SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

BARRETT PAVING MATERIALS, INC.,

Plaintiff, **DECISION & ORDER**

-vs- **Index No: 2017EF1235**

COUNTY OF ONONDAGA, BUFFALO DRILLING COMPANY, INC. and HONEYWELL INTERNATIONAL, INC.,

Defendants.

APPEARANCES:

FOR PLAINTIFF: **COUCH WHITE, LLP**
Elizabeth L. Callahan, Esq., of Counsel

FOR DEFENDANTS: **ROBERT A. DURR, COUNTY ATTORNEY**
Benjamin M. Yaus, Esq. of Counsel
For Defendant County of Onondaga

GOLDBERG SEGALLA
Matthew D. Gumaer, Esq., of Counsel
For Defendant Buffalo Drilling

GERMAIN & GERMAIN, LLP
John J. Marzocchi, Esq., of Counsel
For Defendant Honeywell International, Inc.

PARIS, J.

This action arises out of a damaged underground 30 inch force main utility struck during drilling for the foundation of an overhead sign structure. Plaintiff Barrett Paving, the sole prime contractor on the project, entered into a contract with the County of Onondaga in October 2015 for the "Onondaga County Lakeview Amphitheater Highway Improvements" project to enlarge Exit 7 off Route 690. Ancillary road work was required including replacement of the existing overhead sign structure with a wider sign. Pursuant to the contract, Barrett was tasked with locating and protecting all underground utilities which may conflict with the subject project, and was solely responsible for paying for and performing any repair work. Barrett's bid and the subsequent contract included ten test pit excavations to locate underground utilities.

The contract drawings for the project prepared in 2015 by C&S notified Plaintiff of the existence of underground utilities including the subject force main. The notes to the contract drawings entitled "utilities" state that a sanitary force main is in the proximity of both overhead sign structures and note that the contractor shall be responsible to coordinate all drilling operations with the lake cleanup team of Honeywell International, Inc., the owner of the force main. The drawings also state that it was the contractor's responsibility to take

necessary precautions to prevent damage to the underground utilities.

Prior to any drilling excavation, Honeywell provided Barrett with a 1978 sewer project drawing done by C&S which depicted the approximate depth and location of the force main. The force main was a former county sewer and Honeywell, the current owner, was not certain of its exact location. The 1978 drawing was approximate because, *inter alia*, site conditions had changed and the scale of the drawing could have become skewed. Calculations made by Barrett, as well as representatives of the County's agent, C&S Engineering and Honeywell, estimated that the force main would be located approximately 15' to 17' below the surface in the area of the drilling operation.

Barrett determined that test pits would be required to determine the location of the force main. Three test pits were dug. The first test pit was dug to between 6' and 8', the second test pit was dug to between 10' and 14', and the third test pit was dug to between 15' and 17'. The force main was not located as a result of any of the three test pits and no further test pits were dug, although ten test pits were included in the contract.

The force main and the fact that it had not been located was not raised or discussed at a pre-drilling meeting held on December 1, 2015 which was attended by representatives of Barrett, the County's agent, C&S Engineering, and

Honeywell. Also in attendance at the meeting was Buffalo Drilling who had subcontracted with Barrett to perform the drilling operation on the project. Buffalo Drilling was not advised of any potential conflict with any underground facility in the drilling area and was not involved in the test pit excavations. Buffalo Drilling made a Dig Safe inquiry prior to drilling, but the subject force main was not registered with Dig Safe.

On December 9, 2015, while drilling in the area of test pit #1, Buffalo Drilling struck the subject force main causing enormous amounts of semi-treated water to enter the excavation area. It was subsequently determined that the force main was located 15' to 17' below the surface in the area of the break.

Barrett Paving performed the repair work related to the force main and completed the remainder of the work on the project in the Spring of 2016. Barrett submitted a claim for reimbursement to the County of Onondaga for the costs associated with the remediation and repair of the force main. Onondaga County denied the claim.

Plaintiff commenced this action against Buffalo Drilling, the County of Onondaga and Honeywell International, Inc. in 2017. A Trial Note of Issue was filed on December 26, 2019, and the matter has been scheduled for Trial.

All three Defendants have moved for summary judgment dismissal of

the Complaint and any crossclaims. Plaintiff opposes these motions.

For the reasons that follow, the Court finds that each of the Defendants met their prima facie burden for summary judgment, and that Plaintiff raised no legitimate issue of fact in opposition so as to defeat summary judgment. *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

COUNTY OF ONONDAGA:

Plaintiff asserts a single cause of action against the County for breach of contract stemming from the County's denial of payment for the repair work performed by Barrett on the subject force main. While the Plaintiff concedes that it had a contractual duty to locate and protect underground utilities and to repair any damages, it nevertheless alleges that the County, and/or its agent, C&S Engineering, failed to provide drawings or other information accurately depicting the location of the force main. Plaintiff also claims that the County "directed" Plaintiff both as to the location and depth that the test pits were to be dug and to commence the drilling operation.

