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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BERMUDA ROAD PROPERTIES, LLC, a
Nevada limited liability company,

Plaintiff,

v.

ECOLOGICAL STEEL SYSTEMS, INC., a
Delaware corporation, d/b/a ECOSTEEL,

Defendant.

2:12-cv-1579-RCJ-VCF
ORDER

Currently before the Court are Bermuda Road Properties, LLC’s Motion for Summary Judgment (#15) and Motion to Dismiss Ecological Steel System’s Counterclaims (#16).

BACKGROUND

I. Complaint

On September 5, 2012, Bermuda Road Properties, LLC (“Bermuda Road”) filed a complaint in this Court, based on diversity jurisdiction, against Ecological Steel Systems, Inc. (“EcoSteel”). (Compl. (#1) at 1-2). According to the complaint, Bermuda Road was a Nevada limited liability company with its principle place of business in Nevada and Ecosteel was a Delaware corporation with its principal place of business in Utah. (*Id.* at 1). The complaint alleged the following. (*Id.* at 2). Bermuda Road owned undeveloped property near Bermuda Road and Sunset Road in Las Vegas, Nevada (the “Property”). (*Id.*). Bermuda Road intended to construct a meeting facility on the Property (the “Project”). (*Id.*). On March 17, 2012, the parties executed a “Services and Purchase Agreement” (the “Agreement”). (*Id.*). The Agreement contemplated that EcoSteel would service, design, purchase, supply, then erect the steel required to construct the Project. (*Id.*). In order to perform under the Agreement,

1 EcoSteel needed a Nevada state contractor's license pursuant to NRS Chapter 624. (*Id.*).
2 EcoSteel did not have such a license and could not perform. (*Id.*). EcoSteel had not
3 registered as a foreign corporation with the Nevada Secretary of State. (*Id.*). Before Bermuda
4 Road was aware that EcoSteel did not have a Nevada state contractor's license, it forwarded
5 approximately \$2.1 million as a down payment to EcoSteel pursuant to the Agreement. (*Id.*).
6 Bermuda Road demanded the return of the down payment. (*Id.* at 3).

7 The complaint alleged two causes of action. (*Id.*). In the first cause of action, Bermuda
8 Road sought declaratory relief that EcoSteel could not perform under the Agreement because
9 it did not have a Nevada contractor's license and that the Agreement was illegal and could not
10 be enforced under NRS § 624.320. (*Id.*). Bermuda Road sought declaratory relief that the
11 Agreement was illegal, unenforceable, null, and void. (*Id.*). In the second cause of action,
12 Bermuda Road alleged unjust enrichment because it had conferred a substantial benefit upon
13 EcoSteel in the form of the down payment for which EcoSteel had not reimbursed Bermuda
14 Road. (*Id.*). Bermuda Road sought to recover in *quantum meruit*. (*Id.* at 4).

15 **II. Counterclaim**

16 In response, EcoSteel filed an answer and counterclaim on October 3, 2012. (Answer
17 (#12) at 1-6; Counterclaim (#12) at 7-14). In the answer, EcoSteel admitted that it had not yet
18 obtained a Nevada contractor's license and that it had not yet registered with the Nevada
19 Secretary of State. (Answer (#12) at 2).

20 In the counterclaim, EcoSteel alleged the following. (Counterclaim (#12) at 7). The
21 parties had entered into negotiations for the design, fabrication, and delivery of engineered
22 steel panels for the Project through a transaction broker. (*Id.* at 8). EcoSteel initially offered
23 to design, fabricate, and deliver Bermuda Road's engineered steel panels to Nevada. (*Id.*).
24 However, Bermuda Road wanted a fixed price for the steel design, fabrication, delivery, labor,
25 and steel erection costs. (*Id.*). EcoSteel told Bermuda Road that "as a design manufacturer
26 it [did] not provide labor and steel erection services but that it had contacts in the industry that
27 could provide those services." (*Id.*). Bermuda Road requested that EcoSteel include the costs
28 of labor and steel erection in its fixed-price bid. (*Id.*). EcoSteel included those costs in its bid

