

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

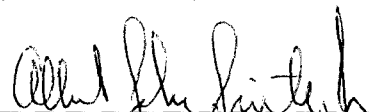
SFL CONSTRUCTION, INC.	:	March Term, 2010
	:	
<i>Plaintiff</i>	:	Case No. 05347
	:	
v.	:	Commerce Program
	:	
TOSA CONSTRUCTION, INC., N. PAONE	:	
CONSTRUCTION, INC., NICOLA PAONE, ROSEANN	:	
PAONE and D.R. HORTON, INC.	:	
	:	Control Nos. 11100527,
<i>Defendants</i>	:	11120464

ORDER

And Now, this 15th day of June, 2012, upon consideration of the Motion for Summary Judgment of Defendant D.R. Horton, Inc. and the Motion for Partial Summary Judgment of Defendants Tosa Construction, Inc., N. Paone Construction, Inc., Nicola Paone and Roseann Paone, it is **Ordered** as follows:

- 1) The Motion for Summary Judgment of Defendant D.R. Horton, Inc. is **Granted**;
- 2) The Motion for Partial Summary Judgment of Defendants Tosa Construction, Inc., N. Paone Construction, Inc., Nicola Paone and Roseann Paone is **Denied**.

By The Court,



Albert John Snite, Jr. J.

Sfl Construction, Inc. -ORDOP



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CONSTRUCTION, INC., NICOLA PAONE, ROSEANN	:	
PAONE and D.R. HORTON, INC.	:	
	:	
<i>Defendants</i>	:	Control No. 11100527

OPINION

Before the Court is the Motion for Summary Judgment of Defendant D.R. Horton, Inc. For the reasons below, the Motion for Summary Judgment is granted and the claim of unjust enrichment asserted by plaintiff SFL Corporation, Inc. against Defendant D.R Horton is dismissed.

Background¹

Defendant D.R. Horton (“D.R. Horton,”) is a foreign corporation. At all times relevant to this action, D.R. Horton was developing a three-building condominium named The Grande at Riverview (“the Project,”) located in Conshohocken, Pennsylvania. Defendants Tosa Construction, Inc. (“Tosa,”) and N. Paone Construction, Inc. (“NPC,”) are Pennsylvania corporations engaged in the construction business. Individual defendant Nicola Paone (“Nicola Paone,”) resides at 590 Kohlman Drive, Hatfield, Pennsylvania. Nicola Paone is owner or member of both Tosa and NPC.

¹ Unless otherwise noted, the facts described in the Background section of this Opinion are gleaned from Plaintiff’s Second Amended Complaint and Defendants’ Answers to the Second Amended Complaint.

Individual defendant Roseann or Rosann Paone (“Rosann Paone,”) resides at the same address as Nicola Paone. Whenever hereinafter necessary, Tosa, NPC and Nicola and Rosann Paone, will be identified collectively as the “Tosa Defendants.” Plaintiff SFL Construction, Inc. (“SFL,”) is a Pennsylvania corporation engaged in construction business. At all times relevant to this action, SFL performed carpentry work at the Project.

On 2 May 2005, D.R. Horton and Tosa entered into a “Contractor Agreement.” Pursuant to this agreement, Tosa agreed to perform construction work at the Project as an “independent contractor,” and promised to refrain from subcontracting the work without prior authorization from D.R. Horton.²

On 30 March 2006, Plaintiff SFL executed an “Agreement” which identified Tosa as Contractor, and SFL as Subcontractor.³ Pursuant to this document, SFL agreed to work on the floor and roof trusses at the Project, and install windows, doors and stairs therein. The Agreement shows no execution on behalf of Tosa, and no release from D.R. Horton permitting use of a subcontractor.

