[Cite as *Flexospan Steel Bldgs., Inc. v. M & C Constr., L.L.C.*, 2021-Ohio-3332.]

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

FLEXOSPAN STEEL BUILDINGS, INC.,

Plaintiff-Appellee,

v.

M & C CONSTRUCTION LLC,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 20 MA 0120**

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Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No.18-CV-3010

**BEFORE:**
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty.* Jeffrey L. Koberg, Law Offices of Timothy Sullivan, 18013 Cleveland Parkway, STE 180, Cleveland, Ohio 44135, for Plaintiff-Appellee and

*Atty. James R. Wise,* Hartford & Wise, Co., LPA, 91 West Taggart, P.O. Box 85, East Palestine, Ohio 44413, for Defendant-Appellant.

Dated: September 15, 2021

**D'Apolito, J.**

**{¶1}** Defendant-Appellant M&C Construction LLC ("M&C") appeals the entry of judgment in favor of Plaintiff-Appellee, Flexospan Steel Inc. ("Flexospan") by the Mahoning County Court of Common Pleas, following a bench trial before the Magistrate, on this action on a stated account, and, in the alternative, for unjust enrichment. M&C advances a single assignment of error with four subparts.

**{¶2}** First, M&C argues that Flexospan did not sustain its burden of proof to establish the existence of a stated account or the elements of unjust enrichment. Next, M&C argues that the trial court erred in entering judgment in favor of Flexospan on both counts, as a contract is an essential element of the account claim, and the absence of a contract is an essential element of the unjust enrichment claim. Third, M&C argues that Flexospan has unclean hands, because the company failed to confirm that an agency relationship existed between the purported agent and M&C prior to extending credit to M&C. Finally, M&C asserts that Flexospan failed to join a necessary party, because the purported agent was not made a party to the case.

**{¶3}** For the following reasons, the judgment entry of the trial court finding in favor of Appellee on both counts and awarding damages in the amount of $35,513.42 plus interest, is affirmed.

## FACTS

**{¶4}** Three witnesses offered testimony at the bench trial: Ron Leksell, the purported agent of M&C; Lauri Frederick, the President of Flexospan; and Michael Stanec, the President and owner/operator of M&C.

**{¶5}** M&C is an Ohio limited liability company in the business of residential and commercial construction. Flexospan is a Pennsylvania corporation that manufactures commercial and industrial steel siding, roofing, and accessories.

**{¶6}** Leksell testified that he was self-employed in the construction business for the majority of his career, but in his final years he began subcontracting in the commercial and industrial roofing business. He retired two years prior to the bench trial.

**{¶7}** According to Leksell's testimony, he acted as a de facto project manager on behalf of M&C on four jobs: the Howe Candy job, the Wendell August job, the Columbus job, and the Youngstown Armory job. Leksell's responsibilities included preparing a "take off" sheet (a list of required materials), which he would discuss with Stanec, sometimes in person, sometimes by telephone. If Stanec authorized the materials list, Leksell would place an order. Leksell testified that Stanec, in addition to approving and disapproving materials, also discussed suppliers.

**{¶8}** Leksell characterized his role on the job site as a "troubleshooter." He testified that he retrieved the materials from Flexospan and delivered them to the respective job sites.

**{¶9}** The Howe Candy job entailed installing a new rubber roof. During the installation, Leksell discovered that a new box gutter was needed. The box gutter was not on the original take off sheet. According to Leksell, M&C had no previous relationship with Flexospan, but Leksell had been purchasing materials from the company for over twenty years. According to Leksell, Stanec approved the purchase from Flexospan because Flexospan was able to provide the box gutter and required accessories within a few days.

**{¶10}** The Columbus job entailed removing and replacing a flat rubber roof. During installation, Leksell discovered the need for a metal wall panel with a hidden fastener panel. According to Leksell, Stanec approved the purchase from Flexospan due to the company's ability to provide the necessary products in a few days.

**{¶11}** The Wendell August job entailed replacing a standing seam roof with a gutter and flashing for skylights. Leksell explained that "a company called Wesex had spec'd Flexospan in the project." In other words, Wesex, the general contractor, included materials from Flexospan in the specifications for the project. Nonetheless, Leksell engaged in a conversation with Stanec regarding the proposed purchases from Flexospan and Stanec approved them.

**{¶12}** Finally, Leksell conceded that the Youngstown Armory job was a "labor only" job for M&C. However, when the job stalled due to the need for "coping material," Stanec approved the purchase of the material from Flexospan in order to complete the job.

