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

GREENSCAPE LANDSCAPE CONTRACTORS, INC.	:	January Term, 2015
Plaintiff	:	Case No. 02144
v.	:	Commerce Program
CITY OF PHILADELPHIA	:	
Defendant	:	Control No. 16112798

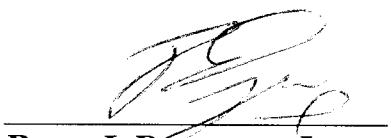
ORDER AND MEMORANDUM OPINION

AND NOW, this 12th day of June, 2017, upon consideration of the motion for summary judgment filed by defendant City of Philadelphia, the response in opposition filed by plaintiff Greenscape Landscape Contractors, Inc., and respective memoranda of law, it is hereby **ORDERED AND DECREED** that the motion for summary judgment is **GRANTED IN ITS ENTIRETY.** However, plaintiff's complaint is not dismissed as of today because of the existence of defendant's counterclaims.

It is therefore further **ORDERED and DECREED** that defendant City of Philadelphia within ten (10) days file *a Praecipe to Discontinue and End its Counterclaims* per its promise in its memorandum of law at footnote 2 that it will withdraw its counterclaims if summary judgment is granted in its favor. Upon entry of

this Praecipe, this Court will enter final judgment by signed court order. Failure to file this Praecipe may result in vacating the summary judgment order to address at trial all factual disputes relating to defendant's counterclaims.

BY THE COURT,



***RAMY I. DJERASSI*, J.**

MEMORANDUM OPINION

The motion for summary judgment requires this Court to determine whether plaintiff may maintain the instant action, where plaintiff, as the non-moving party, has not adduced sufficient evidence on issues essential to its case and on which it bears the burden of proof. For the reasons below, the Court finds that plaintiff has not met its burden of proof and may not maintain the instant action.

BACKGROUND

Plaintiff is Greenscape Landscape Contractors, Inc. ("Greenscape"), an entity with an address in Glenside, Pennsylvania. Defendant is the City of Philadelphia (the "City"), a municipal corporation of the Commonwealth of Pennsylvania.[1]

In 2011, the City invited landscaping businesses to bid for a contract requiring the removal of City-owned trees that were dead, dying, diseased, dangerous, or merely troublesome. Greenscape submitted the lowest bid and won the "Contract" which, *inter alia*, is composed of sections titled "INVITATION AND BID," and "Procurement Specifications"[2] The Contract states as follows in pertinent part:

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[1] "A municipal corporation is a public corporation created by the government for political purposes, having subordinate and local powers of legislation." City of Philadelphia v. Fox, 64 Pa. 169, 169 (Pa. 1870).
[2] Contract between the City and Greenscape, Exhibit A to the motion for summary judgment of City.

> CONTRACT TERM: 01/01/2012—12/31/2012 (INITIAL TERM), with an option to renew for up to ... additional on (1) year periods (the RENEWAL TERM) exercisable, at the City's sole discretion....[3]
>
> CONTRACT TYPE: REQUIREMENTS.... Exact quantities cannot now be determined but estimates thereof are listed herein. Quantities listed may be increased or decreased to meet the requirements of the City during the period of this contract. **A minimum is not guaranteed**.[4]
>
> The [City's] Procurement department has the right to stop the work of ... [Greenscape] and to terminate the contract if it is determined that ... [Greenscape] has failed to meet the requirements of the contract, or the [Greenscape] is performing in an unsatisfactory manner....[5]
>
> All trees and trunks listed in this contract are to be removed to a depth of Twenty Four (24) inches below the present grade, using a stump remover. The complete removal of a tree or trunk shall include the tree and stump....
>
> Stumps must be removed within one week (seven days) following a tree or trunk removal. If stumps are to be left overnight, they must be cut three (3) feet above grade until they are removed, to reduce potential tripping hazards.[6]
>
> ***
>
> PERFORMANCE SECURITY: If the total award amount exceed $500,000 ... the City will require the successful vendor to provide an individual Performance Bond in the amount of 100% of the contract award....[7]