1 after advising Bermuda Road that it could not furnish the labor for steel erection “but that they
2 would put [Bermuda Road] or the general contractor in touch with a licensed steel erector.”
3 (*Id.*). On March 17, 2012, the parties entered into the Agreement. (*Id.*). The scope of
4 EcoSteel’s services under the Agreement was limited to preparing products for shipment and
5 delivering them. (*Id.* at 9). Bermuda Road made the first payment of approximately \$2.1
6 million dollars in connection with the execution of the Agreement upon which EcoSteel
7 immediately began the design and engineering for the steel panels. (*Id.*). On several
8 occasions thereafter, Bermuda Road changed key design elements which required EcoSteel
9 to redesign and reengineer the steel panels. (*Id.*).

10 The counterclaim alleged the following. (*Id.*). The parties and the general contractor
11 held regular meetings to discuss design and engineering details and the progress of the
12 general contractor’s work in readying the site for construction. (*Id.* at 10). On June 12, 2012,
13 they held a meeting and EcoSteel again advised the general contractor and Bermuda Road
14 that it did not have a license to erect the engineered steel panels. (*Id.*). EcoSteel provided
15 its design and engineering information to the municipal building department and re-submitted
16 elements to the building department as necessary based on Bermuda Road’s requested
17 changes. (*Id.*). At the time Bermuda Road filed its complaint, no building permit had been
18 issued but neither the municipality nor Bermuda Road had raised any issues with EcoSteel
19 about the structural design work performed and submitted. (*Id.*). After completion of the
20 engineering, Bermuda Road was required to send EcoSteel a “Production Order” so that
21 EcoSteel could order the raw steel to begin fabrication of the products. (*Id.* at 11). Although
22 some design details had not been finalized, Bermuda Road sent EcoSteel the Production
23 Order on August 2, 2012 believing that a permit would be issued on August 15, 2012. (*Id.*).
24 Pursuant to the Agreement, once a Production Order was placed the Agreement could not be
25 terminated by the buyer and the buyer shall be responsible to accept delivery of all products
26 and to pay all fees and compensation under the Agreement. (*Id.*). Bermuda Road rescinded
27 the Production Order on August 4, 2012. (*Id.*).

28 The counterclaim alleged two causes of action. (*Id.* at 11-12). In the first cause of

1 action, EcoSteel alleged breach of contract against Bermuda Road. (*Id.* at 11). On
2 September 6, 2012, Bermuda Road sent EcoSteel a letter which rescinded the Agreement and
3 demanded a return of all funds paid. (*Id.*).

4 In the second cause of action, EcoSteel alleged quantum meruit/unjust enrichment
5 because it had conferred a substantial benefit upon Bermuda Road in the form of steel
6 fabrication estimation costs, design and engineering work, and related information and
7 services. (*Id.* at 12). Bermuda Road had been enriched by EcoSteel's actions and it would
8 be inequitable to allow Bermuda Road to retain the benefits without compensating or
9 reimbursing EcoSteel. (*Id.*).

10 EcoSteel attached the following exhibits to the counterclaim: (a) the Agreement, (b) a
11 notice of commencement signed by Bermuda Road on August 2, 2012 and notice of
12 modifications to original plans; (c) an email dated August 4, 2012 from Bermuda Road stating
13 that the production notice release had been rescinded and that EcoSteel should stop
14 production; and (d) a letter from Bermuda Road's attorneys dated September 6, 2012
15 demanding acknowledgment that the Agreement was null and void. (See Exhibits (#12-1)).