**{¶13}** In summary, Leksell testified that the orders for all of the material provided on the four jobs were approved in advance by Stanec. He further testified that he placed the orders, with Stanec's authorization, on behalf of M&C.

**{¶14}** Frederick testified that Leksell ordered materials on behalf of M&C. As a consequence, invoices were sent to M&C for the materials ordered by Leksell by U.S. mail. In December of 2013, when all but one of the statements were past due, Frederick telephoned Stanec. According to her testimony, Stanec did not dispute that the products were supplied to M&C, but, instead, requested a list of the job names associated with the statements. Frederick sent them by U.S. mail.

**{¶15}** Frederick called Stanec a second time in January of 2014. According to her testimony, Stanec made no objection to the statements, but again requested that a list of the job names associated with the supplied products. Frederick testified that statements were sent every month to M&C regarding the overdue payments.

**{¶16}** In February of 2014, David Dull from Wesex contacted Frederick requesting a completed steel certification form. Frederick called Stanec and explained that the certificate would not be completed until payment was received.

**{¶17}** According to Frederick, she also received a facsimile of a State of Ohio Tax Exemption form bearing Stanec's signature. Frederick explained that the exemption form had no bearing on a bill due and owing from a Pennsylvania company.

**{¶18}** Then, in July of 2015, Frederick received an electronic mail from an unknown sender requesting all documents relating to M&C. Frederick responded that Flexospan did not share customer information with third parties, and Stanec would have to submit the request in order for the requested information to be provided.

**{¶19}** Stanec testified that Leksell was a subcontractor that he "subbed out to help oversee some jobs." (*Id.* at 103.) He further testified that no subcontractor of M&C has the authority to request credit. Stanec explained that suppliers never extend credit in the absence of a completed credit application and a fully-executed and signed personal guarantee.

**{¶20}** Stanec testified that he had no knowledge of Flexospan, and that he called Frederick immediately upon receipt of the first statement from the company to inform her that he had not authorized the purchases. Stanec further testified that he informed

Frederick that Leksell did not have authority to purchase products on behalf of M&C.

**{¶21}** Stanec conceded that he requested all of the statements, with job names, relating to M&C, but for the sole purpose of determining the materials that Leksell purchased from Flexospan purportedly on M&C's behalf. Stanec explained that he had hoped that the statements would contain addresses of the job sites so he could track the materials, but the statements did not contain the desired information. On cross-examination, Stanec conceded that he sent no written correspondence denying the purchases, however, he claimed that he spoke to Frederick "a couple of times about it." (*Id.* at 112.)

**{¶22}** According to Stanec, the Howe Candy job caused a rift between himself and Leksell, because Stanec discovered that Leksell was performing the job on his own behalf and billing the materials to M&C. Stanec testified that Leksell promised that M&C would be paid for the work, but Howe Candy paid Leksell directly and M&C was never compensated.

**{¶23}** With respect to the Columbus job, Stanec testified that he would not undertake a job in Columbus because he would have "no idea where it's going, how to track it." (*Id.* at 105.) Further, Stanec testified that he only works with suppliers that give him an end-of-year rebate on his purchases. Finally, he testified that he has products delivered to the job site in order to keep a record of the materials provided.

**{¶24}** Stanec denied having any conversation with Leksell about Flexospan. Stanec conceded that he was paid for the Wendell August job, but he asserted that he had no idea that any materials were purchased from Flexospan. He claimed that M&C was "strictly labor" for the Youngstown Armory job, and that he was never paid. (*Id.* at 106, 114.)

**{¶25}** Finally, Stanec testified that the facsimile number on the tax exemption form was not M&C's fax number. However, he conceded on cross-examination that the form bore his signature.

**{¶26}** The Magistrate found in favor of Flexospan on both counts in the complaint. M&C filed objections to the Magistrate's Decision, but the trial court adopted the Magistrate's findings in their entirety. This timely appeal followed.

## ANALYSIS

## ASSIGNMENT OF ERROR NO. 1

**THE TRIAL ERRED [SIC] IN GRANTING JUDGMENT TO PLAINTIFF AGAINST DEFENDANT.**

**{¶27}** An "account stated" requires "an agreement between parties, express or implied, based upon an account balanced and rendered." *AJ Amatore & Co. v. Sebastiani*, 7th Dist. No. 18 MA 0137, 2019-Ohio-4879, 149 N.E.3d 136, ¶ 17, see also *HHL Group, Inc. v. Ken's Auto Serv. Ctr., Inc.*, 9th Dist. Medina No. 10CA0021-M, 2011-Ohio-1153, 2011 WL 860427, ¶ 18 ("An account stated properly exists only where accounts have been examined and the balance admitted as the true balance between the parties, without having been paid."). In other words, an account stated is based upon an assent to its correctness, which may be expressed or implied from the circumstances. *Sebastiani* at ¶ 18, quoting *Creditrust Corp. v. Richard*, 2d Dist. Clark No. 99-CA-94, 2000 WL 896265 (July 7, 2000).