In the late summer and early fall of 2012, the City forwarded three missives to Greenscape. The first, an-mail dated August 10, 2012, complained that Greenscape had failed to timely complete the removal of certain tree stumps, and failed to timely post

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[3] Id., INVITATION-AND-BID, § 1.3—CONTRACT TERM.
[4] Id., § 1.4 (emphasis supplied).
[5] Id., § 2.4—Termination.
[6] Id., PROCUREMENT SPECIFICATIONS, § 3.2—CONSTRUCTION METHODS.
[7] Id., INVITATION-AND-BID, § 3.2.3—PERFORMANCE SECURITY. The record shows that on March 27, 2012, prior to commencement of performance, Greenscape posted the afore-mentioned Performance Bond in the amount of $1,179,491.00. See PERFORMANCE BOND, Exhibit D to the motion for summary judgment of the City.

non-parking signs next to the specific trees slated for removal. The e-mail also complained that Greenscape was failing to timely take-down certain non-parking signs after the trees thereof had been removed.[8] The second missive, an e-mail dated August 27, 2012 which followed in the wake of a meeting between the City and Greenscape, complained that Greenscape had failed to post and subsequently take-down other non-parking signs in the proximity of a different set of trees. In addition, this second e-mail indicated that Greenscape had failed to provide to the City the commencement and completion dates for specific work performed, as required under the Contract.[9] The third missive, a letter dated September 14, 2012, informed Greenscape that the City was terminating the Contract as a result of Greenscape's continued "unsatisfactory service."[10]

On November 1, 2012, Greenscape sent a letter of response to the City. The response disputed the grounds for termination of the Contract, stated that Greenscape was willing to reconcile any "discrepancies" between itself and the City, and offered to agree to a discontinuation of the contractual relationship "with no liability on either side."[11] On November 21, 2012, the City forwarded a letter in response to the letter of Greenscape. In the response, the City informed Greenscape that it would rescind termination of the Contract "[b]ecause the term [thereof was] near expiration"; however, the City also informed Greenscape that it had "no confidence" Greenscape would "meet the level of performance required by [the] contract," and advised

[8] E-mail dated August 10, 2012, Exhibit H to the motion for summary judgment of the City.
[9] E-mail dated August 27, 2012, Exhibit I to the motion for summary judgment of City.
[10] Letter dated September 14, 2012, from the City to Greenscape, Exhibit L to the motion for summary judgment.
[11] Letter dated November 12, 2012, from Greenscape to the City, Exhibit N to the motion for summary judgment.

Greenscape that it would not renew the relationship at the end of its term.[12]

On January 16, 2015, Greenscape commenced the instant action by filing a complaint against the City. In Count I, Greenscape asserts a breach-of-contract claim. Under this claim, Greenscape avers that—

1. the City failed to pay for the removal of certain trees, for a total of $60,375.00;

2. the City prevented Greenscape from completing tree-cutting and stump removal work, as required pursuant to a purchase order issued by the City. Greenscape avers that though it was willing, able, and ready to complete such work, the City's improper termination prevented Greenscape from discharging its duties; and,

3. the City owes Greenscape the remainder of the contract price, in the amount of $582,061.00.[13]

In Count II of the complaint, Greenscape asserts against the City an unjust-enrichment claim. In count III, Greenscape asserts against the City the claim of *quantum meruit*.

On April 11, 2015, the City filed an amended answer with new matter and a single counterclaim to the complaint of Greenscape. In the counterclaim, the City asserts that "on numerous occasions [Greenscape] requested payment ... for trees it had not removed," in violation of Chapter 19—3602 of the Philadelphia Code —the False Claims Ordinance.[14] Finally on November 21, 2016, after discovery had closed, the City filed the instant motion for summary judgment challenging Greenscape's complaint.

DISCUSSION

The law on summary judgment is well-established:

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[12] Letter dated November 21, 2012, from the City to Greenscape, Exhibit O to the motion for summary judgment.
[13] The amount of $582,061.00 is derived by subtracting the amount actually invoiced by the City, $597,430.00, from the amount of the Bond reflecting 100% of the Contract ($1,179,491.00).
[14] Amended answer with new matter and counterclaim, ¶ 14.

