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

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| **SFL CONSTRUCTION, INC.** | : | |
| | : | **MARCH TERM, 2010** |
| **Plaintiff,** | : | **No. 05347** |
| | : | |
| **v.** | : | |
| | : | **COMMERCE PROGRAM** |
| | : | |
| **TOSA CONSTRUCTION, INC., N. PAONE CONSTRUCTION, INC., NICOLA PAONE, and ROSEANN PAONE** | : | |
| | : | |
| **Defendant.** | : | |

## INTRODUCTION

This action arises from alleged breaches of Plaintiff, SFL Construction, Inc.'s ("SFL") written contract with TOSA Construction, Inc. ("Tosa") to perform carpentry framing work at "The Grande at Riverview," a three building apartment complex located in Conshohocken, Pennsylvania. This action was commenced by Writ of Summons on March 27, 2010, with Plaintiff's Second Amended Complaint being filed on August 20, 2010.

By way of background, previous defendant D.R. Horton, Inc. ("D.R. Horton") was the developer of The Grande at Riverview. D.R. Horton and Tosa executed a "Contractor Agreement" agreement wherein Tosa agreed to perform work at the Project as an "independent contractor," and promised to refrain from subcontracting the work without prior authorization from D.R. Horton.[1] On June 15, 2012, this court granted D.R. Horton's Motion for Summary Judgment (control no. 11100527), wherein the court held that SFL had not met its burden to

[1] See June 15, 2012 Order, p. 2.

show that an agency relationship existed between D.R. Horton and Tosa, and SFL could not show D.R. Horton was unjustly enriched, and dismissed D.R. Horton as a defendant in this case.

SFL and the remaining defendants – Tosa, N. Paone Construction, Inc., Nicola Paone, and Roseann Paone – proceeded to a four day bench trial,[2] from March 20, 2013 through March 25, 2013.

## FINDINGS OF FACT

1. On April 14, 2006, SFL executed a written agreement with Tosa to perform panel framing carpentry work at The Grande at Riverview ("Riverview", or "the Project"). [N.T. 3/20/13, 27:17-28:5].
2. Plaintiff, Sebastian Lima, negotiated the contract with Terry (Ted Kernosh) and Nick (Nicola Paone). [N.T. 3/20/13, p. 28:6-8].
3. The parties stipulated that Exhibit D-8 is the entire written agreement between Tosa and SFL. [N.T. 3/20/13, 74:9-14].
4. Tosa was an independent contractor working for D.R. Horton. [N.T. 3/21/13, 12:16-22].
5. On the Riverview project, all trade contracts for D.R. Horton were in writing. D.R. Horton does not enter into oral contracts. [N.T. 3/21/13, 21:8-15].
6. D.R. Horton had no written contracts with Nicola Paone, Roseann Paone, or N. Paone Construction, Inc. [N.T. 3/21/13, 21:23-22:6].
7. Tosa's contract with SFL was for a lump-sum price of $475,000 per building. [N.T. 3/21/13, 26:19-25]. SFL worked on two buildings at the Project.

[2] On January 7, 2013, this court ruled that, upon consideration of SFL's jury demand, and defendants opposition thereto, the action would proceed as a non-jury trial, under the clear terms of the sub-contracting Agreement that stated that "the parties hereby waive trial by jury in any legal proceeding brought by either of them against the other with respect to any matters arising out of or in any way connected with this agreement."