**{¶28}** Assent to the correctness of the balance may occur from the failure to object within a reasonable time to the bill. *Id.* at ¶ 19. An account rendered by one person to another and not objected to by the latter within a reasonable time becomes an account stated. It becomes the duty of the one to whom the account is thus rendered to examine the same within a reasonable time and object if he or she disputes its correctness. *Id.* citing *Credittrust, supra.*

**{¶29}** On the other hand, the Twelfth District had held that the failure to object to the accuracy of billings by the party owing money on an account does not necessarily create an "account stated." *Starr Fireworks, Inc., citing Blanchester Lumber & Supply, Inc. v. Coleman*, 69 Ohio App.3d 263, 266, 590 N.E.2d 770 (12th Dist.1990). The Ninth Appellate District has opined that if "the acknowledgment or admission is qualified, and not absolute, or if there is but an admission that something is due, without specifying how much * * * there is no account stated." *HHL Group, Inc. v. Ken's Auto Serv. Ctr., Inc.*, at ¶ 18.

**{¶30}** In Ohio, an unjust enrichment claim is quasi-contractual in nature. It is an obligation which arises by law to address an instance where a party is the recipient of benefits which that party is not equitably entitled to retain. *Hummel v. Hummel*, 133 Ohio

St. 520, 527, 14 N.E.2d 923 (1938). Unjust enrichment arises where no express contract exists, and any agreements are those implied by the actions of the parties. *Total Office Sols., Inc. v. Grimstad*, 7th Dist. Columbiana No. 18 CO 0014, 2019-Ohio-2638, ¶ 21, citing *Weiper v. W.A. Hill & Assoc.*, 104 Ohio App.3d 250, 262, 661 N.E.2d 796 (1st Dist. 1995).

**{¶31}** The only remedy available to a party in raising an unjust enrichment claim is restitution of the reasonable value of the benefit unjustly conferred. *St. Vincent Med. Ctr. v. Sader*, 100 Ohio App.3d 379, 384, 654 N.E.2d 144 (6th Dist. 1995). The purpose of an unjust enrichment claim "is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant." *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21 (2005), citing *Hughes v. Oberholtzer* 162 Ohio St. 330, 335, 123 N.E.2d 393 (1954).

**{¶32}** The elements of an unjust enrichment claim are: (1) a benefit conferred by plaintiff upon defendant; (2) knowledge by defendant of the benefit; and (3) retention of the benefit by defendant in circumstances where retention without payment to plaintiff is unjust. *L & H Leasing Co. v. Dutton*, 82 Ohio App.3d 528, 534, 612 N.E.2d 787 (3d Dist. 1992). Further, the benefit conferred by the plaintiff must be in response to a fraud, misrepresentation, or bad faith on behalf of the defendant. *McCamon-Hunt Ins. Agency, Inc. v. Med. Mut. of Ohio*, 7th Dist. Mahoning No. 07 MA 94, 2008-Ohio-5142, ¶ 27, citing *Natl. City Bank v. Fleming*, 2 Ohio App.3d 50, 58, 440 N.E.2d 590 (8th Dist. 1981). This requirement ensures the existence of causation between the plaintiff's loss and the defendant's benefit. *Id.*, citing *HLC Trucking v. Harris*, 7th Dist. Belmont No. 01 BA 37, 2003-Ohio-0694, at ¶ 26.

**{¶33}** "[A] court of appeals should affirm a trial court when the evidence is legally sufficient to support the jury verdict as a matter of law." *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, 874 N.E.2d 1198, ¶ 3, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Further, even if the evidence is sufficient as a matter of law, courts should affirm a civil verdict, as not being against the manifest weight of the evidence, if the verdict is supported by some competent, credible evidence. *Id.* Under the civil manifest weight of the evidence standard, courts must "presume that the findings of the trier of fact are correct" in light of the fact that "the [trier of fact] had an

opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 24, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), and *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264.

