STATE OF MICHIGAN

COURT OF APPEALS

ANGELO IAFRATE CONSTRUCTION COMPANY, Plaintiff-Appellant,	UNPUBLISHED October 23, 2007
v	No. 275103 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellee.	LC No. 06-000980-CK

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

In this action involving claims for breach of contract and unjust enrichment or quantum meruit, plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contracted with plaintiff on a road construction project. Pursuant to a subcontract, John Carlo, Inc. ("Carlo"), was required to manufacture the wedging material for the project. Pursuant to plaintiff's agreement with defendant, plaintiff was required to provide original samples of asphalt binders to be used in repaving the roadway. The contract provided that if the samples did not conform to the specifications set forth in the parties' agreement, defendant could impose a 50-percent price reduction.[1] The parties agree that Carlo did not provide the appropriate samples for the asphalt binder used in the project, but that the asphalt actually installed met the standards set forth in the agreement. Because the samples did not conform to the contract specifications, however, defendant exercised its right to impose a 50-percent price reduction. Plaintiff now argues that it was improper for defendant to impose the price reduction when the correct asphalt was actually installed.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We agree that summary

[1] Defendant also had the option of requiring removal of the installed asphalt, but elected not to pursue that option.

disposition was not appropriate under MCR 2.116(C)(8) because the pleadings alone did not support defendant's motion. The allegations in plaintiff's complaint, taken as true, were not so clearly unenforceable as a matter of law that no factual development could justify recovery. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). We conclude, however, that summary disposition was appropriate under MCR 2.116(C)(10), because the submitted evidence shows that there is no genuine issue of material fact with respect to the fact that defendant was permitted to impose the price reduction penalty against plaintiff. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Thus, reversal is not required. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005).

Plaintiff agrees that the price adjustment provision in the parties' agreement is a liquidated damages clause, but argues that enforcement of that clause amounts to a penalty. As explained in *UAW-GM Human Resources Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 477 (1998), a liquidated damages clause

> is simply an agreement by the parties fixing the amount of damages in case of a breach. *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 294; 386 NW2d 177 (1986). Whether such a provision is valid and enforceable or invalid as a penalty is a question of law. *Moore v St Clair Co*, 120 Mich App 335, 339; 328 NW2d 47 (1982). The courts are to sustain such provisions if the amount is "reasonable with relation to the possible injury suffered" and not "unconscionable or excessive." *Id*. at 340, citing *Curran v Williams*, 352 Mich 278, 282; 89 NW2d 602 (1958).

A court need not inquire into the intent of the parties on this issue. *Moore*, *supra* at 339. Only the writing should be examined. *Id*. at 340. "However, if the amount stipulated is valid but damages in the event of breach are uncertain or difficult to ascertain, then it must be determined whether the parties intended to fix the amount of damages, based upon the writing, subject matter and situation of the parties," which is also a question of law. *Id*.

Even where parties have included a liquidated damages provision in their agreement, as a matter of policy and equity, a court will award actual damages for a breach and ignore a clause for liquidated damages if the parties' agreement is clearly unjust and unconscionable. *Worley v McCarty*, 354 Mich 599, 605-606; 93 NW2d 269 (1958); *Curran v Williams*, 352 Mich 278, 282-283; 89 NW2d 602 (1958). Such stipulations on damages will be ignored where the amount previously agreed on is clearly out of proportion to the total amounts involved. *Wilkinson v Lanterman*, 314 Mich 568, 576-577; 22 NW2d 827 (1946). In *Jaquith v Hudson*, 5 Mich 123, 133 (1858), our Supreme Court acknowledged that liquidated damages provisions in contracts need not be enforced if they are clearly unjust and unconscionable, but explained that

> the court will apply this principle, and disregard the express stipulation of parties, *only* in those cases where it is obvious from the contract before them, and the whole subject matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties, would violate this principle, which alone the court recognizes as the law of the contract. [Emphasis in original.]

Accordingly, the parties' agreement to reduce the price will be enforced if the amount is reasonable in relation to the possible injury defendant suffered and is not unconscionable or excessive.

It is undisputed that the parties' agreement required Carlo to provide samples from the actual materials it was to use in the asphalt before the work on the project was performed. The agreement also established the amount of damages if the samples did not meet the required standards, at the rate of a 50-percent price reduction.

Plaintiff argues that the price reduction of $51,200.30 amounts to a penalty because the asphalt actually used in the project was sufficient to meet prescribed standards. Plaintiff maintains that defendant suffered no damages because only the samples were inadequate. Because the proper samples were not provided before the asphalt was installed, however, additional testing was required to confirm that the materials actually installed were proper. Plaintiff acknowledges that additional testing was required after the inadequate samples were discovered. Further, even if plaintiff arranged for the testing, plaintiff concedes that defendant supervised the testing. Thus, although the proper materials may have been installed, plaintiff has not shown that defendant did not suffer some damages because of the failure to comply with the terms of the parties' agreement to provide proper samples before the asphalt was installed.

Plaintiff also argues that the liquidated damages provision should not be enforced because it is merely a detail in the parties' agreement and plaintiff substantially performed under that agreement. See *P & M Const Co, Inc v Hammond Ventures, Inc*, 3 Mich App 306, 314-315; 142 NW2d 468 (1966). We disagree. The parties' agreement specifically addressed price reductions and other remedies in the event that proper samples were not provided. We may not disregard this express requirement as a minor detail. Plaintiff also acknowledges that even if it substantially performed, defendant would be entitled to deduct its damages from the contract price, which appears to be exactly what the liquidated damages clause was intended to do.

Because plaintiff failed to show that the liquidated damages clause was excessive or unconscionable in relation to the harm caused to defendant, the trial court properly enforced this portion of the parties' agreement.

Plaintiff also argues that unjust enrichment prevents defendant from recovering the $51,220.30 reduction. As this Court explained in *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003):

> To sustain a claim for unjust enrichment, plaintiff needed to show that defendants received a benefit from plaintiff and that an inequity resulted to plaintiff as a consequence of defendants' retention of that benefit. In such situations, a contract will be implied by law to prevent unjust enrichment. [Footnotes omitted.]

However, a party is not entitled to enforce an implied contract where there is an express contract in existence covering the same subject matter. *Id.*; see also *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991); *Neal v Neal*, 219 Mich App 490, 495; 557 NW2d 133 (1996). For this rule to apply, there must be a valid, enforceable contract. *Biagini v Mocnik*, 369 Mich 657, 659-660; 120 NW2d 827 (1963).

Because the parties have an express contract that includes a valid liquidated damages clause, plaintiff cannot prevail on its theory of unjust enrichment. The parties agreed that defendant would be entitled to a price reduction in the event that plaintiff 's subcontractor did not comply with the requirement for providing samples. This Court may not ignore that provision based on unjust enrichment.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis