SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
*JUDGE*

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

June 14, 2005

Richard E. Berl, Jr., Esquire
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RE: T.A. Tyre Contractor, Inc. v. Elizabeth B. Dean and Christopher J. Olsen,
C.A. No. 04L-03-001

Dear Counsel:

This action arises from the construction of a house in Lewes, Delaware. Plaintiff T.A. Tyre General Contractor, Inc. ("plaintiff") was the general contractor; defendants Elizabeth B. Dean and Christopher J. Olsen ("defendants") are the owners of the house; and John Mateyko ("architect") was the architect.

Pending before the Court is defendants' motion to dismiss plaintiff's count alleging entitlement to recovery of sums due it based on the theory of *quantum meruit.*

In 2002, plaintiff and defendants entered into a contract which provided for plaintiff to construct a house at 413 Burton Street, Lewes, DE. This contract included a document prepared by plaintiff which was attached to the complaint; the Specifications, Plans and Drawings of the

Architect ("Specifications"); AIA Document A101-1997 "Standard Form of Agreement Between Owner and Contractor"; and AIA Document A201-1997 "General Conditions of the Contract for Construction".

Article 7 of AIA Document A201-1997 "General Conditions of the Contract for Construction" describes the procedure to be followed with regard to change orders. It requires change orders to be in writing. Paragraph 7 of the Dispute Resolution Procedures found in the Specifications and Sections 4.4, 4.5, and 4.6 of the AIA Document A201-1997 "General Conditions of the Contract for Construction" require that the parties submit disputes to the architect and if they are not happy with his decision, submit them to mediation and then arbitration.

Disputes regarding payment for work done ensued and plaintiff submitted forty-three (43) claims to the architect for resolution. The architect issued a decision thereon on February 19, 2004.

On March 1, 2004, plaintiff filed its original complaint against defendants.[1] Count one was a claim for a mechanics' lien and in personam action against defendants. Plaintiff asserted the amount owed was $23,909.28.

The original complaint alleges in pertinent part as follows:

> 4. Dean and Olsen contracted with Plaintiffs to build a residential dwelling at 413 Burton Street, Lewes, Delaware, 19958. Mateyko's plans and specifications are incorporated into the contract, and he is specifically identified as an agent for the owners. ...
> 5. Dean and Olsen represented that Mateyko was their agent and had their authority to oversee the project and to approve design changes and modifications.

[1]The complaint also contained a claim against the architect; however, the parties later stipulated to the claim's dismissal with prejudice. That claim is irrelevant to the pending matter.

> 6. Throughout the course of construction Dean, Olsen, and Mateyko requested numerous changes in the plans and specifications for the project. Copies of the change order requests are attached hereto as Exhibit "C".
> 7. These numerous change orders resulted in substantial delays in the progress of the project, as well as significant additional cost.

The change order requests attached to the complaint consisted of those submitted to the architect for resolution before this suit was filed plus three additional ones.

On March 25, 2004, defendants filed their answer and a counterclaim. In that pleading, they did not assert as affirmative defenses that the architect had considered the claims or that the matter should be submitted to mediation and then arbitration pursuant to the provisions of the contract. Defendants' counterclaim was based on a breach of contract claim and sought an award of $38,800.00 in liquidated damages.

The parties participated in a scheduling conference in this case. An arbitration took place. The arbitrator awarded plaintiff all sums requested and denied defendants their counterclaim. Defendants thereafter filed a demand for a trial de novo. Defendants thereafter filed interrogatories and a request for production of documents on plaintiff, and responded to plaintiff's interrogatories, request for admissions, and request for production of documents.

On March 21, 2005, plaintiff filed a motion to amend the pleadings in order to state a claim for *quantum meruit.* The claim arose from the same transactions and/or occurrences set forth in the original complaint. In its moving papers, plaintiff represented as follows:

> 2. As a result of the mandatory arbitration hearing and discovery, it has become apparent that Defendants will rely upon the lack of written change orders, or the lack of signed change orders, in connection with the scope of work, in an effort to avoid payment for work completed by Plaintiff, and from which they continue to benefit.
> 3. Recovery under "quantum meruit" is permitted if the relationship between the parties, or disputed terms of work, are not governed by express contract. Plaintiff

alleges that work requested by the Defendants or their architect/agent, but not reduced to a written change order, or not signed by Defendants, was clearly outside the scope of the original undertaking, and known by Defendants to be such. Such work is therefore susceptible to a *quantum meruit* claim. [Citation omitted.]

4. In addition, Defendants were personally responsible for certain aspects of construction for which some additional work by Plaintiff was necessarily involved, and Defendants allowed such work despite the lack of a written change order, or the lack of a signed change order. Such work is similarly susceptible to a *quantum meruit* claim. [Citation omitted.]

5. The amendment of the complaint will not prejudice the Defendants, as it does nothing more than assert an additional theory for the recovery of the same debt, and does not involve new claims or evidence.

6. The amendment as to the amount sought by Plaintiff will similarly not prejudice the Defendants, as that same amount was sought at the arbitration hearing, and the evidence to support that sum was submitted at that time.

The amended complaint also sought to amend the amount to $63,300.71, a substantial increase in the $23,909.28 originally asserted. The amended count contained the following allegations:

18. At the time Plaintiff was asked to submit a bid on the Defendant's contract, not all of the plans and specifications had been decided upon by Defendants and their architect/agent John Mateyko.

