STATE OF MICHIGAN

COURT OF APPEALS

W.C. DUCOMB COMPANY, INC., Plaintiff-Appellant,	UNPUBLISHED February 16, 2012
v ANN ARBOR MACHINE COMPANY and CITIZENS BANK, Defendants-Appellees, and LINAMAR CORP. and LINAMAR USA, INC. Defendants.	No. 301988 Washtenaw Circuit Court LC No. 09-000700-CK

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants'[1] motion for summary disposition. This case arose out of a cancelled project between Chrysler Group, LLC ("Chrysler") and Linamar. As a result of that cancellation, Linamar cancelled its agreements with its contractors, which in turn resulted in the sub-contractors' agreements being cancelled. Plaintiff, as one of these subcontractors, sought payment from Linamar. We affirm.

I. BASIC FACTS

In 2007, Chrysler decided it was going to construct a new plant in Kokomo, Indiana, where a new dual-clutch transmission would be produced. Chrysler then entered into an agreement with Linamar, where Linamar would supply various parts and machines. Linamar, in turn, entered into a contract with Ann Arbor Machine Company ("AAM"). AAM was to supply

[1] "Defendants" refers only to Linamar Corp. and Linamar USA, Inc. (collectively, "Linamar"). The other codefendants were dismissed via stipulated order at the trial court, leaving only appellees as the remaining defendants.

certain equipment in exchange for approximately $12,000,000. AAM, in turn, entered into an agreement with plaintiff, where plaintiff would supply certain materials to AAM.

On October 22, 2008, Chrysler notified Linamar that it was cancelling the Kokomo project. As a result, Linamar was to cease all work on the operation. On October 24, 2008, Linamar notified AAM to cease its operations on the project. Linamar also requested all of its suppliers, including AAM, to compile cancellation costs that Linamar would then submit to Chrysler.

On December 2, 2008, AAM submitted to Linamar a cancellation claim of $10,789,733. The claim included $97,335.67 that was owed to plaintiff. Thereafter, Linamar submitted to Chrysler a claim in the amount of $19,356,471, which included the $10,789,733 from AAM (and necessarily the $97,335.67 from plaintiff). On January 27, 2009, Chrysler and Linamar eventually reached an initial settlement agreement related to the cancellation of the project. The settlement provided that Chrysler would pay Linamar 100 percent of the tooling and 80 percent of the capital costs. This equates to Chrysler paying 85.2 percent of the overall $19,356,471 amount, or $16.49 million. The agreement required Chrysler to pay $2,000,000 by January 30, 2009, which it did, leaving approximately $14.49 million owed.

On March 27, 2009, Chrysler and Linamar entered into a new settlement agreement. The new agreement contained the following three provisions:

> 1. Instead of the $14.59[2] million US [previously agreed upon], Chrysler will pay Linamar $8.25 million US by March 31st, 2009.
>
> 2. Linamar will negotiate, absorb and finalize all supplier cancellation claims above the $8.25 million US and Chrysler will have no further liability in respect of any claims made by Linamar or it's [sic] suppliers on the Kokomo project.
>
> 3. Chrysler will continue to work with Linamar in identifying new opportunities with the intent of sourcing $25-$50 million in the next 180 days. [Footnote added.]

Also on March 27, 2009, the same day that Linamar and Chrysler entered into the amended settlement agreement, Linamar and AAM entered into their own settlement agreement. The Linamar-AAM agreement provided, in pertinent part, the following:

> 1. Subject to the conditions and on the terms stated herein, Linamar shall pay AAM the amount of $5,000,000 in full settlement of any and all claims relating to the Supply Contract ("Cancellation Payment"). Linamar shall pay the Cancellation Payment as follows:

[2] This appears to be a typo since the amount owed was $14.49 million.

(a) Linamar shall deliver a check in the amount of $4,850,000 on or before April 1, 2009.

(b) Linamar shall retain from the Cancellation Payment the amount of $150,000 (the "Hold-Back") to be held by Linamar until December 31, 2009. Linamar shall disburse the balance of the Hold-Back funds within five (5) business days after December 31, 2009.

2. As a condition precedent to Linamar's obligation to release any of the Hold-back funds, AAM shall:

(a) negotiate, settle and fully satisfy the claims of all subcontractors or third party vendors used by AAM in connection with AAM's performance under the Supply Contract ("Subcontractors");

[3]4. AAM may defend, indemnify and shall hold Linamar harmless from and against any claims or demands by any Subcontractor or other third party vendor arising out of or in any way relating to AAM's work under the Supply Contract, including, without limitation, all reasonable attorney's fees and other costs and expenses incurred in connection therewith. Linamar shall be entitled to use any or all of the Hold-Back funds in full or partial satisfaction of AAM's obligations under this provision.