The County has met its prima facie burden by establishing that it did not breach its contract with the Plaintiff. Plaintiff agreed, as part of the contract, that it had examined the contract and site and was fully informed regarding all conditions affecting the work to be done and labor and materials to be furnished,

including the existence of underground facilities and structures, and that its information was secured by personal investigation and research and not from estimates of records of the County. Plaintiff also agreed that it would make no claim against the County by reasons of estimates, tests or representations of any officer or agent of the County.

Plaintiff represented and warranted that it had "carefully examined" the site and plans and that, from its own investigations, it was satisfied as to the nature and location of the work and subsurface materials likely to be encountered. Plaintiff waived all right to plead any misunderstanding regarding the same.

The contract further required that any changes or modifications to the contract had to be made in writing. The County has established that no change orders or modifications were made relative to the test pits or underground facilities.

It was the Plaintiff's responsibility to verify the exact locations of all underground utilities and to avoid damaging them. The Plaintiff was responsible under the contract for the expense of any repair or reinstallation of work resulting from the contractor's failure to verify the special conditions, i.e. the location of utilities prior to performing the work.

The County did not breach the contract by declining to pay for the

cost of repairs to the underground force main. The Plaintiff was expressly required under the contract to pay for such repairs itself. Moreover, recovery cannot be had for extra work which actually falls within the contract or the plans and specifications. *Savin Bros. v. State of New York*, 62 AD2d 511 (4th Dept. 1978), *aff'd* 47 NY2d 934 (1976).

In determining whether Plaintiff is entitled to additional compensation for alleged extra work, the primary guide is the contract itself. *Mid-State Indus. v. State of New York,* 117 AD3d 1255 (3d Dept. 2014). If the contract reveals that the parties intended the contractor to rely upon its own investigation, no recovery for extra work may be had, absent a showing of fraud or misrepresentation as to existing conditions. *Mid-State Indus., supra.*

In the instant case, Plaintiff has made no allegations of fraud or misrepresentations, and the bid documents and contract place the burden wholly upon Plaintiff to investigate the site and verify the location of utilities and required Plaintiff to protect and repair at its sole cost any damaged utilities.

Plaintiff's allegation that the County failed to provide drawings or other information accurately depicting the location of the force main is irrelevant. The County was under no duty to provide drawings or information as to the location of the force main. Plaintiff was contractually obligated to investigate and

obtain that information itself.

Plaintiff has raised no valid issue of fact in opposition to the County's motion. It is clear that the Plaintiff had a contractual duty to locate the subject force main itself and the County was not responsible for providing Plaintiff with drawings or other information accurately depicting the location of the force main. While Plaintiff contends that the County or its agent, C&S, directed Barrett as to the location and the depth to dig the test pits, the evidence before the Court does not establish those allegations, and, in any event, such allegations are irrelevant as the responsibility was on Barrett to identify the location and depth of the test pits without reliance on the County. *Kenaidan Constr. Corp. v. County of Erie*, 4 AD3d 756 (4th Dept. 2004).

Despite Barrett's calculation that the force main should be located approximately 17' below the surface, the evidence establishes that only the third pit was potentially dug to a depth of 17'. The first test pit was only dug to between 6' and 8', and the second test pit was only dug to between 10' and 14". Notably, the subject force main was in fact ultimately located 15' to 17' below the surface in the area of the first test pit. Since Barrett inexplicitly failed to dig the first and second test pits to a depth of 17', any allegation that the County directed Barrett as to the location and depth of the test pits is irrelevant as under the

contract the Plaintiff can make no claim against the County by reason of any representations of any officer or agent of the County. *Kenaidan Constr. Corp., supra.*

Nor would Barrett's claim that C&S gave Barrett notice to proceed with work on the construction project act as a waiver of the contract provision requiring that any changes or modifications be in writing. Barrett was responsible for locating the force main and for any necessary repair to the force main. Even if C&S directed Barrett to begin the drilling project and directed Barrett where and how deep to dig the test pits, allegations which are not supported by the evidence before the Court, no legitimate question of fact is raised because such directives would constitute an oral modification of the contract and oral modifications are prohibited under the contract. While the provision against oral modifications may be waived, a waiver will only be found where the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by the County and executed by the Plaintiff. *See CNP Mechanical, Inc. v. Allied Builders, Inc.*, 84 AD3d 1748 (4th Dept. 2011). Plaintiff's allegations here are insufficient to establish any legitimate question of fact about whether a waiver of the provisions of the contract occurred here.