19. Plaintiff and Defendants, and their agent, Mateyko, through a pattern or course of dealing, modified their original undertaking, in terms of the final plans and specifications, timing and price, on a regular basis.

20. Additional work, modifications to specifications, and the actual scheduling of tasks requested by Defendants and directed by their agent, and completed by Plaintiff, were not described or contemplated when the job began.

21. Defendants and their agent knew, or should have know, that additional work and modifications being requested would include additional costs and would affect the timing of construction.

22. In addition, Defendants and their agent witnessed additional work and modifications being undertaken at their request or insistence, and took part in numerous meetings at which the additional work was considered.

23. Further, Defendants assumed responsibility for the completion of certain work and for the providing of certain materials to be incorporated into the dwelling, and which necessarily involved additional work on the part of Plaintiff.

24. Even though written change orders may not have been utilized on all occasions, and even though prepared change orders may not have been signed by

> Defendants or their agent, Defendants have derived a benefit from the additional work, and Plaintiff is entitled to payment under the theory of *quantum meruit.*

Defendants opposed the motion to amend. The Court, however, granted the motion to amend with the proviso that defendants could file a motion to dismiss after filing their answer thereto. Defendants filed their motion to dismiss as instructed. Therein, they argued the count alleging *quantum meruit* should be dismissed because: 1) the theory of *quantum meruit* does not apply; 2) the claim was submitted to an architect who issued a decision thereon; and 3) plaintiff was required to pursue mediation and/or arbitration rather than institute this suit.

Defendants first argue that since plaintiff has stated a claim based on contract, the theory of *quantum meruit* is unavailable to them. The general rule of law is that a party is not entitled to recovery under *quantum meruit* if a contract exists. Stoltz Realty Company v. Paul, Del. Super., C.A. No. 94C-02-208, Del Pesco, J. (Sept. 20, 1995), rearg. den. Stoltz Realty Company v. Paul, Del. Super., C.A. No. 94C-02-208, Del Pesco, J. (Oct. 13, 1995). However, that general law does not resolve the issue at hand.

Here, the dispute centers around the provision of the contract requiring a written change order. Delaware law recognizes that the facts may show that the parties have waived that provision. J.A. Moore & Sons Construction Company v. Inden, Del. Super., C.A. No. 95L-09-008, Graves, J. (June 17, 1998) at 9-10; W.E. Cleaver & Sons, Inc. v. Darley Club, Del. Super., C.A. No. 84L-SE-26, Chandler, J. (Sept. 16, 1987) at 6. See 13 Am.Jur. 2d Building and Construction Contracts § 26 (2004). When the facts show that such has occurred, then the Court can award sums based on the theory of *quantum meruit.* R.E. Height & Associates v. W.B. Vendable & Sons, Inc., Del. Super., C.A. No. 94C-11-023, Lee, J. (Oct. 30, 1996) at 10-11, 13,

15.

It is not appropriate at this stage of the proceedings to make any factual determination regarding whether a waiver of the provision requiring a written change order took place. However, since the complaint alleges such occurred and since the facts may bear out such allegations, plaintiff's claim seeking recovery under a theory of *quantum meruit* is permissible. Thus, I deny dismissal of the claim on this ground.

I now turn to defendants' other two arguments.

The *quantum meruit* claims, although based on a different theory of recovery from the mechanics' lien and in personam claims, are based on the same facts: plaintiff seeks to recover money for tasks performed in constructing defendants' home which apparently were not authorized by signed change orders. Defendants, without addressing how the *quantum meruit* claims are to be treated differently from the mechanics' lien and in personam claims, argue that the claims were addressed by the architect and since plaintiff did not pursue an appeal thereof by way of mediation or arbitration, the decision of the architect is binding. Connected with that argument is defendants' argument that plaintiff was required to submit this matter to mediation and then arbitration rather than file suit in a court of law.

Defendants have actively participated in this litigation. They filed an answer where they did not assert these conditions as precluding the litigation. They asserted a counterclaim. They participated in an arbitration and filed a de novo appeal therefrom. They participated in discovery. After all of this participation, they now seek to advance these two conditions as precluding plaintiff's claims.

Defendants have waived the right to assert the decision of the architect is binding and that

plaintiff was required to submit the matter to mediation and/or arbitration rather than file suit in a court of law. Robert James and Associates, Ltd. v. Palmer, Del. Super., C.A. No. 95L-10-047, Herlihy, J. (January 13, 1997). To allow defendants to assert these defenses against the *quantum meruit* claims would, in effect, allow them to preclude portions of plaintiff's case while at the same time, provide them with the opportunity to obtain discovery and to pursue a counterclaim within the judicial system. They cannot have it both ways. Id. Consequently, I deny defendants' motion to dismiss based on the grounds that the architect's decision is binding and that this matter cannot be resolved in a court of law.

A final issue I address which was not raised in the motion to dismiss but which was raised in the pretrial stipulation concerns the amended amount of sums due with regard to the mechanics' lien. The mechanics' lien, if granted, will be limited to the original amount alleged. The Architects Studio, Inc. v. Broadmeadows Investment, LLC, Del. Super., C.A. No. 98L-03-046, Del Pesco, J. (Aug. 31, 1998).

For the foregoing reasons, defendants' motion to dismiss Count Two of the amended complaint is denied. Furthermore, the amount of the mechanics' lien, if granted, will be limited to the original amount alleged.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office