STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: June 21, 2018)

E.W. BURMAN, INC.	:	
	:	
v.	:	**C.A. No. WC-2008-0107**
	:	
BRADFORD DYEING ASSOCIATION, INC.	:	

DECISION

K. RODGERS, J. This dispute between Plaintiff E.W. Burman, Inc. (Plaintiff or E.W. Burman) and Defendant Bradford Dyeing Association, Inc. (Defendant or Bradford) arises out of plans for Plaintiff to rebuild portions of Defendant's Westerly, Rhode Island facility following a fire in 2007. Plaintiff alleges that the parties had an oral contract for Plaintiff to construct the permanent replacement roof on the facility, that Defendant breached that oral contract, and that Plaintiff is entitled to damages for its out-of-pocket expenses as well as its lost profits.

Following a non-jury trial, this Court requested the parties to submit post trial briefs. Having reviewed said briefs, this Court now will render a Decision.

Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 8-2-14(a). For the reasons set forth herein, judgment shall enter for Defendant.

I

Findings of Fact

Upon assessing the credibility of the witnesses, weighing all the evidence presented, and considering the undisputed facts as submitted by the parties, the Court makes the following findings of fact.

In May 2007, a fire ravaged Defendant's factory in Westerly, causing significant damage to its equipment and roof. The reconstruction of the facility was slated to proceed in two phases: Phase I involved fashioning a temporary roof in order to allow Defendant to resume operations; Phase II involved the construction of a permanent replacement roof. Liberty Mutual Insurance Company (Liberty Mutual) insured Defendant for its business interruption and contributed to Phase I expenses as a result of the fire. Defendant also expected that Liberty Mutual would contribute to Phase II repairs.

Defendant engaged Commonwealth Engineers & Consultants, Inc. (Commonwealth) to design the new roof. In July 2007, Commonwealth sent a request for proposals to several general contractors, which included plans for the new roof it had designed for Defendant's facility, and indicated that Defendant planned to award a contract by approximately August 8, 2007. The plans called for construction of a sawtooth-style roof, which matched the original roof prior to the fire.

In early August 2007, Plaintiff submitted a bid to complete the Phase II reconstruction. Defendant accepted Plaintiff's bid, which came in approximately $400,000 lower than the next lowest bid. Plaintiff and Defendant had never worked with each other previously.

On August 27, 2007, Plaintiff's president, Edward Burman (Burman), met with engineers Steven Clarke (Clarke) and Bruce Bartel (Bartel) from Commonwealth, as well as Charles Doherty (Doherty) from Liberty Mutual to discuss the scope of the roof repair project (the Project). Liberty Mutual had engaged an independent engineering firm, Simpson, Gumpertz & Heger, to verify the Phase II plans, and to ensure Plaintiff fully understood the scope of the work on which it had bid—a particularly important consideration, given that Plaintiff's bid was significantly lower than any other bid.

At the scope of work meeting, Liberty Mutual's engineer, along with Clarke and Bartel, asked Burman specific questions about the structure of the facility and the Project to ensure Plaintiff understood the size of the materials being used and the processes necessary to rehabilitate the facility. Burman inquired what form of contract would be used and offered to start with an American Institute of Architects (AIA) form contract. Before the meeting concluded, Burman shared Plaintiff's contractor license number with Commonwealth, which was necessary to obtain building permits, as well as its insurance certificate and payment and performance bonds. None of Defendant's employees or officers was present at this meeting.

Within a few hours of the conclusion of the scope of work meeting, Burman sent Clarke a particular AIA form contract (the AIA contract) with the proposed terms for Plaintiff's relationship with Defendant. Burman created a schedule and forwarded the same to Clarke on August 30, 2007. That schedule called for submittals and reviews to begin on September 3, 2007 and be completed by September 21, 2007, materials procurement to begin on September 17, 2007, and the Project to be complete on December 31, 2007. Joint Ex. 18. Plaintiff made some adjustments to the schedule at Commonwealth's request to address inclement weather issues as the Project would not be completed until the winter. The revised schedule again called for the same submittal and review timeline, the same materials procurement start date, and the same completion date. Joint Ex. 20.