16 **III. Services and Purchase Agreement (the "Agreement")**

17 The parties entered into the Agreement on March 17, 2012, whereby "EcoSteel
18 desire[d] to sell to Buyer certain pre-engineered building components and related goods and
19 services as more specifically described on Exhibit 'A' & Exhibit 'B' to this Agreement."
20 (Agreement (#12-1) at 2). Under scope of services, the Agreement stated:

21 Except as otherwise provided herein, EcoSteel's scope of supplies and services
22 related to the Products pursuant to this Agreement is limited to preparing for
23 shipment and delivering the Products to Buyer's Ship To Address. (*Id.*). The
24 Products are sold unassembled and except as otherwise provided herein, Buyer
has sole responsibility for selecting the delivery site, site preparation, erection
of the Products, suitability of the Products for Buyer's intended use, assembly
of the Products, and compliance with all applicable law, rules and ordinances.

25 (*Id.*). Under payment, the Agreement stated that "[i]n no event shall payment of any of the
26 fees and compensation due under this Agreement be contingent on any items involving
27 materials or labor not provided by EcoSteel or any items outside the scope of work of this
28 Agreement." (*Id.*).

1 The Agreement’s design code and structural specifications section stated the following:

2 Buyer or Buyer’s site engineer shall review all design load criteria, live loads,
3 wind loads, collateral loads, dead loads, roof loads, seismic loads, snow loads,
4 zone criteria, and other relevant criteria to verify that such criteria meet or
5 exceed the building code requirements of the local jurisdiction where the Project
6 is being constructed. EcoSteel will cooperate with Buyer or Buyer’s site
7 engineer and provide and provide all reasonable and relevant frame information
8 necessary to complete foundation and site design, including anchor bolt
9 locations and sizes, frame structural calculations, and reaction force diagrams.
10 In addition, EcoSteel will provide structural drawings wet stamped by a structural
11 engineer licensed in the state where the Project is located.

12 (*Id.*). The Agreement stated that it “along with all Exhibits that are, or may be, attached to
13 this Agreement, constitute[d] the entire agreement between the Parties and supersede[d] all
14 prior agreements and understandings, whether written or oral, relating to the subject matter
15 of this Agreement.” (*Id.* at 3). The Agreement stated that “[i]n the event that any provision of
16 this Agreement shall be invalid, illegal, or otherwise unenforceable, the validity, legality, and
17 enforceability of the remaining provisions shall in no way be affected or impaired thereby.” (*Id.*
18 at 4).

19 Exhibit A demonstrated that Phase A involved the permit stage and that Phase B
20 involved production/construction once the permit was issued. (*Id.* at 6). EcoSteel planned to
21 “shop drawings” to an architect and a steel erector. (*Id.*).

22 Exhibit B described EcoSteel’s services as engineering, detailing, and project
23 management. (*Id.* at 8). Specifically, EcoSteel was to “provide architectural design review,
24 3D structural modeling, structural engineering, steel detailing services, project management,
25 and all drawings relevant to EcoSteel’s scope of work for an approximately 90,000 square foot
26 Commercial conference and training center. Additional architectural services not provided by
27 EcoSteel include[d], but [were] not limited to mechanical, electrical, plumbing, foundation, and
28 interior finish details.” (*Id.*). EcoSteel planned to provide project management services “from
initial design to completion.” (*Id.*). EcoSteel planned to provide the following project drawings:
(1) structural engineering plans and details stamped by structural engineer licensed in build
state; (2) stamped anchor bolt plans; (3) architectural plans, sections, and details; (4) steel
detailing, framing, and erection plans; (5) insulated panel and trim detail plans; (6) cross

1 sections, wall sections, and details; and (7) shop drawings and bills of materials. (*Id.*).