8. SFL completed all of the work at Building Number 1 of the Riverview. [N.T. 3/21/13, 31:7-12].
9. SFL completed all of its work on Building Number 2, except for a "small amount of repair work." [N.T. 3/21/13 31:13-32:17].
10. SFL was not paid $25,000 out of the $475,000 owed for the completion of carpentry work at Building Number 1. [N.T. 3/20/13, 33:8-10].
11. SFL was not paid $60,000 out of the $475,000 for the completion of carpentry work at Building Number 2. [N.T. 3/21/13, 28:24-29:10].
12. The framing of the Riverview Buildings was to be constructed with prefabricated wood structures, referred to as "Panel Walls" [D-8, p. 2]. The framing carpentry work at Riverview was to be performed with factory-made panel frames. [N.T. 3/20/13, 27:25-28:5].
13. Tosa issued to SFL an extra work order to switch to perform stick framing installation, because of problems with the panel framed walls. [N.T. 3/21/13, 84:13-85:2].
14. As a result of the switch to stick frames, SFL incurred costs for additional labor and materials, totaling $33,250. [P-6, p. 2].
15. SFL was not paid $28,500 that it charged for stick framing 19 units on the second floor of Building 1. [N.T. 3/20/13, 49:16-19].
16. Tosa was responsible for providing SFL with a crane at the Riverview Project for use on both building one and two. [D-8, TOSA 376; N.T. 3/21/13, 27:6-10].
17. The crane provided failed to reach certain parts of the Riverview job site, and SFL and its work crew had to manually transport construction materials, including walls, trusses and plywood. [N.T. 3/20/13, 50:7-24].

18. SFL was to be paid $500 per unit for the manual transportation of heavy materials at the Riverview, necessitated by the crane's failure. [N.T. 3/20/13, p. 51:15-21].
19. SFL billed TOSA for $18,500 of the additional work performed, for the manual transportation and removal of heavy materials to the second and third floor of Building 1. [N.T. 3/20/13, 61:18-62:7].
20. SFL submitted a separate charge for moving trusses to the roof without the use of a crane for $72,000 ($2,000 per unit, for 36 units.) [N.T. 3/20/13, 55:16-24]. SFL failed to produce evidence that this was agreed upon with a representative from Tosa.
21. SFL hired approximately 26 extra men to manually transport the construction materials, including trusses, who were paid approximately $16 per hour for their work. [N.T. 3/20/13, 57:5-13]. SFL produced no payroll records to substantiate what it paid for the labor that it claimed as extra work.
22. Ted Kernosh was the on-site Project Manager for Tosa. [N.T. 3/21/13, 15:4-7].
23. Kernosh was essentially the eyes, ears, and mouth on the work site for Tosa. [N.T. 3/21/13, 59:10-18], and was one of the people primarily responsible for Tosa at the Riverview project. [N.T. 3/21/13, 58:10-13].
24. Defendant Nicola Paone went to the Riverview project only a handful of times during the project's two years. [N.T. 3/21/13, 58:14-18].
25. Kernosh authorized paying SFL extra monies for performing extra work at the Riverview site. [N.T. 3/20/13, 44:6-19].
26. SFL received written work orders from Tosa, totaling $24,010. [N.T. 3/20/13, 39:6-10; D-3; D-6].

27. SFL was only paid $570.00 out of the $24,010 for approved extra work orders. [N.T. 3/20/13, 40:21-23].

28. SFL was not paid $23,440 for completed work orders issued to SFL by Tosa. [N.T. 3/21/13, 29:11-19].

29. Tosa issued SFL a series of back charges. [N.T. 3/20/13, 65:24-66:14].

30. Exhibit D-6 is a Tosa accounts payable invoice list dated October 8, 2010, relating to the SFL's work at Riverview Project. [N.T. 3/22/13, 8-20].

31. Any line item on D-6 with the designation "BC" in front of it would be a back charge, [N.T. 3/22/13, 51:21-23]; any line item with "WO" indicates an approved work order in excess of the lump-sum contract price per building of $475,000 per building. [N.T. 3/21/13, 53:15-19].

32. WO's were issued by Tosa after Tosa got approval from D.R. Horton for the extra purchase order. [N.T. 3/21/13, 53:19-23].

33. After inspections were made on the Project, Tosa was assessed with a multitude of back charges from D.R. Horton for deficiencies in the work. [D-6, at TOSA 331]. The backcharges from D.R. Horton to Tosa was a basis for Tosa to withhold payment from SFL. [N.T. 3/25/13, 48:21-25].

34. The agreement between Tosa and SFL required Tosa to pay SFL only when all of certain enumerated events had occurred, and allowed Tosa to withhold payments from SFL on numerous grounds. [N.T. 3/22/13, 15:3-18].