Based on the foregoing, the County of Onondaga's motion for summary

judgment is hereby **GRANTED.**

BUFFALO DRILLING:

Buffalo Drilling had a subcontract with Barrett Paving to perform drilling work on the project. Soon after Buffalo commenced its drilling operation, it struck the subject force main which was located 15' to 17' below the ground where Barrett directed Buffalo to drill and in the area of Barrett's first test pit.

The Complaint alleges a single cause of action against Buffalo Drilling for breach of contract. Plaintiff claims that Buffalo Drilling, under its subcontract with Barrett, agreed to indemnify Barrett and the County of Onondaga against any property damage arising out of or in connection with Buffalo Drilling's work on the project. Plaintiff further alleges that the subcontract also requires that Buffalo Drilling assume all duties toward Barrett Paving that Barrett assumed toward the County including assuming the responsibility of locating and protecting any underground utilities that may conflict with the drilling.

Buffalo Drilling has met its prima facie burden of establishing that the flow-down provision in its subcontract with Barrett does not require that Buffalo Drilling assume all duties toward Barrett that Barrett assumed toward the County of Onondaga, including assuming responsibility for locating and protecting any underground utilities that may conflict with the project. Barrett was

contractually obligated to locate the force main and undertook such efforts via test pit excavations and was paid for that work. Barrett did not subcontract out to Buffalo Drilling any of the exploratory work, including the test pit excavations which Barrett performed prior to Buffalo Drilling's appearance on the worksite. This responsibility remained with Barrett.

The scope of work outlined in the subcontract between Barrett and Buffalo Drilling included two items: drill shaft for overhead signs and pole excavation and concrete placement. Buffalo Drilling had no involvement in the location efforts, and no work related to the test pit excavations and location of utilities was included or incorporated by reference into the subcontract. Nor would any legal obligations possessed by Buffalo Drilling as an excavator act to bring location of utilities within the scope of Buffalo's work under the contract.

Under New York law, incorporation clauses in a construction contract which incorporate prime contract clauses by reference into a subcontract will bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor. *Auburn Custom Millwork v. Schmidt & Schmidt*, 148 AD3d 1527 (4th Dept. 2017). Any provisions in the prime contract which are unrelated to the work of the subcontractor are not incorporated into the subcontract. *Navillus Tile, Inc. v. Bovis*

Lend Lease LMB, Inc., 74 AD3d 1299 (2d Dept. 2010).

Therefore, the flow-down clause in the subcontract would not apply to the damages caused to the force main as the location of the force main was clearly outside of the scope of the work outlined in the subcontract.

Buffalo Drilling has also met its prima facie burden of establishing that the indemnity provision in its subcontract with Barrett is barred by General Obligations Law §5-322.1 which prohibits the enforcement of an agreement indemnifying a promisee for its own negligence. Only a general contractor who is free from negligence may enforce his subcontractor's agreement to indemnify. *Brown v. Two Exchange Plaza Prtns.*, 146 AD2d 129 (1st Dept. 1989); *Auriemma v. Biltmore Theatre*, 82 AD3d 1 (1st Dept. 2011).

Here, Barrett was contractually obligated to locate the subject force main but it is beyond dispute that Barrett failed to dig the test pits to a sufficient depth and failed to locate the underground force main before commencing the drilling on the project. Buffalo had no involvement in the location efforts and was not at fault for the failure to locate the subject force main, a task contractually given to Barrett. Buffalo has established at least some degree of negligence on the part of Barrett, and Barrett has raised no issue of fact as to its complete lack of negligence. The contentions raised by Barrett, including allegations as to who

directed the location and depth of the test pits and a failure to provide accurate information as to the location of the subject force main, are not supported by the evidence before the Court. Considering the fact that it is undisputed that had the location of the force main been identified the incident would not have occurred, Plaintiff has failed to establish a complete lack of negligence on it's own part or even to raise a question in that regard.

Based on the foregoing, Buffalo Drilling's motion for summary judgment is hereby **GRANTED.**

HONEYWELL INTERNATIONAL:

The Complaint alleges claims against Honeywell for implied indemnification, unjust enrichment and negligence.

With regard to the implied indemnification claim, a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Divens v. Finger Lakes Gaming & Racing*, 151 AD3d 1640 (4th Dept. 2017). Here, Plaintiff is seeking recovery from Honeywell for the cost of the repair to property belonging to Honeywell. Plaintiff was contractually obligated to verify the location of underground utilities, including the 30' force main. It is undisputed that Plaintiff failed to dig its test pits to the depth at which the force main was calculated to be located, and that the force main was ultimately

struck and damaged at that location. Because the undisputed facts establish some degree of wrongdoing on its part, Plaintiff is not entitled to implied indemnification. Plaintiff's attempts to identify issues of fact relative to Honeywell's conduct either do not support any conflict in the testimony or are irrelevant in light of the undisputed facts establishing Plaintiff's own negligence.