2 Under pricing and order details, the project goods and services were itemized under the
3 following categories: (a) steel structures; (b) wall and roof insulated panels; (c) floor framing
4 and decking; (d) trim, fasteners, and misc.; (e) design, modeling, and steel detailing; (f)
5 structural engineering; (g) labor–structural steel, panels, and trim; (h) freight; and (i) project
6 management. (*Id.* at 13). Under labor, the details stated that the “steel erector provided by
7 EcoSteel shall have all Licenses, insurance and Certifications needed to erect the steel in
8 Clark County.” (*Id.*). The labor description stated “[i]nallation for all primary and secondary
9 steel, steel pan deck, wall and roof panels and associated exterior trim.” (*Id.*). Under project
10 management, the details stated “[o]n-site Project Manager during initial delivery phase and
11 final punch list inspections. Remote project management through all phases of the project
12 through completion.” (*Id.*). The total contract price was for \$5,381,500. (*Id.*). The labor cost
13 accounted for \$665,000. (*Id.*).

14 **LEGAL STANDARD**

15 In reviewing a motion for summary judgment, the court construes the evidence in the
16 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
17 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment “if the movant shows
18 that there is no genuine dispute as to any material fact and the movant is entitled to judgment
19 as a matter of law.” Fed.R.Civ.P. 56(a). Material facts are “facts that might affect the outcome
20 of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106
21 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is “genuine” if the evidence is such
22 that a reasonable jury could return a verdict for the nonmoving party. *Id.*

23 The moving party bears the initial burden of identifying the portions of the pleadings and
24 evidence that the party believes to demonstrate the absence of any genuine issue of material
25 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265
26 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the
27 assertion by “citing to particular parts of materials in the record, including depositions,
28 documents, electronically stored information, affidavits or declarations, stipulations (including

1 those made for purposes of the motion only), admissions, interrogatory answers, or other
2 materials” or “showing that the materials cited do not establish the absence or presence of a
3 genuine dispute, or that an adverse party cannot produce admissible evidence to support the
4 fact.” Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the
5 motion, the burden shifts to the nonmoving party to come forward with specific facts showing
6 that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
7 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). “The mere existence of a
8 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be
9 evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252,
10 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment “by
11 relying solely on conclusory allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d
12 1040, 1045 (9th Cir. 1989). “Where the record taken as a whole could not lead a rational trier
13 of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita*, 475
14 U.S. at 587, 106 S.Ct. at 1356.

15 **DISCUSSION¹**

16 Bermuda Road filed a motion for summary judgment on its complaint. (Mot. for Summ.
17 J. (#15) at 2). Bermuda Road asserts that the Court may grant summary judgment because
18 EcoSteel failed to register as a foreign corporation with the Nevada Secretary of State. (*Id.*
19 at 6). Bermuda Road argues that the contract is void *ab initio* because EcoSteel is not a
20 licensed contractor pursuant to NRS § 624.020. (*Id.* at 6-7). Bermuda Road asserts that
21 EcoSteel is a contractor within the meaning of the statute because the Agreement called for
22 \$665,000 worth of construction. (*Id.* at 7-8). Bermuda Road asserts that the Agreement

23
24 ¹ The Court will consider Bermuda Road’s motion for summary judgment (#15) on its
25 own complaint and Bermuda Road’s motion to dismiss (#16) EcoSteel’s counterclaims
26 together because the parties make the same arguments in both. The Court notes that
27 EcoSteel attached the same exhibits to its opposition to the motion to dismiss as it did to its
28 opposition for the motion for summary judgment. (*Compare* Opp’n to Mot. to Dismiss (#21),
with Opp’n to Mot. for Summ. J. (#22)). For that reason, the Court converts Bermuda Steel’s
motion to dismiss into a motion for summary judgment on the counterclaims. See Fed. R. Civ.
P. 12(d) (stating that if the district court relies on materials outside the pleadings in making its
ruling, it must treat the motion to dismiss as one for summary judgment and give the
non-moving party an opportunity to respond).

1 cannot be severed because the entire Agreement falls under NRS Chapter 624. (*Id.* at 8).
2 Bermuda Road argues that no exception applies to warrant unjust enrichment for EcoSteel.
3 (*Id.* at 11). Bermuda Steel relies on the case of *Interstate Commercial Bldg. Serv., Inc. v.*
4 *Bank of Am. Nat'l Trust & Sav. Ass'n*, 23 F.Supp.2d 1166 (D. Nev. 1998) to support its
5 arguments. (*See id.* at 7-14).