35. Some examples for a reason to withhold payments include safety violations, defective work, misuse of materials, and failure to maintain a clean work area. [N.T. 3/22/13, 16:9-13, 18:23-20:19, 21:24-22:3].

36. If SFL had a safety violation observed by D.R. Horton, Tosa would receive a back charge in the nature of a fine, and D.R. Horton would sometimes send photographs which validated its claims. [N.T. 3/22/13, 16:14-25, 35:25-36:6].

37. There were times when SFL was issued back charges against the Riverview account, for things that occurred at the Riverdale project.[3] [N.T. 3/21/13, 68:21-69:14; 3/22/13, 111:8-17].

38. If Tosa disputed a charge with D.R. Horton, but D.R. Horton would not reverse it, then Tosa would withhold payment from its subcontractor. [N.T. 3/21/13, 77:9-14].

39. Many times when Tosa would confront D.R. Horton about extra work claimed by SFL, D.R. Horton said that the work was already within the scope of the contract between D.R. Horton and Tosa. As a result, D.R. Horton would deny purchase orders. [N.T. 3/22/13, 30:9-14].

40. Defendant Nicola Paone met with D.R. Horton two or three times to discuss Tosa's payment claims. [N.T. 3/21/13. 155:11-13].

41. Tosa claimed a total of $287,769.37 owed to it by D.R. Horton, which included four open accounts, including $103,192.07 for the Riverview project. [D-7].

42. Ultimately, Tosa reached a settlement with D.R. Horton wherein Tosa received payment from D.R. Horton of approximately $63,000 which covered disputes involving all four projects. [N.T. 3/21/13 81:21-82:8].

43. The exact amount of the settlement was $63,423.00 paid to Tosa by D.R. Horton by check dated December 7, 2007. [D-7 at Tosa 337].

[3] The Riverdale Project was a separate construction project, contracted between SFL and Tosa, and not at issue in this case.

44. The $103,192.07 claimed owed on Riverview, divided by $287,769.37, the total amount claimed owed for the four projects, applied to the $63,423.00 actually paid is $22,743.04, which equals the settlement percentage received by Tosa for the Riverview Project.

## CONCLUSIONS OF LAW

1. SFL has asserted claims for Breach of Contract, Promissory Estoppel, a claim under the Pennsylvania Contractor Subcontractor Payment Act, 73 Pa. C.S.§501 *et seq.*, Unjust Enrichment, as well as a claim for piercing the corporate veil.
2. To prevail on its breach of contract claim, SFL bears the burden of proving, by a preponderance of the evidence: (1) the existence of a contract; (2) breach of duty imposed by contract, and (3) damages. See, e.g., Sullivan v. Chartwell Inv. Partners, 873 A.2d 710 (Pa. Super. 2005).
3. Alternatively to the breach of contract claim, to prevail on its Promissory Estoppel claim, SFL must prove that: (1) the promisor made a promise that would reasonably be expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. Crouse v. Cyclops Indus., 745 A. 2d 606, 610 (Pa. 2000). As promissory estoppel is invoked in reliance on injustice, it permits an equitable remedy to a contract dispute. Id.
4. Alternatively to the breach of contract claim, to prevail on its unjust enrichment claim, SFL must show benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

Lackner v. Glosser, 892 A.2d 21, 34 (Pa. 2006). By its nature, the doctrine of quasicontract, or unjust enrichment, is inapplicable where a written or express contract exists. Id.