On September 6, 2007, Plaintiff authorized Reliable Truss and Components, Inc. (Reliable Truss) to begin preparing shop drawings for the roof trusses. Joint Ex. 28. Several days later, on September 11, 2007, Plaintiff ordered $63,000 worth of stainless steel angles and flat bars from Shawmut Metal. Joint Ex. 108. On September 13, 2007, Burman forwarded

Reliable Truss' completed shop drawings to Bartel for his review and comment.[1] The transmittal from Burman to Bartel noted that "[Plaintiff] will verify count [and] dimensions once we're able to access [the] facility." Joint Ex. 38.

For over six weeks between September 10 and October 23, 2007, the parties did not progress in their negotiations over the terms of their proposed written agreement. On September 13, 2007, Burman contacted Bartel seeking access to the site so that he, his project manager, and the demolition contractor could familiarize themselves with the building and surrounding area. Bartel replied approximately two hours later and stated:

> "We have been directed by Bradford's attorney to wait on any [site] visits or other work activities until contract issues are worked out with the insurance company.
>
> "So, wait on any site visits until there is a contractual relationship between [E.W.] Burman and Bradford Dye." Joint Ex. 41.

Burman followed up with Bartel several days later, on September 17, 2007, via email: "Any movement on the legal end? We need to get on site ASAP to verify dimensions." Joint Ex. 48. Bartel replied several hours later: "As there is no signed contract, all work done to date and *until a contract is signed,* is at your own risk." *Id.* (emphasis added).

That same day, Clarke informed Burman that there was an issue between Defendant and Liberty Mutual which prevented the Project from progressing at that time and prevented Plaintiff's employees from accessing the site. Thus, Plaintiff's involvement with the Project was on hold during this time as it remained unable to verify the truss dimensions, which Commonwealth had required prior to proceeding.

[1] Burman testified that when purchasing materials or awarding subcontracts, it is necessary to have detailed information in written form, stamped, and sent to the project engineer to approve that the selected materials meet project specifications. According to Burman, until shop drawings have been approved, a vendor will not move forward in producing the material.

On October 23, 2007, Burman emailed Bartel indicating that Clarke had called to inform him that the project was ready to move forward. Contract negotiations thereafter resumed, and Burman and Clarke exchanged revised versions of the AIA contract.

On October 25, 2007, Plaintiff's employees gained access to the facility and confirmed the various measurements which Commonwealth required be verified before proceeding with the truss work. However, the terms of Plaintiff's relationship with Defendant were still the subject of negotiation. Defendant sought a substantial price adjustment because its own employees performed a significant amount of demolition work during the six-week unexpected downtime. Notwithstanding these continued negotiations, and Bartel's September 17, 2007 email directing Plaintiff that all work was at its own risk until there was a contractual relationship between the parties, Plaintiff began ordering fasteners on October 29, 2007. These fasteners were custom made and were not returnable, and Plaintiff was aware of this at the time the order was placed. The expected cost of those fasteners was $50,929.82.

As late as November 6, 2007, Burman and Clarke were still engaged in active negotiations via email concerning the terms of the AIA contract between E.W. Burman and Bradford. Joint Ex. 88. At or about that time, Bradford and Liberty Mutual reached agreement on the extent to which Liberty Mutual would contribute to Phase II after the fire loss. As a result of the financial contribution by its insurer, Defendant elected to halt negotiations with Plaintiff on the Project in favor of selecting a different design for the roof repair—one that would be simpler and less costly (the Revised Project). The Revised Project called for replacing the old factory equipment with more modern equipment; however, in order to install such modern equipment, the roof would need to be designed differently for everything to fit. Defendant thereafter notified Plaintiff of this roof design change. Rather than allege at that time that it had

an oral agreement with Defendant, Plaintiff bid on the Revised Project. Plaintiff was not the low bidder, and Defendant awarded the contract to a different contractor.