On 29 November 2006, SFL sent a letter to Tosa. The letter stated that—

It has become more difficult to move forward and complete work at the ... Tosa projects being built by D.R. Horton ... due to lack of materials....
[A]dditional extra work ... will not be started until completed and past due work orders for work already performed are paid.
SFL’s contract is solely with Tosa; subsequently [sic] payments should not be delayed or effected by the failure of Tosa ... to collect funds from third parties.
SFL is not part of the prime contract with the third party;

² Contractor Agreement, “Scope of the Work,” “Assignment and Appointment of Subcontractors,” Exhibit C1 to the Motion for Summary Judgment of Defendant D.R. Horton.

³ Agreement between Tosa Construction and SFL Construction, Exhibit E to the Motion for Summary Judgment of Defendant D.R. Horton.

SFL contract is solely with Tosa.⁴

On 9 June 2010, SFL filed an original complaint against individual defendants Nicola and Rosann Paone, Tosa Construction, Paone Construction, and D.R. Horton. On 20 August 2010, SFL filed a Second Amended Complaint against the same Defendants. In the Second Amended Complaint, SFL asserts against all defendants the claims of Breach-of-Contract, Promissory Estoppel, Violation of 73 Pa. C.S. § 501 *et seq.* (the Contractor and Subcontractor Payment Act) and Unjust Enrichment. Specifically, the Second Amended Complaint alleges that at all relevant times, Tosa was acting “as a general contractor and agent for DR Horton.”⁵ The Second Amended Complaint also asserts that Nicola and Rosann Paone undercapitalized Tosa and NPC, inter-mingled the affairs of both, and used each entity to commit fraud against SFL. Thus, the Second Amended Complaint seeks to hold D.R. Horton liable as a principal of Tosa, and seeks to hold all Tosa Defendants liable by piercing the corporate veils of Tosa and NPC.

On 9 and 13 September 2010, the Tosa Defendants and D.R. Horton filed their respective Preliminary Objections to SFL’s Second Amended Complaint. On 12 October 2010, the Court sustained-in-part and overruled-in-part the Preliminary Objections of D.R. Horton. The Court sustained D.R. Horton’s Preliminary Objections as to the claims of Breach-of-Contract and Violation of the Contractor-Subcontractor Payment Act, and those claims were dismissed. As to the claim asserting Promissory Estoppel, the Court sustained-in-part the Preliminary Objections and granted SFL leave to amend its Second Amended Complaint, within twenty days, “to include specific factual

⁴ Letter from SFL to Tosa dated 29 November 2006, Exhibit G to the Motion for Summary Judgment of D.R. Horton.

⁵ Second Amended Complaint, ¶ 5.

allegation that D.R. Horton directly agreed to pay Plaintiff [SFL] ”⁶ Finally, the Court overruled D.R. Horton’s Preliminary Objections attacking SFL’s claim of Unjust Enrichment. Subsequently, SFL failed to timely amend its Second Amended Complaint and failed to preserve for trial the claim of Promissory Estoppel as against D.R. Horton. As a result, Unjust Enrichment is the only surviving claim that SFL currently asserts against D.R. Horton. On 3December 2010, the Court overruled in their entirety the Preliminary Objections filed by the Tosa Defendants, and all the claims against such Defendants survive.

Discussion

Summary judgment is properly granted when, 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 which in a jury trial would require the issues to be submitted to a jury.... [T]he motion for summary judgment encompasses two concepts:

- (1) the absence of a dispute as to any material fact and
- (2) the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense.

In summary judgment cases, review of the record must be conducted in the light most favorable to the non-moving party, and all doubts regarding the existence of a genuine issue of material fact must be resolved against the moving party. Failure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict in its favor establishes the entitlement of the moving party to judgment as a matter of law.⁷

I. Plaintiff SFL has not met its burden of proof to show that an agency relationship existed between D.R. Horton and Tosa.

According to D.R. Horton, SFL has failed to prove that Tosa was an agent of D.R.

⁶ Order dated 12 October 2010.

⁷ Young v. DOT, 560 Pa. 373, 375-376, 744 A.2d 1276, 1277 (Pa. 2000).