6 In support of the motion for summary judgment, Bermuda Road submitted: (a) the
7 declaration of Dieudonne Nkwethat, Bermuda Road's property manager; (b) the Agreement;
8 (c) a copy of the wire transfer from Bermuda Road to EcoSteel in the amount of \$2,152,600;
9 (d) an email from Bermuda Road to EcoSteel dated August 6, 2012 requesting a "bill of
10 materials list breakdown with weights and tonnages for each category" and "materials
11 suppliers and the fabricators different locations" and EcoSteel's response that they were "not
12 willing to provide this detailed information" to Bermuda Road at that time; (e) an email, dated
13 August 6, 2012, from Bermuda Road to EcoSteel asking "who the steel was purchased from
14 and the status of the steel"; and (f) an email thread between Bermuda Road and EcoSteel
15 requesting assurance that the \$2.1 million was held in an account and EcoSteel's response
16 that the contracts did not stipulate to holding client deposits in a trust and that Bermuda Road
17 needed to go through the court systems to acquire EcoSteel's private bank account
18 information. (*See Exhibits (#15-1)*).

19 In response, EcoSteel argues that it has now registered as a Nevada foreign company.
20 (*Opp'n to Mot. to Summ. J. (#22)* at 3). EcoSteel asserts that the portion of the Agreement
21 requiring a contractor's license is severable leaving the remaining portions enforceable. (*Id.*
22 at 13). EcoSteel contends that if the Court severs the labor and installation line item from the
23 Agreement the remainder of the Agreement would be enforceable. (*Id.* at 14). EcoSteel
24 argues that pursuant to Nevada law it did not need a license to do engineering/design work
25 or project management because its engineer, Joseph D. Crilly, was licensed in Nevada. (*Id.*
26 at 15-17). EcoSteel contends that its project management duties only included work that was
27 allowed by Nevada's engineering licensing statute. (*Id.* at 17). EcoSteel asserts that it was
28 only "a mere manufacturer supplying steel products" to Bermuda Road. (*Id.* at 18). EcoSteel

1 argues that Bermuda Road knew that EcoSteel did not have a contractor's license and is now
2 seeking to take advantage. (*Id.*). EcoSteel asserts that unjust enrichment applies to it
3 because EcoSteel agreed to place installation in its bid at Bermuda Road's request, EcoSteel
4 told Bermuda Road that it lacked the license for installation and Bermuda Road continued to
5 enter into the Agreement, EcoSteel did not know it was required to have a license at the time
6 of bidding, and it was understood in June 2012 that Bermuda Road would amend the
7 Agreement to sever the installation work from EcoSteel's scope of work and assign it to a
8 general contractor. (*Id.* at 20).

9 EcoSteel attached several exhibits in support of its opposition to summary judgment.
10 The affidavit of Joss Hudson, President of EcoSteel, stated the following. (Hudson Aff. (#22-1)
11 at 2). EcoSteel specialized in providing "Materials & Engineering/Fabrication specifically for
12 Steel Systems that [were] designed in a 3D Engineering process." (*Id.*). The process enabled
13 EcoSteel to "virtually build all of the components of the building in a software environment"
14 which was "more expedient and economical to ensure that the contractors [were] not field
15 modifying parts after fabrication ha[d] already occurred and components [were] on site." (*Id.*).
16 EcoSteel was one of the few pre-engineered steel building companies in the country that
17 utilized the concept of virtually building all components including the bolts in the holes that
18 connected the structures. (*Id.* at 2-3). EcoSteel did not engineer building systems unless a
19 materials contract was in place. (*Id.* at 3). EcoSteel employed engineers and architects but
20 it was "not an engineering firm." (*Id.*). It was a "steel supplier that engineer[ed] its own
21 products." (*Id.*). It did not sell its engineering services. (*Id.*).