> [s]ummary judgment may be granted only in cases where it is clear and free from doubt that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. The moving party has the burden of proving the nonexistence of any genuine issues of material fact. The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.
>
> The entry of summary judgment is proper where the incontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no issue of material fact exists and that the moving party is entitled to judgment as a matter of law.[15]

I. GREENSCAPE HAS FAILED TO OFFER EVIDENCE OF WORK WHICH IT ALLEGEDLY PERFORMED, AND WHOSE BALANCE ALLEGEDLY REMAINS OUTSTANDING.

In the complaint, Greenscape avers that the City has "not paid [Greenscape] for the entirety of the work completed or contracted, with $60,375.00 remaining outstanding."[16] In the motion for summary judgment, the City challenges these averments. According to the motion for summary judgment, Greenscape has offered no evidence showing that it performed work for which it is entitled to recover an outstanding balance of $60, 375.00.[17] To resolve this dispute, the Court shall examine the evidentiary record as developed in the course of litigation. However, before turning to the evidence of record, the Court reiterates a well-established standard for summary judgment:

> [w]here the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue

[15] Kleban v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2001 PA Super 92, ¶ 7, 771 A.2d 39, 42 (2001)
[16] Complaint, ¶ 14.
[17] Motion for summary judgment, ¶¶ 60—69.

> essential to his case and on which it bears the burden of proof ... establishes the entitlement of the moving party to judgment as a matter of law.[18]

In the course of litigation, the City submitted to Greenscape its first set of interrogatories and requests for production of documents. Specifically, Interrogatory No. 12 asked Greenscape to identify any invoice which Greenscape claims is still due and owing, and asked Greenscape to identify the date of the invoice, as well as the manner by which the invoice had been submitted to the City.[19] Greenscape's answer to the afore-mentioned interrogatory merely stated that "[a]ll invoices have been sent to the City during the course of business...."[20] Subsequently, the principal of Greenscape, Robert Damerjian ("Mr. Damerjian"), was deposed on September 29, 2016. During this deposition, Mr. Damerjian testified that Greenscape had been sending its invoices to the City via telefax.[21] After this statement, the following exchange took place between counsel for the City and Mr. Damerjian:

Q. Is it your contention that Greenscape faxed documents to the City that the City says it did not receive?
A. Yes.
Q. And did you produce any documentation of these faxes? Did you give to counsel any documentation of those faxes?
A. What do you mean by documentation?
Q. Do you have anything to show that Greenscape faxes [*sic*] these documents?
A. Not that I know of, unless whatever I gave my attorney.[22]

On the same topic, Mr. Damerjian additionally testified as follows:

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[18] Cigna Corp. v. Exec. Risk Indem., Inc., 111 A.3d 204, 210, (Pa. Super. 2015) appeal denied, 126 A.3d 1281 (Pa. 2015) (discussing Pa. R.C.P. 1035.2(2)).
[19] City's first set of interrogatories and requests for production of documents, interrogatory No. 12, Exhibit P to the motion for summary judgment.
[20] Answer to the City's first set of interrogatories and requests for production of documents, answer No. 12, Exhibit P to the motion for summary judgment.
[21] Deposition of Damerjian, Exhibit 3 to the answer in opposition to the motion for summary judgment of the City, at 71:8—9.
[22] Id., at 71:19—24, 72:1—7.

Q. So paragraph 14 [of the Complaint] says there is $60,375.00 remaining outstanding for completed work. Does some of that $60,000.00 [*sic*] include ... trees that the City disputed that work had been done on, for instance?
A. Yes.
Q. And have you ever identified specifically which trees are disputed? Each tree has a serial number, correct?
A. Yes.
Q. Have you ever put together a list of serial numbers that are under dispute?
A. Yes.