Horton when Tosa and SFL entered into a subcontract.⁸ D.R. Horton concludes that since SFL has not proven the existence of an agency relationship between D.R. Horton and Tosa, D.R. Horton may not be bound by Tosa's alleged breach of the subcontract.

In Pennsylvania, the law on agency is well settled:

There are four grounds upon which a jury can conclude that an agency relationship exists and that the principal is bound by a particular act of the agent and liable to third parties on the basis thereof.... The jury may find that the alleged agent had—

- 1) express authority directly granted by the principal to bind the principal as to certain matters; or
- 2) implied authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority; or
- 3) apparent authority, i.e. authority that the principal has by words or conduct held the alleged agent out as having; or
- 4) authority that the principal is estopped to deny.⁹

In this case, SFL has failed to point to any evidence showing that the Tosa Defendants were acting under the express, implied or apparent authority of D.R. Horton, or that D.R. Horton should be estopped from denying the existence of such an agency relationship. By way of example, the Motion for Summary Judgment of Defendant D.R. Horton states that—

SFL has not produced any evidence showing that D.R. Horton ... entered into an agency relationship with [the Tosa Defendants] or led SFL to believe that [D.R. Horton] granted [the Tosa Defendants] authority to act as D.R. Horton.¹⁰

In response, SFL merely states that the assertion is “Denied.”¹¹ However, mere denial is insufficient at this stage of the litigation because SFL is “an adverse party who will bear

⁸ Motion for Summary Judgment of D.R. Horton, ¶ 56.

⁹ Bolus v. United Penn Bank, 363 Pa. Super. 247, 259-260; 525 A.2d 1215, 1221 (Pa. Super. 1987).

¹⁰ Motion for Summary Judgment of D.R. Horton, ¶ 58.

¹¹ Response in Opposition to the Motion for Summary Judgment of D.R. Horton, ¶ 58.

the burden of proof at trial” “to produce evidence of facts essential to [its] cause of action.”¹² Since SFL has offered no evidence showing the existence of an agency relationship between D.R. Horton and the Tosa Defendants, SFL may not bind D.R. Horton to the actions of those Defendants.

II. SFL cannot show that D.R. Horton was unjustly enriched.

In Pennsylvania,

The elements of unjust enrichment are 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. 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.

[C]onferral of a benefit is a necessary, but not sufficient, condition of a valid unjust enrichment claim. The doctrine does not apply simply because the defendant may have benefitted as a result of the actions of the plaintiff.... In order to avoid dismissal of the unjust enrichment claim, the plaintiff must allege in its complaint facts showing that the defendants specifically requested benefits or misled the plaintiff.¹³

In this case, SFL admits having no evidence to show that D.R. Horton requested benefits from SFL, and offers no evidence whatsoever to prove that it was misled by D.R. Horton.¹⁴ The failure by SFL “to adduce sufficient evidence on an issue essential to its case, and on which it bears the burden of proof such that a jury could return a verdict in its favor, establishes the entitlement of the moving party to judgment as a matter of

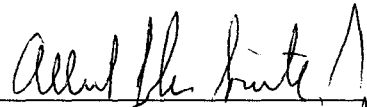
¹² Young v. DOT, 560 Pa. 373, 375-376; 744 A.2d 1276, 1277 (Pa. 2000) (discussing the standards for summary judgment).

¹³ Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa., 2010 Pa. Super. 175, P. 11; 7 A.3d 278, (Pa. Super. Ct. 2010).

¹⁴ Plaintiff SFL’s Response in Opposition to the Motion for Summary Judgment of H.R. Horton, ¶¶ 73, 78.

law.”¹⁵ The Motion for Summary Judgment of Defendant D.R. Horton is granted and the Second Amended Complaint is dismissed as to that Defendant.

By The Court,


Albert John Snite, Jr., J.

¹⁵ Young v. DOT, 560 Pa. 373, 375-376, 744 A.2d 1276, 1277 (Pa. 2000).