After learning E.W. Burman was not the low bidder, Burman then forwarded invoices to Clarke for the custom trusses and fasteners that had been purchased, again without contending that there existed any oral agreement. Defendant maintained that it had no liability for expenses incurred without its consent and in the absence of a contractual relationship. Thereafter, Burman raised for the first time that the parties had an enforceable oral agreement. Plaintiff seeks to recover $99,987.34[2] for out-of-pocket expenses connected with labor costs and the purchase of custom hardware and fasteners, *see* Joint Ex. 100, in addition to lost profits of $120,630, *see* Joint Ex. 14, for a total of $220,617.34.

II

Presentation of Witnesses

At trial, Plaintiff presented the testimony of its president, Burman. Burman has worked for Plaintiff since 1965, and he took over as president in 1977, succeeding his father. He testified that Plaintiff is in the commercial construction business and has completed significant projects for corporations such as CVS, A.T. Cross, and BankBoston, as well as for the State of Rhode Island.

Burman testified that Plaintiff expected to earn $120,630 in profit on the Project and that Bartel had impressed upon him that time was of the essence in completing the Phase II repairs. Burman claimed at trial that after the August 27, 2007 scope of work meeting, Plaintiff and Defendant were bound by an oral agreement to construct the Project.

[2] Of this amount, $825 represents the cost for Reliable Truss' shop drawings, $61,800 represents the cost of hardware from Shawmut Metal, and $26,600 represents the cost of fasteners from Tri-State Fasteners. *See* Joint Ex. 100. The total due to both Shawmut Metal and Tri-State Fasteners was reduced by the amount of product not yet fabricated at the time Plaintiff canceled its order.

Burman chronicled the negotiations over the written contract, which continued unabated following the alleged creation of this purported oral agreement. He also explained the various areas of disagreement over which the parties negotiated.

Burman explained that it was not uncommon to begin construction projects without a written agreement in place, and that he had even finished some construction projects before signing a contract. He testified that he believed Bartel's September 13, 2007 email was in error, and that the contractual relationship referenced in the second paragraph was not the one between Plaintiff and Defendant, but between Defendant and Liberty Mutual. Burman testified that Bartel's email advising Plaintiff that all work was at its own risk until a contract was signed was a "very confusing e-mail." (Trial Tr. 59:16, Jan. 23, 2012 (Tr. I).) Burman stated that he called Clarke after receiving Bartel's email, and he summarized the conversation as follows:

> "I was trying to get a clarification on [Bartel's] e-mail, and [Clarke] assured me that there was no problem with our contract, that there was a contract issue between [Defendant] and Liberty Mutual, and once that was resolved we would be able to get back on site, take our measurements and get the project moving again. But we had to wait for the lawyers to do their lawyering before we could do that, and he said he'd get back to me the minute that he heard." *Id.* at 60:8-16.

This Court finds Burman's testimony to be self-serving and lacking in credibility. It is unreasonable to believe, as Burman suggests, that Bartel mistakenly referenced the contractual issues between E.W. Burman and Bradford but meant Bradford and Liberty Mutual when Burman's own contract negotiations had come to a halt. Burman was well aware that Plaintiff had no signed contract with Defendant in September 2007, which renders the remainder of Bartel's directive on September 17, 2007 all that more clear: "all work done to date and *until a contract is signed*, is at your own risk." Joint Ex. 48 (emphasis added). Further, when the contract negotiations resumed between Plaintiff and Defendant on October 25, 2007, it was

evident that the parties had not reached agreement on many terms but remained intent on entering into a written instrument. It is disingenuous for Burman to assert that, notwithstanding the significant efforts in negotiating the construction contract with the Defendant through early November 2007, that the parties had already been bound by an oral contract established at the August 27, 2007 scope of work meeting in which Defendant was not present.