On March 31, 2009, Chrysler paid the $8.25 million to Linamar. Linamar complied with the first provision of its agreement with AAM by paying AAM $4,850,000 on April 1, 2009.

Through the course of some of these negotiations and discussions, AAM started to wind down and, in fact, terminated its operations on March 31, 2009.

II. PROCEDURAL HISTORY

On June 12, 2009, plaintiff filed suit against AAM and its lender Citizens Bank ("Citizens") seeking recovery of money allegedly owed plaintiff as a result of the cancelled Kokomo project. On February 12, 2010, plaintiff amended its complaint to include the Linamar defendants.

On May 18, 2010, plaintiff, AAM, and Citizens entered into a settlement agreement and release. As part of that agreement, plaintiff agreed to dismiss AAM and Citizens as defendants in the law suit, and AAM assigned to plaintiff its right to seek collection of the remaining $150,000 allegedly owed by Linamar. Shortly thereafter, a stipulated order for consent judgment was entered that dismissed both AAM and Citizens.

[3] The copy of the contract provided by both parties does not have any subparts after (a) nor does it have a "3" section.

Having obtained the assignment from AAM, plaintiff filed its second amended complaint on July 8, 2010. With the Linamar entities as the only remaining defendants, the complaint sought recovery on four different counts: unjust enrichment, constructive trust, breach of contract/third-party beneficiary, and breach of contract.

After conducting discovery, Linamar filed a motion for summary disposition on all counts on November 15, 2010. Linamar argued that plaintiff could not show that Linamar received any benefit from *plaintiff*, that no contract rights could be enforced against Linamar because the condition precedent had not been satisfied, and, since plaintiff could not prevail on any of its substantive claims, it could not claim a constructive trust over the $150,000.

Plaintiff filed a response, arguing that plaintiff provided a benefit to Linamar by submitting supplier invoices, which in turn resulted in the settlement payment by Chrysler to Linamar, that the Linamar-AAM settlement required Linamar to pay on sub-contractor claims from the hold-back funds, that plaintiff was a third-party beneficiary of the Linamar-AAM agreement, and that a constructive trust should be declared.

The trial court determined that plaintiff could not prevail on the unjust enrichment claim because any benefit Linamar obtained came from Chrysler, and not plaintiff. The trial court also determined that the condition precedent in the Linamar-AAM agreement was never satisfied; thus, plaintiff could not prevail on any breach of contract claim, whether as an assignee of AAM or as a third-party beneficiary. Last, the trial court dismissed the "constructive trust" count because it determined that it was not an independent ground for a claim; instead, it was a remedy.

III. ANALYSIS

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10)[4] is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

[4] While Linamar moved for summary disposition under both MCR 2.116(C)(8) and MCR 2.116(C)(10), the parties and the trial court relied on materials beyond the pleadings. Thus, the motion is considered as being granted solely under MCR 2.116(C)(10). *Mino v Clio School Dist*, 255 Mich App 60, 63 n 2; 661 NW2d 586 (2003).

A. UNJUST ENRICHMENT

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendants on plaintiff's unjust enrichment claim. We disagree.

Unjust enrichment is an equitable doctrine and occurs where (1) the defendant has received a benefit from the plaintiff and (2) it would be inequitable to allow defendant to retain that benefit. *Kammer Asphalt Paving Co v E China Twp Schools*, 443 Mich 176, 185; 504 NW2d 635 (1993); *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007). If these requirements are satisfied, "the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006).

Plaintiff claims that Linamar was unjustly enriched when Linamar retained a benefit by failing to pay plaintiff money it received from Chrysler in conjunction with its settlement agreement with Chrysler. Assuming that retaining the money from Chrysler was a benefit, it is undisputed that those funds came from Chrysler, not plaintiff. Accordingly, plaintiff cannot establish the first element of unjust enrichment.

Plaintiff's reliance on *Morris Pumps*, 273 Mich App 187, is misplaced. In *Morris Pumps*, the city of Detroit contracted with the defendant general contractor to construct a wastewater-treatment facility. The defendant, in turn, entered into an agreement with the subcontractor Centerline Piping. And Centerline Piping, in turn, entered into an agreement with the plaintiff to supply certain equipment and materials.