22 The affidavit stated the following. (*Id.* at 4). EcoSteel's written estimates notified
23 Bermuda Road that "EcoSteel [did] not provide the erection labor, but once structural
24 engineering and steel detailing [was] completed, the plans [could] be submitted for Erection
25 quotes." (*Id.*). In the end, Bermuda Road's Thom Morse told Hudson that Bermuda Road
26 wanted "a fixed price for the steel design, fabrication and delivery of the Products, as well as
27 labor and steel erection costs." (*Id.* at 5). Hudson reminded Morse that EcoSteel was a
28 design manufacturer and did not provide labor and steel erection services and was not

1 licensed to do so but had “several teams of erectors around the country that [it] had worked
2 with in the past that [it] could bring in for the job.” (*Id.*). Acquiescing Bermuda Road’s request,
3 EcoSteel included the costs of labor and installation in its fixed price bid. (*Id.*). Hudson was
4 not aware that EcoSteel needed a Nevada contractor’s license at the time it submitted a bid
5 for work that required a contractor’s license. (*Id.*). He assumed that EcoSteel did not need
6 a license until the time the work was to be performed. (*Id.*). On June 12, 2012, EcoSteel
7 again advised the general contractor and Bermuda Road that it did not have a license to
8 contract for installation. (*Id.* at 7). EcoSteel provided its design and engineering information
9 and plans to the municipal building department, stamped by EcoSteel’s Nevada licensed
10 engineer, Joseph D. Crilley. (*Id.*). EcoSteel revised the design and engineering information
11 pursuant to Bermuda Steel’s requested changes and resubmitted elements to the building
12 department as necessary. (*Id.*). In July 2012, EcoSteel raised the licensing issue again and
13 proposed that either EcoSteel get licensed and subcontract the installation itself or credit back
14 labor and help Bermuda Road and the general contractor, GKG, hire an erector. (*Id.* at 7).
15 EcoSteel became domesticated in Nevada on October 22, 2012. (*Id.* at 9).

16 EcoSteel attached a preliminary pricing estimate, dated November 30, 2011, for
17 Bermuda Road which stated, *inter alia*, that “EcoSteel does not provide the erection labor, but
18 once structural engineering and steel detailing is completed, the plans can be submitted for
19 Erection quotes.” (Pricing Estimate (22-2) at 27, 31). The pricing estimate stated that
20 construction materials and services by others were not included or provided by EcoSteel. (*Id.*
21 at 34).

22 EcoSteel’s meeting minutes, dated June 12, 2012, demonstrate that EcoSteel and GKG
23 decided that GKG would likely “list EcoSteel as a ‘sub contractor’ since EcoSteel [was] not a
24 licensed contractor in Nevada.” (Meeting Minutes (#22-3) at 25). An email between Thom
25 Morse and Hudson, dated June 14, 2012, demonstrates that Bermuda Road asked EcoSteel
26 to “please check/confirm that an Engineering firm can hire a contractor to erect in this case.”
27 (Contractor Email (#22-4) at 20). An email between EcoSteel and Bermuda Road
28 demonstrates that on, August 2, 2012, Bermuda Road sent EcoSteel the steel production

1 order but then on August 4, 2012, sent EcoSteel an email stating that the production notice
2 release had been rescinded and to stop production. (Production Notice Email (#22-4) at 7).
3 On July 3, 2012, Clark County approved the plans for the Property. (Plan Tracking Status
4 (#22-5) at 2).

5 In reply, Bermuda Road argues that *Interstate Commercial* is “on all fours” and that
6 EcoSteel fails to address that case. (Reply to Mot. for Summ. J. (#29) at 5). Bermuda Road
7 asserts that the Agreement is not severable. (*Id.* at 10-13). Bermuda Road asserts that the
8 evidence regarding any separate oral or implied agreements must be disregarded because
9 the Agreement is complete and unambiguous. (*Id.* at 14).