Clarke also testified at trial. He stated that he never expressly authorized Plaintiff to purchase materials for the Project, and that Plaintiff was expressly told not to send its employees to the job site. Clarke maintained that Defendant did not, to his knowledge, consider changing the roof design until early November.

Clarke was steadfast in his testimony that he was never authorized to bind Defendant to an agreement with Plaintiff, and that it was never his intent to enter into an agreement on Defendant's behalf. Clarke asserted that each version of the proposed written agreement that Defendant, through Commonwealth, forwarded to Plaintiff for execution was rejected, and counteroffers were made by Plaintiff.

Clarke, as engineer, was actively involved in the Project, and, as engineers often do, he served as an intermediary between the parties. The Court finds his testimony to be straightforward and worthy of belief.

Finally, at trial, Gerald Petros (Petros) testified. Petros was Defendant's corporate secretary and former outside legal counsel. Petros explained that Plaintiff was advised of the changes to the roof design as soon as Defendant and Liberty Mutual came to terms about the extent of the insurance coverage available to cover the repairs. Until Liberty Mutual agreed to pay for the new design, Petros felt it unwise to cancel the existing plan which Defendant had

planned to execute throughout its negotiations with Plaintiff. Petros presented as a credible witness and this Court has no reason to doubt the veracity of his testimony.

III

Standard of Review

In a non-jury trial, the standard of review is governed by Rule 52(a) of the Superior Court Rules of Civil Procedure, which provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . " Super. R. Civ. P. 52(a). In a non-jury trial, "'the trial justice sits as a trier of fact as well as of law.'" *Parella v. Montalbano*, 899 A.2d 1226, 1239 (R.I. 2006) (quoting *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" *Id.* (quoting *Hood*, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court." *McBurney v. Roszkowski*, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" *DeSimone Elec., Inc. v. CMG, Inc.*, 901 A.2d 613, 621 (R.I. 2006) (quoting *Walton v. Baird*, 433 A.2d 963, 964 (R.I. 1981)).

"When rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis and discussion of all the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" *Parella*, 899 A.2d at 1239 (quoting *Donnelly v. Cowsill*, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not "'categorically accept or reject each piece of evidence in his

[or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings."' *Notarantonio v. Notarantonio*, 941 A.2d 138, 147 (R.I. 2008) (quoting *Narragansett Elec. Co. v. Carbone*, 898 A.2d 87, 102 (R.I. 2006)).

IV

Analysis

Plaintiff alleges that it and Defendant had an oral agreement as of August 27, 2007, which Defendant breached by not moving forward with the Project and by refusing to pay for the materials Plaintiff already purchased. Plaintiff also contends that Defendant is liable under the theories of unjust enrichment or quasi-contract as well as promissory estoppel. Plaintiff seeks to recoup its out-of-pocket expenses as well as its lost profits.

A

Oral Contract

Given the nature of the claims Plaintiff has made, this Court must first determine whether Plaintiff and Defendant were bound by an oral contract, notwithstanding the continued negotiations over a written agreement. This Court notes at the outset that even million-dollar oral construction contracts, unwise though they might be, are indeed enforceable. *See* James Acret, *Construction Litigation Handbook* § 1:13 (3d ed. 2017).