Plaintiff is not entitled to unjust enrichment against Defendant Honeywell based on the undisputed facts. An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. *Georgia Malone & Co., Inc. v. Rieder,* 19 NY3d 511 (2012). In order to adequately plead such a claim, the Plaintiff must allege that 1) the other party was enriched; 2) at Plaintiff's expense; and 3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. *Georgia Malone, supra; Mandarin Trading Ltd v. Wildenstein*, 16 NY3d 173 (2011).

Plaintiff's unjust enrichment claim borders on the frivolous and must fail as a matter of law because Honeywell was not enriched at Plaintiff's expense. Honeywell was the owner of the subject force main and it was Honeywell's property which was damaged by Plaintiff's conduct. Honeywell was certainly not enriched, and has submitted evidence that it was not made whole by Plaintiff's

remediation. Under the undisputed facts of this case it would not be equitable to permit Plaintiff to recover for its own wrongdoing from Honeywell which experienced no enrichment.

Plaintiff's negligence claim against Honeywell also fails as a matter of law as Honeywell owed no legal duty and did not breach any duty to the Plaintiff.

Plaintiff's negligence claim against Honeywell is predicated on allegations that Honeywell, as owner and operator of the force main, owed Barrett a duty of care to faithfully perform its duties as an operator under NY's Dig Safely one-call Program and to accurately represent the location of its force main. Plaintiff contends that Honeywell breached this duty first by refusing to locate and mark the force main, and second by providing Barrett with outdated and inaccurate drawings which misstated the location of the force main. Plaintiff also complains that Honeywell was negligent in failing to object to Barrett proceeding with excavation despite having failed to locate the force main.

Plaintiff complains that Honeywell had a legal obligation under 16 NYCRR 753-4.5 to locate and mark the underground force main. Under this regulation, once an "operator" of an underground facility is notified that an excavation is planned nearby, the operator is required to make a reasonable

attempt to inform the excavator that any underground facility located within 15' of the work area has been staked, marked or otherwise designated. The Court agrees with Honeywell that it was not an operator and the force main was not an underground facility as defined in the one-call statute. *See* GBL §760(4) and (6); 16 NYCRR 753-1.2(v). No services or materials were provided within the terms of the statute. The force main was used by Honeywell only to convey treated leachate from Honeywell property to the Metro Plant. Thus, Honeywell did not fail to comply with the one-call statute and Plaintiff has failed to raise any legitimate issue of fact.

Moreover, there is no private cause of action available to enforce the one-call statute. *N.A. Orlando Contr. v. Consolidated Edison*, 131 AD2d 827 (2d Dept. 1987). The cases relied on by the Plaintiff are distinguishable as they, unlike the instant case, involve cases where the utility's location was inaccurate.

Nor is any question of fact raised by Honeywell's provision of the 1978 contract drawings to the Plaintiff. Despite Plaintiff's allegations that the drawings did not accurately identify the location of the force main, the drawings were subsequently verified to be accurate as to the location and depth of the force main at the point where the force main was struck. Honeywell provided the only information that it had and that information was sufficient to locate the force main.

Barrett's failure to locate the force main was not the result of any negligence on the part of Honeywell. Nor has Plaintiff raised any valid question of fact relative to Honeywell's subsequent provision of a 2009 drawing where that drawing states on its face that the profile data was not based on a survey but rather on the 1978 contract drawings which had been provided to the Plaintiff.

Finally, Plaintiff's allegation that Honeywell failed to stop Barrett from proceeding with drilling despite the force main not being located cannot support any negligence claim against Honeywell. Honeywell had no role in the project, was not a party to any contract and owed no duty to the Plaintiff or any other party. Honeywell had no say in what or when Barrett did anything.

Based on the foregoing, Honeywell is entitled to dismissal of Plaintiff's Complaint and its motion for summary judgment is hereby **GRANTED**.

CONCLUSION:

To recapitulate:

Defendant Buffalo Drilling's motion for summary judgment is **GRANTED;** and

Defendant County of Onondaga's motion for summary judgment is **GRANTED**; and

Defendant Honeywell's motion for summary judgment is

GRANTED; and

The motions to dismiss the various crossclaims are **GRANTED.**

The Counterclaim of Defendant Honeywell against Plaintiff Barrett Paving for the costs and damages incurred by Honeywell in repairing the force main and in rendering it operational was not a subject of these motions and remains an active claim with a scheduled Trial Date of March 15, 2021. The Court will contact counsel to schedule a conference in this matter.

AND IT IS SO ORDERED.

ENTER:

ANTHONY J. PARIS
JUSTICE OF SUPREME COURT

DATED: **October 20, 2020.**
Syracuse, New York.