5. To prove Tosa's violations under the Pennsylvania Contractor-Subcontractor Payment Act (CSPA) , SFL must meet the statutory guidelines, provided at 73 Pa. C.S. §501 *et seq*., to prove damages for improper payment practices.
6. To prevail on its piercing of the corporate veil claim, the factors to be considered include: undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetrate a fraud. Lumax Indus., Inc. v. Aultman, 669 A.2d 893, 895 (Pa. 1995).
7. SFL has met its burden to prove a breach of contract cause of action against Tosa.
8. SFL has established that there was a written contract between SFL and Tosa which contained all of its essential terms, that Tosa breached multiple terms of that contract, and that SFL suffered damages as a result of Tosa's breaches.
9. A party seeking damages for breach of contract must prove such damages within reasonable certainty. Wilcox v. Regester, 207 A.2d 817, 822 (Pa. 1965).
10. SFL is owed $18,500 for unpaid manual labor, upon deficiency of the crane at the Riverview Project. The crane provided was substantially unable to do the job, under the written contract. It is implicit that the contract required a crane reasonably suitable for the job, and the crane provided was not. Plaintiff told Tosa that the crane was unfit, and Tosa accepted that and agreed to pay $500 per unit.[4]

[4] SFL has asked also for equitable relief, including unjust enrichment and promissory estoppel. The court accepts Plaintiff's testimony, and is convinced that both SFL and Tosa understood that the crane provided was not adequate for the job and could not be expected to perform. Tosa understood this and agreed to pay, with perhaps not spending more on getting a new crane.

11. SFL is owed $28,500 for unpaid invoices, upon the necessity to switch to stick framing.
12. SFL is owed $23,440 for seven unpaid work orders approved by Tosa.
13. SFL is further owed $22,743.04 for the proportional amount that Tosa received back from D.R. Horton on the Riverview Project (see Findings of Fact ¶44).
14. While it is undisputed that $85,000 remains unpaid on the contract – $25,000 on Building Number 1, and $60,000 for Building Number 2 – there is a bitter dispute as to whether this money was properly withheld by Tosa because of back charges. I accept for a fact that some back charges are legitimate on their face, but cannot assume that all are legitimate.[5] It is clear that $22,743.04 is no longer in dispute, because Tosa received this money from Dr. Horton in December, 2007.
15. SFL has not demonstrated non-compliance under CSPA. First, SFL has failed to provide any evidence that any defendants, other than Tosa, was a "subcontractor" as defined under the Act at 73 Pa. C.S. §502. CSPA permits an owner to withhold payment for deficiency items. 73 Pa. C.S. §506. Likewise, contractors may withhold payment from subcontractors for deficiency items. 73 Pa. C.S. §511. As has been previously discussed, when SFL's work was not accepted by the owner, D.R. Horton, and payment was withheld from Tosa, back charges were issued to Tosa as a result. Otherwise, payments were made on a timely basis in accordance with the draw schedule. Retainage was justifiably withheld from SFL by Tosa and the balance owed on Buildings 1 and 2 was offset by the back charges for SFL's deficiencies. As such, SFL has not met its burden of proof that Tosa did not meet its statutory obligations under CSPA.

[5] For example, back charges documented at D-5 at Tosa 291, for repairs made to a forklift, appear to be legitimate on their face. Likewise, a charge for a safety violation documented by a photograph, such as D-4 at Tosa 113, is plainly acceptable on its face. The court cannot, however, go through each and every charge to determine such. There are also plainly inappropriate back charges, for instance, back charging for claims from the Riverdale project [N.T. 3/25/13, 59:11-17].

16. SFL has failed to pierce the corporate veil of Tosa and N. Paone Construction, Inc. SFL's written agreement was only with Tosa; there were no agreements with defendants Nicola Paone, Roseann Paone, or N. Paone Construction, Inc., and SFL has no personal guaranties from any of these parties. SFL has not met its burden to prove that SFL was undercapitalized; that any of the defendants intermingled corporate affairs of N. Paone Construction, Inc. and Tosa; that any of the defendants used Tosa to perpetuate a fraud; that any defendants disregarded the corporate form of Tosa; or that Tosa was a mere sham constituting a façade for any of the defendants' operations. To the contrary, the evidence shows that Tosa maintained its corporate records in good form, and kept its affairs separate and distinct from other defendants.
17. A finding is entered against Tosa, in favor of Plaintiff, in the amount of $93,183.04.

**BY THE COURT:**

**DATE:_____** **_____**

**ALBERT JOHN SNITE, JR., J.**