"For parties to form an enforceable contract, there must be an offer and an acceptance [and e]ach party must have and manifest an objective intent to be bound by the agreement." *Opella v. Opella*, 896 A.2d 714, 720 (R.I. 2006) (citing *Weaver v. Am. Power Conversion Corp.*, 863 A.2d 193, 198 (R.I. 2004); *see also R.I. Five v. Med. Assocs. of Bristol Cty., Inc.*, 668 A.2d 1250, 1253 (R.I. 1996); *UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp.*, 641 A.2d 75, 78

(R.I. 1994); *Smith v Boyd*, 553 A.2d 131, 133 (R.I. 1989). Thus, whether an express or implied contract is alleged, "a litigant must prove mutual assent or a 'meeting of the minds between the parties.'" *Mills v. R.I. Hosp.*, 828 A.2d 526, 528 (R.I. 2003) (quoting *J. Koury Steel Erectors, Inc. of Mass. v. San-Vel Concrete Corp.*, 120 R.I. 360, 365, 387 A.2d 694, 697 (1978)). "'[I]t is a party's objective intent that will be considered as creating either an offer or acceptance.'" *Filippi v. Filippi*, 818 A.2d 608, 623 (R.I. 2003) (quoting *Smith*, 553 A.2d at 133). "Objective intent is determined by the 'external interpretation of the party's or parties' intent as manifested by action.'" *Id.*at 623-34 (quoting *Smith*, 553 A.2d at 133).

1

Intent to Enter Into a Written Contract

Our Supreme Court has discussed the impact of contemplated written agreements on oral contract formation: "One instance in which parties may not wish their assent to particular terms to form a contract is when a written instrument is contemplated." *Smith*, 553 A.2d at 133. The Court instructed:

> "'If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed.'" *Id.* at 133-34 (quoting *Miss. & Dominion Steamship Co. v. Swift*, 86 Me. 248, 258, 29 A. 1063, 1066–67 (1894)).

In evaluating a party's objective intent to be bound by a written instrument, a trier of fact may consider, among other things

> "the practice of the trade or profession, the prior practice between the parties, whether the written contract was to be drawn up by persons other than the parties, and statements made during the

> negotiations. Most persuasive will be the fact that at the time of negotiation, a party states that he or she does not intend to be bound contractually until the written agreement is executed." *Id.* at 134.

First, it is abundantly clear that Defendant, the party sought to be charged, at all times intended that a written agreement be executed between the parties. *See* Joint Exs. 41, 48. Plaintiff offers no evidence to refute Defendant's intent to be bound by a written contract.

Next, Burman testified that the oral contract for which Plaintiff now seeks recovery was formed during the August 27, 2007 scope of work meeting. It is clear to this Court from Burman's *own* actions, on that date and thereafter, that *Plaintiff* also intended at that time to eventually be bound by a written agreement. Within hours of the scope of work meeting, Burman proposed terms for Plaintiff's relationship with Defendant in a written AIA form A101 contract. On September 10, 2007, Clarke advised Burman that representatives of Defendant and Liberty Mutual had reviewed his offer, and they had made some changes. Those changes were significant, though not affecting the contract price. The changes made by Defendant and sent to Burman amounted to a counter-offer. Counter-offers operate as a rejection of the initial offer. *See Ardente v. Horan*, 117 R.I. 254, 260, 366 A.2d 162, 166 (1976); Samuel Williston, *Williston on Contracts* § 5:3 (4th ed.); Restatement (First) *Contracts* § 38 (1932) ("A counter-offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeror in his offer, or the offeree in his counter-offer states that in spite of the counter-offer the original offer shall not be terminated.").

While Burman testified that the changes were minor and they contained "[n]o deal breakers[,]" Plaintiff declined to execute the contract with Defendant's changes, and just over an hour later, Burman replied with more significant changes. Tr. I at 64:24. Specifically, Burman objected to Plaintiff being responsible for unconditional certificates of occupancy, as it was only

performing the demolition and structural work, and other contractors would be providing heating and electrical work. Additionally, Burman objected to a liquidated damages clause that had been added to the contract. This clause called for Plaintiff to pay Defendant damages if the Project was not completed on time and provided an incentive payment to Plaintiff if the Project was completed ahead of schedule. Burman testified that the parties had never discussed such a term in their negotiations up until that point. The per-day incentive payment was only fifty percent of the amount of the per-day liquidated damages provision, so Burman countered by offering to accept the liquidated damages clause if the incentive payment was brought up to the same per-day figure. Defendant never responded to these requested changes nor indicated approval thereof.