10 **I. Registered Foreign Corporation**

11 Pursuant to NRS § 80.055(2), a corporation which fails to register as a foreign
12 corporation with the Nevada Secretary of State “may not commence or maintain any action
13 or proceeding in any court of this State.” Nev. Rev. Stat. § 80.055(2). A court must stay an
14 unqualified foreign corporation’s action until the foreign corporation qualifies. *Exec. Mgmt.,*
15 *Ltd. v. Ticor Title Ins. Co.*, 38 P.3d 872, 876 (Nev. 2002).

16 In this case, EcoSteel filed its counterclaim on October 3, 2012. (See Counterclaim
17 (#12) at 7). On October 22, 2012, EcoSteel became a registered foreign corporation in
18 Nevada. (Entity Search (#22-3) at 22). As such, EcoSteel is a registered foreign corporation
19 in Nevada and the case may proceed.

20 **II. Validity of the Agreement²**

21 In Nevada, “contracts made in contravention of the law do not create a right of action.”
22 *Vincent v. Santa Cruz*, 647 P.2d 379, 381 (Nev. 1982). Pursuant to the Nevada Revised
23 Statutes, a person or business entity “engaged in the business or acting in the capacity of a
24 contractor” is barred from bringing an action on the contract or for compensation for
25 performance thereof absent a duly-issued contractor’s license from the state “at all times
26 during the performance of such act or contract and when the job was bid.” Nev. Rev. Stat.

27
28 ² This section addresses Bermuda Road’s first cause of action for declaratory relief that
the contract is null and void and EcoSteel’s counterclaim for breach of contract.

1 § 624.320.

2 A contractor is synonymous with “builder.” Nev. Rev. Stat. § 624.020(1). A contractor
3 includes a subcontractor or speciality subcontractor, but “does not include anyone who merely
4 furnishes materials or supplies without fabricating them into, or consuming them in the
5 performance of, the work of a contractor.” *Id.* § 624.020(3). “A contractor includes a
6 construction manager who performs management and counseling services on a construction
7 project for a professional fee.” *Id.* § 624.020(4). A contractor is “any person, except a
8 registered architect or a licensed professional engineer, acting solely in a professional
9 capacity, who . . . offers to undertake . . . by or through others, construct, alter, . . . any
10 building, . . . or other structure, . . . or to do any part thereof, including the erection of
11 scaffolding or other structures or works in connection therewith.” *Id.* § 624.020(2).

12 Here, both parties acknowledge that EcoSteel is not a licensed contractor in Nevada.
13 (See Answer (#12) at 2). However, the parties dispute whether EcoSteel was acting as a
14 contractor under the terms of the Agreement. The Court finds that the Agreement, as a whole,
15 required EcoSteel to act in the capacity of a contractor because the Agreement stated that
16 EcoSteel would provide: (1) labor; (2) a steel erector that had all the required licenses,
17 insurance, and certifications needed to erect the steel in Clark County, and (3) project
18 management from initial design through completion. (See Agreement (#12-1) at 8, 13). As
19 such, the Agreement, as whole, required EcoSteel to act in the capacity of a contractor even
20 though it was not licensed in Nevada.

21 Nevertheless, the Court finds that the Agreement is severable.³ Under the doctrine of
22 severability, “where a contract consists of several agreements, one of which is illegal, the
23 illegal portion can be severed if it does not destroy the symmetry of the contract.” *Vincent*, 647
24 P.2d at 381. The Court finds that there were two agreements in this case. The first
25 agreement was for EcoSteel to provide structural engineering, steel detailing, fabrication, and
26 delivery of the steel products. This agreement did not require a contractor’s license. The

27
28 ³ The Court notes that it has read *Interstate Commercial* but finds it inapplicable to the case at hand because the Court finds that the Agreement is severable.