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Q. Can you read me one of the numbers of the bottom?
A. 485.
Q. Okay. So, for the record, the witness just identified pages Bates numbered 485 through 490?
A. Yes.
Q. And if you look at page 490 –before you do that, tell me what you understand these pages to represent.
A. A spreadsheet that my office completed, which was in response to the City's comments whether a tree was completed or not completed, and our findings after we went out to inspect the site and locate the charge on a specific invoice and the date the tree was completed.
Q. Okay. And if you look at the last of the documents [which] you just identified, Greenscape 490, there's a total down there at the bottom, right?
A. Yes.
Q. It says $42,271.00?
A. Yes.

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Q. Do you know what makes up the difference between $60,375.00 and $42,271.00?
A. I do not.[23]

In this case, Greenscape's principal, Mr. Damerjian, testified at his deposition that he "identified specifically" the trees for which the City owed an outstanding balance under the Contract.[24] However, Greenscape and its principal have not only failed to provide this Court with evidence identifying such trees, but have also failed to explain why Greenscape could not even produce the invoices which it allegedly faxed to the City,

[23] Id., at 66:14—68:17.
[24] Id., at 66:21—24.

and which would in all likelihood identify the trees that Greenscape avers to have removed. Indeed, the only pertinent evidence provided by Greenscape consists of an internally prepared spreadsheet which was identified in the course of Mr. Damerjian's deposition as "pages Bates numbered 485 through 490." However such a document, even by Mr. Damerjian's admission, shows a discrepancy between the amount identified therein ($42,271.00), and the amount which Greenscape seeks to recover under Count I of its complaint ($60.375.00). Yet, as clearly evinced by Mr. Damerjian's deposition testimony above, Mr. Damerjian could not even provide an explanation for the discrepancy between the amount claimed in the instant action by Greenscape, and the amount shown in Greenscape's internally prepared spreadsheet.[25] All of the foregoing convinces this Court that Greenscape has failed to adduce sufficient evidence on an issue on which it bears the burden of proof; for this reason, Greenscape may not recover monies for work which Greenscape allegedly performed, and which the City allegedly failed to compensate.

II. GREENSCAPE MAY NOT MAINTAIN THE REMAINDER OF ITS BREACH-OF-CONTRACT CLAIM.

In the complaint, Greenspace avers that it is entitled to $786,943.00 which represents the remainder of the Contract.[26] Greenscape specifically breaks-down this amount as follows:

A. $204,882.00, representing work that the City requested from Greenscape pursuant to a purchase order, but which the City prevented Greenscape from performing; and,

B. $582,061.00, representing the remainder of the entire Contract.[27]

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[25] Id., at 68:15—17.
[26] Complaint.
[27] Id., ¶¶ 15—18.

A. The work which Greenscape was allegedly prevented from performing.

In the complaint, Greenscape avers that it is entitled to recover the amount of $204,882.00. According to Greenscape, this sum represents work which Greenscape would have undertaken and completed, if the City had not improperly terminated the Contract.[28] Challenging this argument, the City argues in its brief that as a matter of law, Greenscape may not proceed with its effort to recover the full value of the work which it was allegedly precluded to perform. Specifically, the City argues that at most, "Greenscape could claim lost profits on work it would have otherwise performed."[29] The City notes that Greenscape has not produced any evidence regarding lost profits, and impliedly concludes that Greenscape may not recover such lost profits.[30]

In Harman v. Chambers, "Plaintiff" and "Defendant" entered into an agreement whereby Defendant agreed to supply Plaintiff with three hopper train-cars for $3,000.00.[31] Plaintiff forwarded the agreed-upon amount to Defendant who cashed the check but failed to deliver the train-cars. Subsequently Plaintiff filed a suit asserting breach-of-contract: through the suit, Plaintiff sought to recover not only the $3,000.00 paid to Defendant, but also expenses incurred into, as well as interest upon the principal. After trial, the court instructed the jury on the issue of damages, and the jury returned in favor of Plaintiff a verdict which included Plaintiff's expenses and lost interest. Defendant appealed.[32] Affirming, the Pennsylvania Supreme Court stated that—

> the measure of damages applicable in a case of breach of contract is that the aggrieved party should be placed as

[28] Id., ¶ 17.
[29] *Memorandum* of law in support of the City's motion for summary judgment at IV.B.4, p. 12.
[30] Id., at footnote 5.
[31] Harman v. Chambers, 57 A.2d 842, 844 (Pa. 1948).
[32] Id. at 843—844.