Burman testified at trial that he had spoken to Clarke on October 23, 2007 and that Clark advised him that Defendant's issue with Liberty Mutual had been worked out and that the project was "ready to go." Tr. I at 74:1-11. Burman claimed that this statement somehow meant that he no longer needed to concern himself with the ongoing, unresolved contract negotiations between Plaintiff and Defendant. This assertion is not credible, particularly in light of the negotiations that occurred between Burman and Clarke that very day and for two weeks thereafter. Specifically, on October 24, 2007, after more than a month without progress in the negotiations, Clarke sent Burman an entirely new version of the form contract. Shortly thereafter, Burman replied with some concerns. Burman again noted the certificate of occupancy issue which had not been resolved. He also sought to eliminate a provision making Plaintiff liable for snow removal, as the project would now be proceeding through the winter. Additionally, because of the new winter schedule, Burman sought reimbursement for temporary heating on site after January 1, 2008. He also desired halving the insurance requirement—from a $10,000,000 policy

to Plaintiff's standard $5,000,000 policy. Finally, Burman sought to reduce Plaintiff's deductible in case of loss from $20,000 to $1000. These changes are not insignificant. Thus, not only did Defendant make clear that it intended to be bound by a written contract, but also Burman's own acts in negotiating the specific things in the written contract support a finding that both parties intended to enter into a written instrument but failed to do so; thus, they cannot be bound to an oral contract.

With respect to the other specific factors our Supreme Court identified in *Smith*, 553 A.2d at 133-134, Burman testified that large construction projects sometimes proceeded without a written contract. However, Burman also noted specifically in his testimony that not all organizations with which he had worked would allow construction without a written agreement in place, and common sense alone would demand recognizing that Defendant seemed clearly opposed to such an arrangement. Also, Plaintiff had not previously done business with Defendant; therefore, there were no past practices between these parties that would justify proceeding without a signed agreement.

Plaintiff's position in this case rests largely on what it perceived as a secretive plan through which Defendant changed the roof design itself. The nature of Defendant's negotiations with its insurer and/or the reason for the change in the roof design is neither relevant to the discrete issues before this Court nor nefarious in intent. Instead, the communications between the parties to the alleged oral contract only serve to reinforce the fact that, at all times, Defendant anticipated its relationship with Plaintiff to be governed by a written—not oral—agreement. Until a contract was signed, Defendant was under no legal obligation to move forward with the Project. Defendant also made abundantly clear—in no uncertain terms—that Plaintiff should not perform any work or incur any expenses until a written agreement between E.W. Burman and

Bradford was in place. Plaintiff chose to ignore that directive and did so at its own peril. Accordingly, this Court finds that no oral contract ever existed between these parties.

2

The Conduct of Parties Demonstrates There Was No Meeting of the Minds

In addition to proving that the parties intended to be bound by a signed, written agreement, the conduct of the parties reveals that there was no meeting of the minds concerning the terms of their relationship. While Burman claimed at trial that there were no deal-breakers in any of the Defendant's proposed revisions to the AIA contract sent to Plaintiff, it is clear that Plaintiff never elected to execute any version of the AIA contract proposed by Defendant; likewise, Defendant did not execute any written agreement proposed by Plaintiff. The parties engaged in offers and counter-offers, but no acceptance of any such offers and/or counter-offers was ever manifested. These ongoing and ultimately unsuccessful negotiations, as well as the communications that accompanied them, constitute strong evidence that Plaintiff and Defendant never came to terms about the nature of their relationship. Thus, this Court concludes that there was no meeting of the minds between the parties concerning the Project. *See Opella*, 896 A.2d at 720; *Mills*, 828 A.2d at 528; *J. Koury Steel*, 120 R.I. at 365, 387 A.2d at 697.