1 second agreement was for EcoSteel to put Bermuda Road in contact with individuals/teams
2 that could provide labor and steel erection services for the cost of \$665,000. If EcoSteel
3 intended to act as a construction manager and sought to build the structure by and through
4 others, then this agreement required a contractor's license. However, if EcoSteel intended
5 only to provide Bermuda Road with its labor and steel erector contacts, then EcoSteel did not
6 need a contractor's license.

7 The Court finds that the contracts are severable because the evidence demonstrates
8 that the parties knew that EcoSteel could only legally engage in the first agreement. The
9 evidence demonstrates that, with respect to the second agreement, the parties contemplated
10 how they could proceed absent EcoSteel's contractor's license. The evidence demonstrates
11 that the parties contemplated whether EcoSteel should obtain a contractor's license, whether
12 GKG would be the licensed contractor and EcoSteel a subcontractor, or whether EcoSteel
13 would have to credit the labor costs back to Bermuda Road. Therefore, the Court finds that
14 there were two agreements in this case.

15 The Court finds that the first agreement is enforceable and that EcoSteel may pursue
16 its breach of contract claim against Bermuda Road. The Court finds that the second
17 agreement is enforceable if EcoSteel intends only to provide Bermuda Road with its labor and
18 steel erector contacts and does not engage in construction management duties that would
19 require a contractor's license. The Court finds that, under the second agreement, Bermuda
20 Road has an enforceable contract and can sue EcoSteel if EcoSteel cannot provide a team
21 that can erect the steel structure for \$665,000.

22 Accordingly, the Court denies Bermuda Road's motion for summary judgment (#15) on
23 the first cause of action for declaratory relief that the contract is null and void. The Court also
24 denies Bermuda Road's motion for summary judgment on EcoSteel's counterclaim for breach
25 of contract (#16).

26 ///

27 ///

28 ///

1 **III. Unjust Enrichment⁴**

2 “An action based on a theory of unjust enrichment is not available when there is an
3 express, written contract, because no agreement can be implied when there is an express
4 agreement.” *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975*, 942
5 P.2d 182, 187 (Nev. 1997). The doctrine of unjust enrichment or recovery in quasi contract
6 applies to situations where there is no legal contract but where the person sought to be
7 charged is in possession of money or property which in good conscience and justice he should
8 not retain but should deliver to another or should pay for. *Id.*

9 In this case, there are two valid legal contracts. As such, there can be no claim for
10 unjust enrichment. Therefore, the Court denies Bermuda Road’s motion for summary
11 judgment (#15) on its second cause of action for unjust enrichment. The Court grants
12 Bermuda Road’s motion for summary judgment on (#16) EcoSteel’s counterclaim for quantum
13 meruit/unjust enrichment.

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28 ⁴ This section addresses Bermuda Road’s second cause of action for unjust enrichment and EcoSteel’s counterclaim for quantum meruit/unjust enrichment.

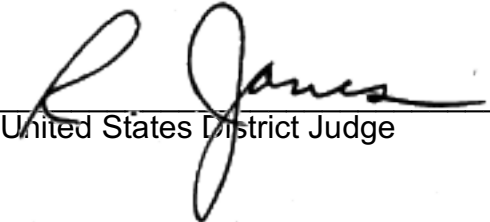
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CONCLUSION

For the foregoing reasons, IT IS ORDERED that Bermuda Road's Motion for Summary Judgment (#15) is DENIED.

IT IS FURTHER ORDERED that Bermuda Road's Motion to Dismiss Ecological Steel System's Counterclaims (#16) is converted into a motion for summary judgment. The Court DENIES in part and GRANTS in part the motion for summary judgment on the counterclaim. The Court denies Bermuda Road summary judgment on the first counterclaim for breach of contract but grants Bermuda Road's motion for summary judgment on the second counterclaim for unjust enrichment. Therefore, the only remaining claim in this case is Ecological Steel's counterclaim for breach of contract.

DATED: This 1st day of April, 2013.


United States District Judge