SCPV and McKenna, did not claim the contract had been breached, and SCPV necessarily waived any such breach by McKenna[4] when it paid McKenna despite its knowledge that Dougherty was doing the work.[5]

---

[3] *Id.*, 911 A.2d at 143-144.

[4] *See* Samuel J. Marranca General Contracting Co. v. Amerimar Cherry Hill Assoc. Ltd. Partnership, 416 Pa. Super. 45, 49, 610 A.2d 499, 501 (1992) ("Waiver is a voluntary and intentional abandonment or relinquishment

3. The Bank was also not a party to that contract, so it would be inequitable to enforce the terms of the SCPV-McKenna contract against the Bank to find that the Bank's seizure of the funds was unjust.[6]

Trevdan Building Supply v. Toll Brothers, Inc.,[7] the case upon which Dougherty relies for its argument that the money paid to McKenna was not a seizable receivable, is inapposite. In that case, Toll Brothers, who was arguably in a position similar to SCPV's in this case, had a contract with Houston Drywall, who played the McKenna role, to perform construction work for Toll Brothers. Houston Drywall assigned its receivables to Gulf Coast Bank, who was thereby in a position similar to that of the Bank in this case, and Houston Drywall also entered into a materials contract with Trevdan Building Supply, which was in a position similar to Dougherty.

Trevdan supplied building materials to Houston Drywall, who used the materials in construction for Toll Brothers. Houston Drywall went out of business, and Toll Brothers held funds due to Houston Drywall for the materials supplied by Trevdan. Both Trevdan and Gulf Coast claimed entitlement to the amounts held by Toll Brothers. The court awarded the funds to Trevdan rather than Gulf Coast Bank, and Dougherty argues the court should reach the same result in this case. However, there are significant factual differences between the two cases, which justify different outcomes.

---

of a known right. Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.")

[5] According to Dougherty, SCPV refused to agree to a joint check arrangement by which it would have made checks payable to both Dougherty and McKenna, so it must have known Dougherty was involved in the snow removal work. *See* First Amended Complaint, ¶ 15.

[6] "Where a third party benefits from a contract entered into between two other parties . . . in the absence of some misleading by the third party, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third party." Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa., 7 A.3d 278, 283 (Pa. Super. 2010). There is no evidence the Bank misled Dougherty in any way.

[7] 996 A.2d 520 (Pa. Super. 2010).

First, the Trevdan case involves a construction project and construction contracts, whereas this case involves a service contract. This difference is significant because the equitable materialman's lien, which Trevdan claimed and the court recognized in that case, exists only with respect to unpaid contract funds withheld by the owner during a construction project.[8] Since Dougherty was not acting as a construction subcontractor, materialman or laborer for McKenna, it is not entitled to claim such a lien in this case.

Second, in Trevdan, the construction contract between Toll Brothers and Houston Drywall contained

> express conditions directing the contractor to pay its subcontractors, materialmen, and laborers and to certify that payment had been rendered [to them] as a condition of payment [to the contractor. The contract also provided that] failure to pay subcontractors and materialmen constitutes a material breach of contract that permits the owner to retain sufficient funds to satisfy the contractor's payment obligation.[9]

In this case, the contract between SCPV and McKenna contained no such conditions to payment, and the contract recognized no additional parties whom SCPV could, should or would pay. Because of the significant differences between Trevdan and this case, Trevdan is not relevant precedent here, and it does not support Dougherty's claim of entitlement to the funds seized by the Bank.

Dougherty also objects to this court's dismissal of Dougherty's claims based on the law of the case doctrine.[10] Since the court did not dismiss Dougherty's unjust enrichment claim at

---

[8] *See id.*, 996 A.2d at 524.

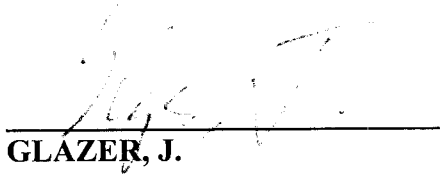
[9] *Id.*, 996 A.2d at 526.

[10] "This doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. Among the related but distinct rules which make up the law of the case doctrine are that: . . . (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court." Commonwealth v. Starr, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995).

the summary judgment stage, Dougherty argues the court could not later dismiss such claim before trial. The prior judge issued no opinion in connection with his summary judgment ruling, so his rationale for not dismissing the unjust enrichment/constructive trust claims at that juncture is not known. Whatever it was, it does not bind this court. The law of the case doctrine does not require such slavish adherence to its precepts that the trial court must force a jury to sit through a trial in which no cognizable legal claim is litigated and then await the appellate court's reversal after an appeal.[11]

For all these reasons, the court denies Dougherty's Post-Trial Motion.

**BY THE COURT:**



**GLAZER, J.**

[11] *See id.* (Law of the case doctrine does not apply where the prior ruling was clearly erroneous); DiGregorio v. Keystone Health Plan E., 840 A.2d 361, 371-372 (Pa. Super. 2003) (Appellate court found " there was no viable cause of action for either punitive damages or attorneys' fees, [so] the motions court's order to the contrary clearly was erroneous. . . . Furthermore, since the order clearly was subject to certain reversal on appeal, the order allowing [plaintiffs] to proceed to trial with a totally frivolous claim would have squandered the judicial resources of the trial court and this Court as well. Thus, . . . adherence to the motions court's order was intolerable and the trial court's decision to overrule the prior order fell within the clearly erroneous exception.") *See also* Schindler v. Sofamor, 774 A.2d 765, 775, n. 11 (Pa. Super. 2001) (Defendant "presented the issue of intended use in a motion for summary judgment and in a motion for compulsory nonsuit. The trial court declined to rule in [defendant's] favor until after trial was complete and [plaintiffs] were awarded a significant jury verdict. It is unfortunate that the trial court arrived at the proper legal result only after significant expenditures of time and effort by the litigants and the jury.")