Finally, Burman never indicated to Clarke, Bartel, or any employee or officer of Bradford that there was already an oral contract governing the parties. It was not until after it became clear that Plaintiff would not be involved in rebuilding Defendant's facility that Burman alleged for the first time the existence of an oral contract. This fact is particularly significant because Plaintiff submitted a new bid on the Revised Project after incurring expenses on purchasing items it knew it would be unable to repurpose with the new design—all the while never once claiming to have an enforceable agreement to construct the original Project. This lends further

credence that the parties had not reached a meeting of the minds on the terms of the Project at the August 27, 2007 scope of review meeting or anytime thereafter.

B

Implied-In-Fact Contract

Count II of the First Amended Complaint alleges that Defendant breached an implied contract. "An implied-in-fact contract 'is a form of express contract wherein the elements of the contract are found in and determined from the relations of, and the communications between the parties, rather than from a single clearly expressed written document.'" *Cote v. Aiello*, 148 A.3d 537, 545 (R.I. 2016) (quoting *Marshall Contractors, Inc. v. Brown Univ.*, 692 A.2d 665, 669 (R.I. 1997)). "'The difference between an express contract and an implied-in-fact contract is simply the manner by which the parties express their mutual assent.'" *Id.* (quoting *Marshall Contractors, Inc.*, 692 A.2d at 669). "Critically, to be enforceable, an implied-in-fact contract 'must contain all [of] the elements of an express contract.'" *Id.* (quoting *Bailey v. West*, 105 R.I. 61, 64, 249 A.2d 414, 416 (1969)). Our Supreme Court has concluded that "the 'essential elements of contracts 'implied in fact' are mutual agreement, and intent to promise, but the agreement and the promise have not been made in words and are implied from the facts.'" *Id.* (quoting *Bailey*, 105 R.I. at 64, 249 A.2d at 416). "In determining whether these elements are present, we generally look to the 'parties' conduct, actions, and correspondence.'" *Id.* (quoting *Marshall Contractors, Inc.*, 692 A.2d at 669).

Here, it is clear from the conduct, actions, and correspondence of the parties that there had been no agreement as to the terms of their relationship. As discussed previously, negotiations were ongoing and never resulted in a final agreement with mutually agreed-upon terms. Defendant, through Commonwealth, unequivocally directed Plaintiff to take no action

until such a time as the parties formed and signed a contract. This Court finds that there is a lack of mutual assent to any agreement, an element which must be present for this Court to find an implied-in-fact contract. *See id.* (holding that implied-in-fact contracts "must contain all [of] the elements of an express contract"). Accordingly, this Court finds that no implied-in-fact contract existed between these parties.

C

Quasi-Contract and Unjust Enrichment

Count III of the First Amended Complaint, titled Quasi-Contract,[3] alleges that Defendant was unjustly enriched by Plaintiff's work, and that Defendant should be required to compensate Plaintiff for the reasonable value thereof. To recover for unjust enrichment, a plaintiff must prove:

> "(1) that [the plaintiff] conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances 'that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.'" *Dellagrotta v. Dellagrotta*, 873 A.2d 101, 113 (R.I. 2005) (quoting *Bouchard v. Price*, 694 A.2d 670, 673 (R.I. 1997)).

Rhode Island recognizes unjust enrichment as a claim even when there is no legally cognizable action in tort or contract law. *See generally* Todd Barton, *Filling in the Gaps in Civil Liability: The Development of Unjust Enrichment in Rhode Island*, 9 Roger Williams U. L. Rev. 695, 707 (2004).

[3] This Court notes that quasi-contract and unjust enrichment are synonymous in their application in Rhode Island. *See Process Eng'rs & Constructors, Inc. v. DiGregorio, Inc.*, 93 A.3d 1047, 1053 (R.I. 2014) (citing *Multi–State Restoration, Inc. v. DWS Props., LLC*, 61 A.3d 414, 418 (R.I. 2013) (noting that "actions brought upon theories of unjust enrichment and quasi-contract are essentially the same")).