**{¶34}** The testimony of Leksell and Frederick was directly contradicted by Stanec's testimony. As a consequence, the verdicts in this case turned exclusively on the believability of the witnesses. As the trier of fact is in the best position to determine credibility, we must not second-guess the trial court in assessing the credibility of the witnesses. *Dimmerling v. Dimmerling*, 7th Dist. Noble No. 18 NO 0460, 2019-Ohio-2710, 2019 WL 2774307, ¶ 65. Unless a greater amount of evidence supports a contradictory finding, appellate courts should defer to the trier of facts conclusions because it is in a better position, "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

**{¶35}** Here, the trial court credited Frederick's testimony that Stanec expressed no objection to the statements. Instead, he asked for additional information, not once, but twice. A year later, another party requested the same information regarding the amount owed to Flexospan. The trial court concluded that Stanec failed to object to the statements in a reasonable time and entered judgment in favor of Flexospan. Likewise, the trial court relied on the testimony of Leksell and Frederick to conclude that M&C was unjustly enriched as a result of the use of Flexospan's products. Insofar as we must defer to the trial court with respct to the credibility of witnesses, we find that no miscarriage of justice resulted from the entry of judgment in favor of Flexospan and against M&C on both counts in the complaint.

**{¶36}** Next, M&C contends that the trial court erred in entering judgment on both the stated account claim and the unjust enrichment claim. While it is true that an unjust enrichment claim cannot stand when an express contract exists, a stated account claim can be predicated upon an express or implied agreement between the parties. An unjust

enrichment claim is similarly predicated upon an agreement implied by the actions of the parties. Accordingly, we find no conflict in the trial court's entry of judgment in favor of Flexospan on both claims. Further, the trial court entered judgment on both claims for the amount due and owing on the statements, so there was no double recovery. Accordingly, we find no error.

**{¶37}** In its third argument, M&C argues that Flexospan had unclean hands based on its failure to confirm Leksell's purported agency relationship with M&C. The "clean hands doctrine" of equity requires that whenever a party takes the initiative to set into motion the judicial machinery to obtain some remedy but has violated good faith by [its] prior-related conduct, the court will deny the remedy. *Ferguson v. Boron*, 7th Dist. No. 15 CO 0030, 2018-Ohio-69, 105 N.E.3d 424, ¶ 18. The movant's conduct "must constitute reprehensible, grossly inequitable, or unconscionable conduct, rather than mere negligence, ignorance, or inappropriateness." *Id*. at ¶ 19, citing *Wiley v. Wiley*, 3d Dist. No. 9-06-34, 2007-Ohio-6423, at ¶ 15, 2007 WL 4225506. In order to bar a movant's claims, the movant must be at fault in relation to the nonmovant and in relation to the subject matter on which the movant's claims are based. *Trott v. Trott*, 10th Dist. No. 01 AP–852, 2002-Ohio-1077, 2002 WL 392286.

**{¶38}** Here, neither count in the complaint is based on the purported agency relationship between Leksell and M&C. The judgment on the stated account was predicated upon Stanec's failure to timely deny the account balance on the statements. The judgment for unjust enrichment was based upon M&C's use of Flexospan's products. Accordingly, we reject M&C's unclean hands argument.

**{¶39}** Finally, M&C contends that Flexospan failed to join a necessary party. Joinder of a party necessary for a just adjudication is provided under Civ.R. 19(A), which states a person subject to service "shall be joined as a party" if:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason

> of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee. * * * If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. * * *

If joinder is not feasible, the court can determine whether the action can still proceed, i.e., whether the party is in fact indispensable. Civ.R. 19(B) (listing factors).

**{¶40}** As previously stated, Flexospan did not rely on the purported agency relationship between M&C and Stanec to establish M&C's obligation. Further, Leksell claims no interest in the subject of this civil action. M&C argues that "Leksell was paid for certain jobs in which M&C received no compensation." (Appellant's Brf., p. 8.) However, M&C could have filed a third-party complaint against Leksell in order to assert its claims, but chose not to do so. As a consequence, we find no merit in M&C's Civ. R. 19(A) argument.

## CONCLUSION

**{¶41}** In summary, the verdicts on both counts were predicated completely upon the credibility assigned to the witnesses by the trier of fact. Because we must defer to the trial court's credibility determination, in the absence of evidence in the record calling into question the trial court's credibility determinations, we find that the judgment in favor of Flexospan is supported by competent, credible evidence. Further, M&C's arguments predicated upon Leksell's role in the purchases is misplaced, as the purported agency relationship has no bearing on the essential elements of the asserted claims. Accordingly, the judgment entry of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**