> nearly as possible in the same position he would have occupied had there been no breach. In other words, he is entitled to be reimbursed for the money actually paid out and for all reasonable and proper expenses incurred on the faith of the contract.[33]

In this case, even assuming that the City committed a breach by improperly terminating the (reinstated) Contract, this Court is nevertheless left with no evidence showing the amounts which Greenscape may have expended to fulfill its obligations thereunder. Moreover, Greenscape has not pointed to any calculation showing that, but for the City's alleged breach, Greenscape would have been entitled to receive a certain amount of expected profits. Stated another way, even if this Court assumes for the sake of arguing that the City committed a breach, Greenscape could not prove its damages. Greenscape could not prove its damages because as the non-moving party, it has failed "to adduce sufficient evidence on an issue essential to [its] case and on which it bears the burden of proof."[34] For this reason, Greenscape may not maintain the portion of its breach-of-contract claim seeking damages for work which Greenscape would have undertaken and completed, but for the City's alleged breach.

B. The remainder of the entire contract.

Greenscape's complaint seeks to additionally recover the value represented by the remainder of its Contract with the City, in the amount of $582,061.00. Greenscape claims it is entitled to such an amount because the City "never issued the remaining

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[33] Id. at 845 (Pa. 1948). Many subsequent decisions in this Commonwealth are in lock-step the afore-quoted ruling. For example, the Pennsylvania Superior Court has held that "[d]amages for a breach of contract should place the aggrieved party in "as nearly as possible in the same position [it] would have occupied had there been no breach.... To that end, the aggrieved party may recover **all damages**, provided (1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract." Ely v. Susquehanna Aquacultures, Inc., 130 A.3d 6, 10 (Pa. Super. 2015), appeal denied sub nom. Ely v. Susquehana Aquacultures, Inc., 136 A.3d 982 (Pa. 2016) (emphasis supplied).

[34] Cigna Corp. v. Exec. Risk Indem., Inc., 111 A.3d 204, 210, (Pa. Super. 2015) appeal denied, 126 A.3d 1281 (Pa. 2015) (discussing Pa. R.C.P. 1035.2(2)).

purchase order of $582,061.00" out of a total of Contract of $1,179,491.00.[35] This claim does not reconcile with the clear and unambiguous language of the Contract which not only specifies that the term of the agreement spanned the period between January 1, 2012 and December 31, 2012, but also states that the option to renew was solely exercisable at the City's discretion.[36] Moreover, the Contract also clearly and unambiguously states that "[q]uantities listed [in the contract] may be increased or decreased to meet the requirements of the City during the period of this contract [and a] **minimum is not guaranteed**.[37] In this case, the City exercised its right to allow the Contract to expire, and exercised its right to determine the requirements thereunder. For this reason, Greenscape may not maintain the portion of its breach-of-contract claim seeking recovery of damages in the form of the non-invoiced remainder of the Contract.

In addition, Greenscape's attempt to collect the remainder of the contract must also fail as a matter of law. The attempt fails as a matter of law for the same reason which this Court articulated earlier in its discussion –namely, even if the City had breached the Contract, Greenscape could expect to recover only its expenditures and anticipated profits. However, Greenscape has not offered evidence of such expenditures and anticipated profits. Greenscape's failure to adduce evidence on an issue material to its claim means that the Court has no evidence capable of placing Greenscape in the

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[35] Complaint, ¶ 18.

[36] Contract between the City and Greenscape, Exhibit A to the motion for summary judgment of City, § 1.3—Contract Term.