Here, the evidence submitted at trial does not demonstrate how Plaintiff's purchase of custom hardware and fasteners without Defendant's consent, which Defendant never received or used, conferred a benefit onto Defendant. "[A] benefit is conferred when improvements are made to property, materials are furnished, or services are rendered without payment." *Carbone*, 898 A.2d at 99; *see also Dellagrotta v. Dellagrotta*, 873 A.2d 101, 113–14 (R.I. 2005) (home improvements); *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1148–49 (R.I. 1994) (medical services); *Newport Oil Corp. v. Viti Bros., Inc.*, 454 A.2d 706, 706–08 (R.I. 1983) (gasoline deliveries made to the defendant service station for resale); *Providence Steel & Iron Co. v. Flammand*, 413 A.2d 487, 487–88 (R.I. 1980) (steel building components); *Best v. McAuslan*, 27 R.I. 107, 108–10, 60 A. 774, 774–75 (1905) (medical services).

This Court finds that Defendant received no benefit from Plaintiff's purchases or pre-contract preparatory work, as nothing was furnished to Defendant nor were improvements made to Defendant's property. Moreover, Defendant had made abundantly clear that Plaintiff was not to incur any expenses until such time as Plaintiff and Defendant executed a written agreement, and that any such costs incurred would be at Plaintiff's own risk. Even if Defendant had received some benefit from Plaintiff's actions, the circumstances surrounding those actions are such that it would not be inequitable for Defendant to "retain the benefit without paying the value thereof." *See Dellagrotta*, 873 A.2d at 113. Accordingly, Plaintiff's unjust enrichment claim must fail.

D

Promissory Estoppel

Finally, Count IV of the First Amended Complaint alleges that Plaintiff is entitled to recover under principles of promissory estoppel. Our Supreme Court has defined promissory estoppel as "'[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance, [and therefore] is binding if injustice can be avoided only by enforcement of the promise.'" *Filippi*, 818 A.2d at 625 (quoting *Alix v. Alix*, 497 A.2d 18, 21 (R.I. 1985)). A successful promissory estoppel action must include a clear and unambiguous promise. *Id.* Our Supreme Court has adopted a three-element approach to assess promissory estoppel claims. *Id.* at 625-26. Thus, to establish promissory estoppel, there must be: "1. A clear and unambiguous promise; 2. Reasonable and justifiable reliance upon the promise; and 3. Detriment to the promisee, caused by his or her reliance on the promise." *Id.* at 626.

Here, the "promise" was anything but clear and unambiguous. The parties continued to negotiate various aspects of the construction agreement, and they never brought those negotiations to a close with a final agreement to which they both assented. All the while, Defendant had clearly advised Plaintiff not to move forward until there was a written contract in place.

Similarly, Plaintiff's reliance on any alleged promise was neither reasonable nor justifiable. Defendant explicitly warned Plaintiff not to move forward until the parties had a contractual relationship. This statement was unrebutted with respect to the existence of this purported oral agreement. It would be unjust to hold Defendant liable for Plaintiff's ill-advised actions thereafter. Accordingly, this Court finds that promissory estoppel is inapplicable here.

V

Conclusion

For all these reasons, judgment shall enter for Defendant on all counts in Plaintiff's First Amended Complaint.

Counsel for Defendant shall prepare a judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**E.W. Burman, Inc. v. Bradford Dyeing Association, Inc.**
CASE NO:	**WC-2008-0107**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**June 21, 2018**
JUSTICE/MAGISTRATE:	**K. Rodgers, J.**
ATTORNEYS:	
For Plaintiff:	**Christopher C. Whitney, Esq.** **R. Thomas Dunn, Esq.**
For Defendant:	**Marc DeSisto, Esq.**