The plaintiff fulfilled its obligations and delivered the equipment to the project site. However, shortly afterwards, Centerline Piping went out of business. The defendant general contractor hired a new subcontractor to replace Centerline Piping. The new subcontractor used the equipment that the plaintiff had provided. Neither Centerline nor the defendant general contractor ever paid the plaintiff for the materials.

This Court held that the defendant general contractor's "retention of the materials, coupled with [the] defendant's failure to compensate plaintiffs, resulted in the unjust enrichment of [the] defendant at plaintiffs' expense." *Id.* at 197.

The facts surrounding *Morris Pumps* are distinguishable. In *Morris Pumps*, the defendant received a benefit *from the plaintiff* by "retaining and using" the plaintiff's materials. *Id.* In the case at bar, Linamar did not retain or use the materials that plaintiff manufactured. To the contrary, the evidence shows that the materials were liquidated by Citizens in order to satisfy some of AAM's debts. Furthermore, plaintiff's characterization that this money was "at the expense" of plaintiff is not accurate. If Chrysler had not paid Linamar, there was no evidence to suggest that Chrysler would have paid plaintiff. Thus, Chrysler's payment cannot be deemed to be "at the expense" of plaintiff.

For the above reasons, we determine that plaintiff failed to present sufficient evidence to support its claim of unjust enrichment. As a result, the trial court did not err when it granted summary disposition in favor of Linamar on this count.

B. BREACH OF CONTRACT

Plaintiff next argues that the trial court erred when it dismissed its breach of contract claims. We disagree. This issue involves the interpretation of a contract, which we review de novo. *Bandit Indus, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). In interpreting a contract, we must apply the plain and unambiguous language of a contract as the document reflects the parties' intent as a matter of law. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). Additionally, a contract is to be construed in its entirety. *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000). All of its parts are to be harmonized so far as reasonably possible, and no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable. *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010).

At the heart of this issue is whether the failure to satisfy the condition precedent in the AAM-Linamar agreement is fatal to plaintiff's contractual claims. A condition precedent is a fact or event that the parties intend must take place before there is a right to performance. *Able Demolition v Pontiac*, 275 Mich App 577, 583; 739 NW2d 696 (2007). Thus, "[f]ailure to satisfy a condition precedent prevents a cause of action for failure of performance." *Berkel Co Contractors v Christman Co*, 210 Mich App 416, 420; 533 NW2d 838 (1995). It is not disputed that AAM never satisfied the condition set forth in paragraph 2 of the contract.

The pertinent section of the AAM-Linamar contract covers paragraphs 1, 2, and 4. The copies of the contract did not contain a paragraph 3. The paragraphs are as follows:

> 1. Subject to the conditions and on the terms stated herein, Linamar shall pay AAM the amount of $5,000,000 in full settlement of any and all claims relating to the Supply Contract ("Cancellation Payment"). Linamar shall pay the Cancellation Payment as follows:
>
> > (a) Linamar shall deliver a check in the amount of $4,850,000 on or before April 1, 2009.
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> > (b) Linamar shall retain from the Cancellation Payment the amount of $150,000 (the "Hold-Back") to be held by Linamar until December 31, 2009. Linamar shall disburse the balance of the Hold-Back funds within five (5) business days after December 31, 2009.
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> 2. As a condition precedent to Linamar's obligation to release any of the Hold-back funds, AAM shall:
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> > (a) negotiate, settle and fully satisfy the claims of all subcontractors or third party vendors used by AAM in connection with AAM's performance under the Supply Contract ("Subcontractors");
>
> 4. AAM may defend, indemnify and shall hold Linamar harmless from and against any claims or demands by any Subcontractor or other third party vendor arising out of or in any way relating to AAM's work under the Supply Contract, including, without limitation, all reasonable attorney's fees and other costs and

> expenses incurred in connection therewith. Linamar shall be entitled to use any or all of the Hold-Back funds in full or partial satisfaction of AAM's obligations under this provision.

At the outset, we recognize that, since paragraph 1(b) deals with Linamar's obligation to pay AAM, plaintiff's recovery under this obligation necessarily requires plaintiff's status as AAM's assignee. Likewise, since paragraph 4 deals with Linamar paying subcontractors who were not party to the contract, plaintiff's recovery on this obligation involves its status as a third-party beneficiary.