[37] Id., § 1.4 (emphasis supplied). Under Pennsylvania law, "[t]he task of interpreting a contract is generally performed by the court rather than by a jury and the goal of that task is to ascertain the intent of the parties as manifested by the language of the written instrument.... Determining whether contract terms are clear or ambiguous is a question of law...." Walton v. Philadelphia Nat. Bank., 545 A.2d 1383, 1388 (Pa. Super. 1988).

position it would have occupied, but for any breach allegedly committed by the City. Based on the foregoing, this Court finds that Greenscape may not maintain its breach-of-contract claim, and the claim is dismissed in its entirety.[38]

III. GREENSCAPE MAY NOT MAINTAIN THE ALTERNATIVE CLAIMS OF UNJUST ENRICHMENT AND *QUANTUM MERUIT*.

As alternatives to the breach-of-contract claim, Greenscape asserts the additional claims of unjust enrichment and *quantum meruit*, respectively in Counts II and III of its Complaint. Under Pennsylvania law—

> [q]*uantum meruit* is an equitable remedy to provide restitution for unjust enrichment in the amount of the reasonable value of services.
>
> ***
>
> Where unjust enrichment is found, the law implies a contract, which requires the defendant to pay to the plaintiff the value of the benefit conferred.... The elements necessary to prove unjust enrichment are:
>
> (1) benefits conferred on defendant by plaintiff;
> (2) appreciation of such benefits by defendant; and,
> (3) acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value....
>
> In determining if the doctrine applies, our focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.[39]

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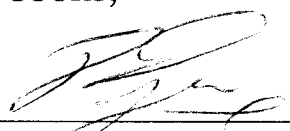
[38] Greenscape's complaint also seeks to recover $19,673.58 representing 2.5% of the Bond, as applied to the non-invoiced portion of the total Contract. See complaint, ¶ 19. This claim may not stand because the Contract states that "[i]f an individual Performance Bond ... is required ... such bond shall be and remain in full force and effect throughout the Initial Term.... It is the sole responsibility of [Greenscape] to ensure that such bond(s) remain in full force and effect ... and failure to do so shall be deemed an event of default." See Contract between the City and Greenscape, Exhibit A to the motion for summary judgment of City, § 1.3.2—Contract Term. This clear and unambiguous language only shows that Greenscape was required to maintain its Bond throughout the term of the Contract. This Court could not find any provision requiring the City to refund a percentage of Greenscape's bond based on the non-invoiced portion of the contract, and Greenscape has not directed this Court's attention to such a provision, if any.

[39] Durst v. Milroy General Contracting, Inc., 52 A.3d 357, 360 (Pa. Super. 2012).

In this case, the Court has already determined that Greenscape failed to adduce any evidence of the number of trees which it asserts to have removed without receiving just compensation. Without such evidence, this Court cannot determine the value of benefits allegedly conferred by Greenscape to the City, and the claims asserting unjust enrichment and *quantum meruit* may not be maintained.[40]

For the foregoing reasons, the motion for summary judgment of the City is granted in its entirety, and the complaint of Greenscape is dismissed.[41]

BY THE COURT,



***RAMY I. DJERASSI*, J.**

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[40] Although unjust enrichment and *quantum meruit* are pleaded as separate claims in the instant action, each is merely the complement of the other: "[*q*]*uantum meruit* is an equitable remedy to provide restitution for unjust enrichment in the amount of the reasonable value of services." Id. In other words, the term "unjust enrichment" represents the inequity derived by the retention of a benefit without compensation, whereas the term *quantum meruit* represents the remedy to the inequity.

[41] The Court is mindful that the City, in the *memorandum* of law in support of its motion for summary judgment, at footnote 2, states that—

> [t]he City has not moved for summary judgment in its favor on its Counterclaim alleging that Greenscape violated the false Claims Act, Phila Code §19—3601 *et seq.*, as, unlike Greenscape's claims which are governed by the clear language of the Contract, the City's Counterclaim involves factual information better suited for resolution at trial. **Should this Court grant the City's motion for Summary Judgment in full and dismiss all of Greenscape's claims, the City will withdraw its Counterclaim**. (Emphasis added).