Given the explicit language of paragraph 2 ("As a condition precedent to . . . ."), there is no question that a condition precedent exists. There also is no question that the condition was never satisfied because AAM never negotiated, settled, and fully satisfied the claims of all its subcontractors or third-party vendors. The next question to be answered is which obligations are subject to the condition. There are two different obligations at issue. The first one is contained in paragraph 1(b), which describes Linamar's obligation to pay the $150,000 hold-back funds to AAM. The second obligation is found in paragraph 4, which describes Linamar's purported obligation to "use any or all of the Hold-Back funds in full or partial satisfaction of AAM's obligations."

Because interpreting the condition precedent as applying to paragraph 4 would create an irreconcilable conflict, we hold that the condition precedent in paragraph 2 only applies to the obligation contained in paragraph 1(b). Paragraph 4 of the contract describes how AAM is to defend and hold Linamar harmless against any claims from any subcontractors that AAM had agreements with. It then states that "Linamar shall be entitled to use any or all of the Hold-Back funds in full or partial satisfaction of AAM's obligations under this provision." The clear and plain language of the provision allows for Linamar to pay these subcontractors out of the hold-back fund. However, if paragraph 2 was a condition precedent to this "obligation," then the obligation would *never* be triggered because if the condition was satisfied, that means that all of the subcontractors' claims were already fully negotiated and settled. Thus, the subcontractors could never bring a claim against Linamar.

Furthermore, the placement of the condition precedent in the contract supports our view. The condition is placed in the sentence immediately following the obligation provided in paragraph 1(b). So when paragraph 2 states, "As a condition precedent to Linamar's obligation," it is understood it is referring to the obligation that was just previously mentioned. Notably, it did not state that the condition applied to any[5] or all of Linamar's obligation**s**, but instead to a single obligation.

However, having decided that there is no condition precedent associated with paragraph 4, plaintiff still cannot succeed on its third-party beneficiary claim. Because the "obligation" present in paragraph 4 did not compel Linamar to pay AAM's subcontractors, we need not

[5] While the condition contains the word "any," it clearly refers to the hold-back fund itself, in the context of its obligation to pay AAM.

determine whether plaintiff is an actual third-party beneficiary or merely an incidental beneficiary. Paragraph 4 states that "Linamar shall *be entitled* to use any or all of the Hold-Back funds in full or partial satisfaction of AAM's obligations under this provision." (Emphasis added.) *Random House Webster's College Dictionary* (1997) defines "entitle" as "to give a right or claim to something." Thus, Linamar had *a right* to use any or all of the hold-back funds to satisfy all or part of AAM's obligations, but it was not *obligated* to do so. If the parties intended Linamar to have been bound to satisfy the debts of the subcontractors, the contract would have omitted the "be entitled to" language and would have read, "Linamar shall use any or all of the Hold-Back funds . . . ." Instead, paragraph 4 merely allowed Linamar to legally spend money from the hold-back fund without having to obtain AAM's permission.

In sum, plaintiff's contract claims fail. Plaintiff cannot prevail by virtue of it being an assignee of AAM because the condition precedent was never met regarding the paragraph 2 obligation. And plaintiff cannot prevail on its theory of being a third-party beneficiary because the "obligation" in paragraph 4 was not a definite, enforceable promise. The trial court, in dismissing plaintiff's claims, relied exclusively on the condition precedent not being met. Even though the trial court erroneously relied on this theory for plaintiff's third-party beneficiary claim, we affirm because the correct result was reached. See *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

C. CONSTRUCTIVE TRUST

Plaintiff next argues that the trial court erred when it dismissed its constructive trust claim. We disagree.

A constructive trust is a legal fiction that is used purely as an equitable remedy. *Nelson v Woodworth*, 363 Mich 244, 250; 109 NW2d 861 (1961). It is imposed when property has been acquired under such circumstances that the holder of legal title may not, in good conscience, retain the beneficial interest. *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958). The party seeking to have a constructive trust imposed has the burden to establish fraud, misrepresentation, concealment, undue influence, duress, or similar circumstance that would make it inequitable for the legal title holder to retain and enjoy the property. *Kammer Asphalt*, 443 Mich at 188.

Here, plaintiff simply relies on the unjust enrichment claim that was discussed, *supra*, as the justification for imposing the constructive trust. Since we found that plaintiff cannot successfully maintain that claim, there is no basis for imposing a constructive trust. Thus, the trial court did not err when it dismissed plaintiff's constructive trust claim.

Affirmed. Defendants, the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray