
IN THE SUPREME COURT OF OHIO

TRANSTAR ELECTRIC, INC.)
Appellee) Case No.: 2013-0148
vs.) On Appeal from the Lucas County
Court of Appeals,
A.E.M. ELECTRIC SERVICES CORP.) Sixth Appellate District
Appellant.)

MERIT BRIEF OF APPELLANT, A.E.M. ELECTRIC SERVICES CORPORATION

James P. Silk, Jr. (0062463)
SPENGLER NATHANSON P.L.L.
Four Seagate, Suite 400
Toledo, Ohio 43604-2622
Telephone: 419-252-6210
Facsimile: 419-241-8599
jsilk@snlaw.com

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CLERK OF COURT
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COUNSEL FOR APPELLANT, A.E.M. ELECTRIC SERVICES CORPORATION

Luther L. Liggett, Jr. (0004683)
Heather Logan Melick (0068756)
Luper Neidenthal & Logan
50 West Broad St., Suite 1200
Columbus, OH 43215-3374
Telephone: 614-229-4423
Email: Liggett@lnlattorneys.com
Telephone: 614-229-4444
Email: hmelick@lnlattorneys.com
Facsimile: 614-345-4948

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COUNSEL FOR APPELLEE, TRANSTAR ELECTRIC, INC.

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STATEMENT OF FACTS

The relevant facts are largely undisputed. Transtar Electric, Inc. ("Transtar") and A.E.M. Electrical Services Corp. ("A.E.M.") entered into a subcontract agreement in January 2007 for Transtar to perform construction work on a Holiday Inn Hotel project. (Supp. 1) Transtar performed work pursuant to the subcontract. (Supp. 1) Transtar periodically invoiced A.E.M. for work performed in the total amount of \$186,709.00. (Supp. 2) A.E.M. made various payments to Transtar in a total amount of \$142,620.10. A.E.M. did not pay Transtar the remaining \$44,088.90 as the owner of the project failed to pay A.E.M. for the work performed by Transtar. (Supp. 2) Pursuant to Section 4 of the subcontract agreement, A.E.M. was only obligated to pay Transtar if A.E.M. received payment from the owner for the work performed by Transtar. (Supp. 1) A.E.M. has sought payment for the work performed by Transtar and will continue to do so. (Supp. 2)

Section 4- Payment of the subcontract states in part as follows:

(c) The Contractor shall pay to the Subcontractor the amount due under subparagraph (a) above only upon satisfaction of all four of the following conditions ... (iv) The contractor has received payment from the owner for work performed by subcontractor. **RECEIPT OF PAYMENT BY CONTRACTOR FROM THE OWNER FOR WORK PERFORMED BY SUBCONTRACTOR IS A CONDITIONAL PRECEDENT TO PAYMENT BY CONTRACTOR TO SUBCONTRACTOR FOR THAT WORK.**

(emphasis in original) (Supp. 5)

The trial court granted A.E.M.'s motion for summary judgment. The trial court concluded that the contract clause at issue was a pay-if-paid provision which showed that the intent of the parties was to transfer risk of non-payment by the owner from A.E.M. to Transtar. As such, there was no breach of contract by A.E.M. The court of appeals reversed the trial court decision and concluded that the contract provision was a pay-when-paid provision as it did not

clearly and unambiguously indicate that the parties intended to transfer the risk of nonpayment of the owner.

ARGUMENT

Proposition of Law

The unambiguous language in the subcontract between the parties is a "pay-if-paid" provision, which without payment by the owner, does not require the contractor to pay the subcontractor

The cardinal principle in contract interpretation is to give effect to the intent of the parties. *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, ¶ 1 of the syllabus. Such intent is presumed to reside in the language the parties chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1997), ¶ 1 of the syllabus. In the present case the court of appeals ignored the unambiguous intent of the parties.

Ohio courts have recognized conditional payment clauses, such as the one in this case, as binding and enforceable. See *Chapman Excavating, Inc. v. Fortney & Weygandt, Inc.*, 8th Dist. App No. 84005, 2004-Ohio-3867; *Kalkreuth Roofing and Sheet Metal, Inc., v. Bogner Const. Co. and Farmers Ins. Co.*, 5th Dist. No. 97 CA 59, 1998 Ohio App. LEXIS 4694 (August 27, 1998); *Power and Pollution Serve, Inc., v. Suburban Power Piping Corp.*, 74 Ohio App.3d 89, 589 N.E. 2d 69 (8th Dist. 1991); *North Market Assn. Inc., v. Case*, 99 Ohio App. 187 (1959).

There are two types of conditional payment clauses, "pay-if-paid" and "pay-when-paid" contract provisions. *Chapman, supra* at p. 9. Under a "pay-if-paid" provision, the contractor is required to pay a subcontractor only after receiving payment from the owner, and the risk of the owner non-payment falls upon the subcontractor. *Id.* With respect to a "pay-when-paid" provision, a less stringent clause, Ohio courts have generally held that it "does not set a condition

precedent to the general contractor's duty to pay the subcontractor, but rather constitutes an absolute promise to pay" *Power and Pollution Services, Inc.*, *supra* at p. 91.

It is "settled law that contract provisions making certain obligations conditional or contingent upon a happening of a certain event are valid and enforceable." *Thos. J. Dyer Co. v. Bishop International Engineering Co.*, 303 F.2d 655, 658 (6th Cir. 1962). As in *Dyer*, and as acknowledged by Transtar, the issue in the present case is whether the contract between the general contractor and subcontractor contains an express condition demonstrating the intention of the parties. *Id.* at pg. 661.

In *Evans, Mechwart, Hambleton & Tilton, Inc., v. Triad Architects, Ltd*, 196 Ohio App. 3d 784, 2011-Ohio-4979, 965 N.E. 2d 1007, the court cited a typical "pay-if-paid" provision with almost identical language as the provision in the present case (See *p11). The *Evans* court found:

A pay-if paid provision must clearly and unambiguously condition payment to the subcontractors on the receipt of payment from the owner. *Kalkreuth Roofing & Sheet Metal, Inc. v. Bogner Constr. Co.* (Aug. 27, 1998), 5th Dist. No. 97 CA 59, 1998 Ohio App. LEXIS 4694. See also 8 Lord, Williston on Contracts (4th ed. 2010) 636, 19:59 ("[I]f the parties clearly do intend that the risk of nonpayment be borne by the subcontractor and clearly express that intent by making the right of the subcontractor to be paid expressly conditional on the receipt of such payment by the contractor from the owner, they may by contract allocate that risk, and the courts will enforce that freely bargained-for allocation of risk."). Payment provisions qualify as pay-if-paid provisions if they expressly state: (1) payment to the contractor is a condition precedent to payment to the subcontractor (as in the above example), (2) the subcontractor is to bear the risk of the owner's non-payment (as in the above example), or (3) the subcontractor is to be paid exclusively out of a fund the sole source of which is the owner's payment to the subcontractor. *Sloan & Co.*, 2011 U.S. App. LEXIS 15798, at *12-13, fn. 9, 2011 WL 3250447, at *10, fn 9. See also *LBL Skysystems (USA), Inc., v. APG-America, Inc.* (Aug. 31, 2005), E.D. Pa. No. 02-5379, 2005 U.S. Dist. LEXIS 19065, at *92, 2005 WL 2140240, at *32 ("a pay-if-paid condition generally requires words such as 'condition,' 'if and only if,' or 'unless and until' that convey the parties' intention that a payment to a subcontractors is contingent on the contractor's receipt of those funds."); *Main Elec. Ltd., v. Printz Servs. Corp.* (Colo. 1999), 980 P.2d 522, 528, fn.6 ("typically a payment clause that creates a

condition precedent uses the phrase 'as a condition precedent' or other words indicating that the owner's failure to pay was reasonably foreseen and that the purpose of the payment provision was to address this possibility.").

Id. at *12.

Virtually all jurisdictions that have addressed these types of clauses have interpreted condition-precedent language as sufficient to create a pay-if-paid clause. *See, e.g., Envirocorp Well Servs., Inc. v. Camp Dresser & McKee, Inc., No. IP99-1575-C-T/G, 2000 U.S. Dist. LEXIS 16088, 2000 WL 1617840, at *5 (S.D. Ind. Oct. 25, 2000)* (explaining that "[c]ourts that have enforced [pay-if-paid] provisions do so when the provisions explicitly provide that payment to the contractor by the owner is a condition precedent to payment to the subcontractor by the contractor"); *see also L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co., 189 Ariz. 178, 939 P.2d 811, 814-15 (Ariz. Ct. App. 1997)* (enforcing as a pay-if-paid clause a provision stating that contractor's receipt of payment from owner was a condition precedent to its obligation to pay subcontractor); *Gilbane Bldg. Co. v. Brisk Waterproofing Co., 86 Md. App. 21, 585 A.2d 248, 249-51 (Md. Ct. Spec. App. 1991)* (same); *Berkel & Co. Contractors v. Christman Co., 210 Mich. App. 416, 533 N.W.2d 838, 839 (Mich. Ct. App. 1995)* (same).

The Seventh Circuit in *BMD Contractors BMD Contrs., Inc., v. Fid. & Deposit Co.*, 679 F.3d 643, 650 (7th Cir. 2012) recently addressed this very issue. The Seventh Circuit held:

The Sixth Circuit's decision in *Dyer* is the leading case in this group--the others simply follow it--but BMD misreads that opinion by conflating two distinct concepts: (1) a requirement of express language demonstrating the parties' intent to transfer the risk of insolvency, and (2) a requirement that the parties use *particular language* to express that intent (for example, by stating that the subcontractor "assumes the risk" of the owner's insolvency, or something very similar). We do not disagree that to transfer the risk of upstream insolvency or default, the contracting parties must expressly demonstrate their intent to do so; that is the rule from *Dyer*. But by clearly stating that the contractor's receipt of payment from the owner is a condition precedent to the subcontractor's right to payment, the parties have expressly demonstrated *exactly* that intent. Adding specific assumption-of-risk language would reinforce that intent but is not strictly

necessary to create an enforceable pay-if-paid clause. *Dyer* does not hold otherwise.

"Condition precedent" is a legal term of art with a clear meaning: "An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." BLACK'S LAW DICTIONARY 334 (9th ed. 2009). The Industrial Power/BMD contract unambiguously states that Industrial Power's receipt of payment is a condition precedent to BMD's right to payment. This provision means just what it says--that Industrial Power's duty to pay BMD is expressly conditioned on its own receipt of payment--thus evincing the parties' unambiguous intent that each party assumes its own risk of loss if Getrag becomes insolvent or otherwise defaults.

Notably, the subcontracts at issue in *Dyer*, *Midland*, and *Oberle* did not use condition-precedent language like that at issue here, so those cases cannot be read as suggesting that the use of this terminology is insufficient to create a pay-if-paid provision. Although it's possible to reinforce the clarity of a pay-if-paid clause by using redundant language--e.g., "in agreeing to this condition precedent, subcontractor assumes the risk of owner's insolvency"--additional language like this is not necessary if the meaning of the condition precedent is otherwise clear. *MidAmerica Constr. Mgmt., Inc. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1263 (10th Cir. 2006) (noting that a similarly worded subcontract's "failure to say all that it might have said is not enough to throw the intent of the contracting parties into doubt").

Id. at 650.

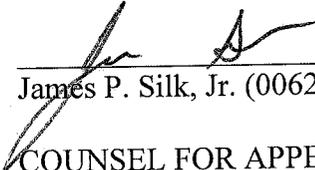
The clause in the current subcontract is a "pay-if-paid" clause. The contractual language is unambiguous and the intent of the parties is clearly defined. The language specifically indicates that payment to A.E.M. by the owner is a condition precedent to payment by A.E.M. to Transtar. This is a classic example of a "pay-if-paid" provision. Not only does the provision indicate that payment by the owner is a condition precedent, the language is capitalized and bolded. A.E.M. had no obligation to make payment to Transtar until A.E.M. received payment from the owner. As such, A.E.M. did not breach the subcontract agreement with Transtar and thus the trial court properly determined A.E.M. was entitled to summary judgment.

CONCLUSION

The court of appeals' decision stands contract interpretation on its head. The contract provision at issue clearly indicates that the parties intended for Transtar to bear the risk of non-payment by the owner. The effect of the court of appeals decision is to undermine the freedom of contracting between a general contractor and a subcontractor. This is contrary to Ohio appellate case law as well as decisions from virtually all other courts that have addressed the issue. The decision undermines the right of parties to contract in Ohio, and provides great uncertainty to contractors and subcontractors as to the validity of unambiguous provisions in their contracts.

A.E.M. respectfully requests that the lower court's decision be reversed.

Respectfully submitted,

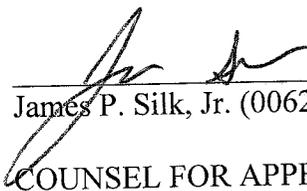


James P. Silk, Jr. (0062463)

COUNSEL FOR APPELLANT, A.E.M.
ELECTRIC SERVICES, CORP.

CERTIFICATE OF SERVICE

I certify that a copy of this MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, A.E.M. ELECTRIC SERVICES CORP., was sent by ordinary U.S. Mail, postage prepaid, this 21st day of May, 2013 to Counsel for Appellant, Luther L. Liggett, Jr., Esq., and Heather Logan Melick, Esq., Luper Neidenthal & Logan, 50 West Broad St., Suite 1200, Columbus, OH 43215-3374.


James P. Silk, Jr. (0062463)
COUNSEL FOR APPELLANT, A.E.M.
ELECTRIC SERVICES CORP.

APPENDIX

Notice of Appeal to the Supreme Court dated January 25, 2013.....1

Opinion and Judgment Entry of the Lucas County Court of Appeals dated
December 14, 20123

Decision and Judgment of the Lucas County Court of Common Pleas dated
March 29, 201217

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0148

TRANSTAR ELECTRIC, INC.

Appellee,

vs.

A.E.M. ELECTRIC SERVICES CORP.

Appellant.

) On Appeal from the Lucas County
Court of Appeals,
) Sixth Appellate District

)
) Court of Appeals
) Case No.: CL-2012-01100

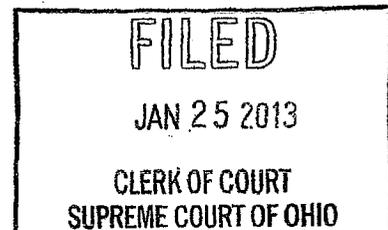
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NOTICE OF APPEAL OF APPELLANT, A.E.M. ELECTRIC SERVICES CORP.

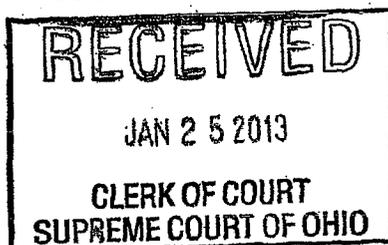
James P. Silk, Jr. (0062463)
SPENGLER NATHANSON P.L.L.
Four Seagate, Suite 400
Toledo, Ohio 43604-2622
Telephone: 419-252-6210
Facsimile: 419-241-8599
jsilk@snlaw.com

COUNSEL FOR APPELLANT, A.E.M. ELECTRIC SERVICES CORP.

Luther L. Liggett, Jr. (0004683)
Heather Logan Melick (0068756)
Luper Neidenthal & Logan
50 West Broad St., Suite 1200
Columbus, OH 43215-3374
Telephone: 614-229-4423
Email: Liggett@lnlattorneys.com
Telephone: 614-229-4444
Email: hmelick@lnlattorneys.com
Facsimile: 614-345-4948



COUNSEL FOR APPELLEE TRANSTAR ELECTRIC, INC.

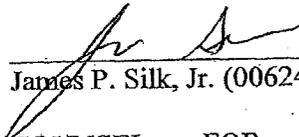


Notice of Appeal of Appellant A.E.M. Electric Services, Corp

Appellant, A.E.M. Electric Services Corp, hereby gives notice of Appeal to the Supreme Court of Ohio from the Judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-12-1100 on December 14, 2012.

This case raises a substantial constitutional question and is one of public or great general interest.

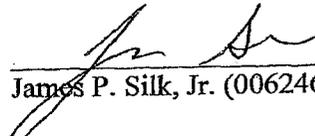
Respectfully submitted,


James P. Silk, Jr. (0062463)

COUNSEL FOR APPELLANT, A.E.M.
ELECTRIC SERVICES, CORP.

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail, postage prepaid, this 24th day of January 2013 to Counsel for Appellee, Luther L. Liggett, Jr., Esq., and Heather Logan Melick, Esq., Luper Neidenthal & Logan, 50 West Broad St., Suite 1200, Columbus, OH 43215-3374.


James P. Silk, Jr. (0062463)

COUNSEL FOR APPELLANT, A.E.M.
ELECTRIC SERVICES CORP.

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COURT OF APPEALS
2012 DEC 14 A 8:27

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS
IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Transtar Electric, Inc.

Court of Appeals No. L-12-1100

Appellant

Trial Court No. CI0201006750

v.

A.E.M. Electric Services Corporation

DECISION AND JUDGMENT

Appellee

Decided: DEC 14 2012

Luther L. Liggett, Jr. and Heather Logan Melick, for appellant.

James P. Silk, Jr., for appellee.

SINGER, P.J.

{¶ 1} Appellant appeals the award of summary judgment in a suit seeking payment on a contract for electrical subcontracting. Because we conclude that the purported pay-if-paid contract provision does not manifest the intent of the parties to shift the risk of owner non-payment from the general contractor to the subcontractor, we reverse.

E-JOURNALIZED

DEC 14 2012

1.

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{¶ 2} Appellee, A.E.M. Electric Services Corp., was general contractor on the construction of a swimming pool at a Holiday Inn in Maumee, Ohio. In January 2007, appellee entered into a subcontract agreement with appellant, Transtar Electric, Inc., for certain electrical work to be performed on the Maumee job.

{¶ 3} Section 4 (c) of the agreement between the parties provided as follows:

(c) The Contractor [appellee] shall pay to the Subcontractor [appellant] the amount due [for work performed] only upon the satisfaction of all four of the following conditions: (i) the Subcontractor has completed all of the Work covered by the payment in a timely and workmanlike manner, * * * (ii) the Owner has approved the Work, * * * (iii) the Subcontractor proves to the Contractor's sole satisfaction that the Project is free and clear from all liens * * * and (iv) the Contractor has received payment from the Owner for the Work performed by Subcontractor.

RECEIPT OF PAYMENT BY CONTRACTOR FROM OWNER FOR WORK PERFORMED BY SUBCONTRACTOR IS A CONDITION PRECEDENT TO PAYMENT BY CONTRACTOR TO SUBCONTRACTOR FOR THAT WORK. (Emphasis sic.)

{¶ 4} Appellant invoiced appellee for work performed in the amount of \$186,709. Appellee paid appellant a total of \$142,620.10. The remaining \$44,088.90 was not paid.

{¶ 5} On September 27, 2010, appellant sued appellee for the unpaid amount on the contract, on account and in unjust enrichment. Appellee denied liability. Following

discovery, the matter was submitted to the trial court on cross-motions for summary judgment.

{¶ 6} Appellee supported its motion with the affidavit of its president who ratified the unpaid amount appellant sought, but averred that the project owner had failed to pay appellee that amount, as well as more. Appellee's president stated that appellee had and would continue to attempt to collect the money from the owner and pledged that appellant would be paid if collection efforts were successful. Absent such payment, however, appellee insisted it was not contractually obligated to pay. Moreover, appellee maintained, neither account nor unjust enrichment was a sustainable claim in the presence of an enforceable contract.

{¶ 7} Appellant argued that the contractual provision that appellee characterizes as a pay-if-paid should be deemed a pay-when-paid clause. Contractual language that shifts the risk of non-payment from the general contractor to a subcontractor is not favored in the law and provisions which effect such a transfer of risk must be carefully scrutinized and approved if, and only if, such risk-shifting is manifestly intended in clear and unequivocal form. Absent such language, the provision should be interpreted to govern only the time at which payment is to be made. If no specific time is stated, then it must be determined what period constitutes a reasonable delay.

{¶ 8} According to appellant, any other interpretation means that the subcontractor has promised to provide materials and labor and the general contractor has made no

promise to pay. In this circumstance, appellant reasoned, the contract failed for want of consideration.

{¶ 9} The trial court concluded that the contract clause at issue was a pay-if-paid provision. Since appellant did not dispute appellee's affidavit averring that, despite appellee's efforts, payment on this portion of the work had not been made, applying this portion of the contract meant that appellant had no present claim. Since a valid contract existed between the parties, claims on account and unjust enrichment were precluded. Accordingly, the court denied appellant's motion for summary judgment and granted appellee's motion. From this judgment, appellant now brings this appeal.

{¶ 10} Appellant sets forth the following two assignments of error:

First Assignment of Error: The trial court erred in not determining the Subcontract clause to be a "pay-when-paid" clause, allowing A.E.M. a reasonable time to collect payment.

Second Assignment of Error: The trial court erred when granting summary judgment without a fact determination as to the basis for the owner's non-payment and A.E.M.'s culpability, rendering the Subcontract void as without consideration, and leaving Transtar without a remedy.

{¶ 11} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as applied in trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d

127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 12} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A “material” fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826,

675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 13} In this matter, there are no questions of material fact; the issue to be determined is the meaning of the contract between the parties.

{¶ 14} The cardinal principle in contract interpretation is to give effect to the intent of the parties. *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 274 (1974), paragraph one of the syllabus. Such intent is presumed to reside in the language the parties chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus. If the language of the contract is clear and unambiguous, the contract must be enforced as written. *Corl v. Thomas & King*, 10th Dist. No. 05AP-1128, 2006-Ohio-2956, ¶ 26. Ambiguity exists only when the terms of an agreement cannot be determined within the four corners of the contract or where the language of the agreement is susceptible to two or more reasonable interpretations. *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 129 Ohio App.3d 45, 55, 716 N.E.2d 1201 (2d Dist.1998).

I. Pay if Paid or Pay when Paid

{¶ 15} In its first assignment of error, appellant maintains that the trial court erred when it concluded that the subcontractor payment provision was a pay-if-paid provision which, without payment by the owner, absolved appellee of any obligation to pay appellant for the labor and material expended on the job.

{¶ 16} Ordinarily, as between a general contractor and a subcontractor, the risk of the insolvency of the owner rests with the general contractor. The general contractor is in the best position to assess the owner's creditworthiness. The ability to best minimize the risk of an owner's default also resides with the general contractor. Thus, normally and legally the insolvency of the owner does not defeat the claim of a subcontractor against a general contractor. *Thos. A. Dyer Co. v. Bishop Internatl. Eng. Co.*, 303 F.2d 655, 660-661 (6th Cir.1962), *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Inc.*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007, ¶ 10 (10th Dist.), *Power & Pollution Servs. v. Suburban Piping*, 74 Ohio App.3d 89, 91, 589 N.E.2d 69 (8th Dist.1991).

{¶ 17} Pay-if-paid provisions in construction contracts seek to alter the distribution of risk of owner default between the contractor and subcontractor by contractually making the owner's payment to the contractor a condition precedent to the contractor's payment to the subcontractor. *Chapman Excavating Co. v. Fortney & Weygandt, Inc.*, 8th Dist. No. 84005, 2004-Ohio-3867, ¶ 22. Such provisions have been inserted into construction contracts for decades. 8 Lord, *Williston on Contracts* (4th Ed.2010) 633, Section 19:59.

{¶ 18} Pay-if-paid provisions are disfavored. Many jurisdictions, including North Carolina and Wisconsin, have enacted legislation voiding such clauses as against public policy. *Id.* at 637, fn. 5, N.C.Gen.Stat. § 22C-2, Wis.Stat. Ann. § 799.135(1). Illinois, Maryland and Missouri have also enacted legislation limiting such clauses. New York

and California have judicially declared pay-if-paid provisions to be against public policy as abrogating the states' lien laws. *West-Fair Elec. Constrs. v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148, 153, 661 N.E.2d 967 (1995), *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15 Cal.4th 882, 896, 938 P.2d 372 (1997).

{¶ 19} Ohio appeals courts, and many other courts, have generally followed the *Dyer* case. There an Ohio general contractor and subcontractor entered into an agreement for the subcontractor to provide materials and labor for plumbing in a horse racing track being built in Kentucky. The agreement between the parties called for the subcontractor to be paid \$115,000 "no part of which shall be due until five (5) days after the Owner shall have paid the Contractor therefor * * *." *Dyer* at 656. When the owner declared bankruptcy, the subcontractor sued the contractor to obtain payment outstanding. The contractor defended, arguing it was not contractually obligated to pay until it was paid by the owner, an event unlikely to ever occur.

{¶ 20} The *Dyer* court found that the disputed provision was a pay-when-paid clause rather than a pay-if-paid.

[W]e see no reason why the usual credit risk of the owner's insolvency assumed by the general contractor should be transferred from the general contractor to the subcontractor. It seems clear to us under the facts of this case that it was the intention of the parties that the subcontractor would be paid by the general contractor for the labor and materials put into the project. We believe that to be the normal

construction of the relationship between the parties. If such was not the intention of the parties it could have been so expressed in unequivocal terms dealing with the possible insolvency of the owner. *Id.* at 661.

{¶ 21} *Dyer* was followed in *Power & Pollution Servs.*, 74 Ohio App.3d 89, 589 N.E.2d 69, which concluded that similar provisions¹ constituted a pay-when-paid clause. “If the parties intended to shift the risk of solvency of the owner to the subcontractor, such intention should have been unambiguously expressed in the contract.” *Id.* at 91.

{¶ 22} In *Kalkreuth Roofing & Sheet Metal, Inc. v. Bogner Const. Co.*, 5th Dist. No. 97 CA 59, 1998 WL 666765 (Aug. 27, 1998), the court treated the following provision as a pay-if -paid clause:

The parties to this purchase order specifically acknowledge and agree that a condition precedent to the obligation of the Contractor to pay Subcontractor is the payment to Contractor by Owner of monies due. This provision does not merely set forth the time at which payment must be made to the Subcontractor. Subcontractor expressly acknowledges that Subcontractor may never be paid in full, or at all, to the extent Contractor is not paid by the Owner.

¹ “5(d) * * * Company [Suburban] shall not be required to pay any such monthly billing of the subcontractor prior to the date Company receives payment of its corresponding monthly billing from the Owner.

“5(e) * * * Within ten (10) days after said final payment by the Owner, Company shall pay the subcontractor the balance of the subcontract sum.”

{¶ 23} The court nonetheless found the provision ambiguous as to the meaning of the phrase "monies due," reversed a summary judgment and remanded the matter for further hearings.

{¶ 24} The following provision in a contractor/subcontractor "work order" was treated as a pay-when-paid clause:

4. a. All progress payments are conditioned upon the Sub furnishing to F & W 1) a signed copy of this work order * * * Partial payments of the Subcontract Sum shall be made within ten (10) days after payment is received by F & W from Owner[.] *Chapman Excavating Co*, 8th Dist. No. 84005, 2004-Ohio-3867, at ¶ 4.

{¶ 25} Perhaps the most exhaustive discussion of the topic appears *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Inc.*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007. There an architectural firm hired a consulting engineering firm to provide civil engineering services on a project. The contract between the architects and the consultant contained the following provisions:

§ 12.5 Payments to the Consultant shall be made promptly after the Architect is paid by the Owner under the Prime Agreement. The Architect shall exert reasonable and diligent efforts to collect prompt payment from the Owner. The Architect shall pay the Consultant in proportion to amounts received from the Owner which are attributable to the Consultant's services rendered.

§ 13.4.3 * * * The Consultant shall be paid for their services under this Agreement within ten (10) working days after receipt by the Architect from the Owner of payment for the services performed by the Consultant on behalf of their Part of the Project. *Id.* at ¶ 4.

{¶ 26} The consulting firm substantially completed its work on the project and billed the architect. When the owner cancelled the project and refused to pay the architect, the architect denied any obligation to pay the consulting firm because of what it characterized as the pay-if-paid contractual clauses. *Id.* at ¶ 5. The consulting firm sued.

{¶ 27} The trial court ruled in favor of the architect, granting its motion for summary judgment.

{¶ 28} The appeals court reversed. The court concluded that the contract language created pay-when-paid, an unconditional obligation to pay within a reasonable amount of time. *Id.* at ¶ 25. In reaching this conclusion, the court attempted to define the characteristics of a pay-if-paid clause:

A pay-if-paid provision must clearly and unambiguously condition payment to the subcontractor on the receipt of payment from the owner. *Kalkreuth Roofing & Sheet Metal, Inc. v. Bogner Constr. Co.* (Aug. 27, 1998), 5th Dist. No. 97 CA 59, 1998 WL 666765. See also 8 Lord, Williston on Contracts (4th Ed. 2010) 636, 19:59 (“[I]f the parties clearly do intend that the risk of nonpayment be borne by the subcontractor and clearly express that intent by making the right of the subcontractor to be

paid expressly conditional on the receipt of such payment by the contractor from the owner, they may by contract allocate that risk, and the courts will enforce that freely bargained-for allocation of risk"). Payment provisions qualify as pay-if-paid provisions if they expressly state that (1) payment to the contractor is a condition precedent to payment to the subcontractor (as in the above example²), (2) the subcontractor is to bear the risk of the owner's nonpayment (as in the above example), or (3) the subcontractor is to be paid exclusively out of a fund the sole source of which is the owner's payment to the subcontractor. *Sloan & Co. [v. Liberty Mut. Ins. Co.]*, 653 F.3d [175] at 187, fn. 9. See also *LBL Skysystems (USA), Inc. v. APG-America, Inc.* (Aug. 31, 2005), E.D.Pa. No. 02-5379, 2005 WL 2140240, at *32 ("A pay-if-paid condition generally requires words such as 'condition,' 'if and only if,' or 'unless and until' that convey the parties' intention that a payment to a subcontractor is contingent on the contractor's receipt of those funds"); *Main Elec., Ltd. v. Printz Servs. Corp.* (Colo.1999), 980 P.2d 522, 528, fn. 6 ("Typically a payment clause that creates a condition precedent uses the phrase 'as a condition precedent' or other words indicating that the

² "A typical 'pay-if-paid' clause might read: 'Contractor's receipt of payment from the owner is a condition precedent to contractor's obligation to make payment to the subcontractor; the subcontractor expressly assumes the risk of the owner's nonpayment and the subcontract price includes this risk.'" *Evans, Mechwart* at ¶ 11, quoting *MidAmerica Constr. Mgmt. v. Mastec N. Am., Inc.*, 436 F.3d 1257, 1261-62 (CA 10 2006).

owner's failure to pay was reasonably foreseen and that the purpose of the payment provision was to address this possibility"). *Id.* at ¶ 12.

{¶ 29} In our view, the language in the *Evans, Mechwart* case goes beyond what was necessary to resolve that case and beyond the position Ohio courts have used to resolve whether a contract provision is pay-if-paid or pay-when-paid. Going back to *Dyer*, Ohio courts have held that, if a contract provision is to be construed as a pay-if-paid clause, the language must clearly and unambiguously indicate that the intent of the parties was to shift the risk of payment from the general contractor to the subcontractor. The sine qua non of such a provision is a clear unambiguous statement that the subcontractor will not be paid if the owner does not pay.

{¶ 30} The *Evans, Mechwart* case, quoting a federal case, suggests that the provision may state that it is a condition precedent or a shift of risk. In our view, this is insufficient. It must be made plain, in plain language, that a subcontractor must ultimately look to the owner of the project for payment. While the words "condition precedent" may be helpful, the term is not sufficiently defined to impart that both parties understand that the provision alters a fundamental custom between a general contractor and a subcontractor. Consequently, absent language making manifest the intent to shift risk of payment, the provision must be construed as a pay-when-paid clause.

{¶ 31} In the present matter, we find no language sufficient to clearly and unambiguously indicate that the parties intended to transfer the ultimate risk of nonpayment to the subcontractor. Consequently, the clause at issue must be interpreted

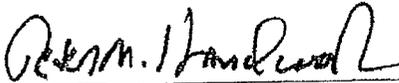
as a pay-when-paid provision. Accordingly, appellant's first assignment of error is well-taken. Appellant's second assignment of error is moot.

{¶ 32} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision, including the determination of a reasonable time for payment. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.


JUDGE

Arlene Singer, P.J.


JUDGE

Thomas J. Osowik, J.
CONCUR.


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

SCANNED

FILED
LUCAS COUNTY

2012 MAR 29 P 1:56

COMMON PLEAS COURT
JAMES W. QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Transtar Electric, Inc.,	*	Case No. G-4801-CI-0201006750
	*	
Plaintiff,	*	Honorable Gene A. Zmuda
	*	
vs.	*	
	*	OPINION AND JUDGMENT ENTRY
A.E.M. Electric Services Corporation,	*	
	*	
Defendant.	*	
	*	

This matter comes before the Court on Plaintiff Transtar Electric, Inc.'s ("plaintiff")
Motion for Summary Judgment.

Defendant A.E.M. Electric Services Corporation ("defendant") filed a memorandum in
opposition to plaintiff's motion for summary judgment and a cross-motion for summary
judgment. Plaintiff filed a reply brief in support of its summary judgment motion and a
memorandum in opposition to defendant's motion for summary judgment. Defendant filed a reply
brief in support. This matter has been fully briefed and is now decisional.

Pursuant to Civil Rule 56(C), summary judgment is proper if:

- "(1) No genuine issue as to any material fact remains to be litigated;
- (2) the moving party is entitled to judgment as a matter of law; and
- (3) it appears from the evidence that reasonable minds can

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come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

To prevail on a motion for summary judgment, the party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293-294. Where the non-moving party would have the burden of proving a number of elements in order to prevail at trial, the party moving for summary judgment may point to evidence that the non-moving party cannot possibly prevail on an essential element of the claim. See, e.g., *Stivison v. Goodyear Tire & Rubber Co.* (1997), 80 Ohio St.3d 498, 499. The moving party "bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." *Dresher*, 75 Ohio St.3d at 292. If established, the burden would then shift to the non-moving party to show that there is a genuine issue of material fact as to that element. *Id.* at 293.

The Ohio Supreme Court has explained the summary judgment burden as follows:

"[T]he movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. The evidentiary materials listed in Civ.R. 56(C) include 'the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.' These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. While the movant is not necessarily obligated to place any of these evidentiary materials in the record, the evidence must be in the record or the motion cannot succeed." *Id.* at 292- 293.

Only after the movant satisfies the initial Dresher burden, must the nonmoving party then present evidence that some issue of material fact remains for the trial court to resolve. *Id.* at 294. "It is basic that regardless of who may have the burden of proof at trial, the burden is on the party moving for summary judgment to establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Horizon Savings v. Wootton* (1991), 73 Ohio App.3d 501, 504.

This case involves a claim for payment under a construction contract between a general contractor and a subcontractor. Plaintiff is an Ohio corporation engaged in the business of electrical construction contracting. (Plaintiff's Complaint, ¶1). Defendant is a Minnesota corporation engaged in the business of electrical construction contracting. (Plaintiff's Complaint, ¶2). On or about January, 2007, defendant engaged plaintiff to perform construction work related to the Holiday Inn Hotel ("Project") at Tollgate Road, City of Maumee, Lucas County, Ohio. (Plaintiff's Complaint, ¶3). Defendant contracted with plaintiff to perform electrical work on the Project after defendant's original contractor left. (Plaintiff's Complaint, ¶4). The parties entered into a Subcontract Agreement ("Agreement") for the Project. (Plaintiff's Complaint, ¶5).

Plaintiff commenced this action seeking payment for the amount remaining unpaid under the Agreement totaling \$44,088.90 plus costs. Plaintiff asserts claims against defendant for breach of contract, account stated, unjust enrichment, and prejudgment interest. Defendant filed a timely answer in this matter.¹

¹Defendant does not dispute the facts in this case. However, defendant argues that the parties' Agreement provides that defendant need not pay plaintiff until the owner of the Project pays defendant.

Plaintiff moves the Court for summary judgment as there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Plaintiff argues that the facts are admitted that plaintiff and defendant entered into the Agreement, plaintiff performed the agreed work under the Agreement, plaintiff invoiced defendant for the work performed in the amount of \$186,709.00, defendant has paid plaintiff \$142,620.10, and defendant has failed to pay plaintiff the remaining \$44,088.90. Therefore, plaintiff contends that based upon the facts of this case, it has established a *prima facie* case for breach of contract. Plaintiff argues that defendant's assertion that it will pay plaintiff only if the owner pays defendant does not relieve defendant from its duty to pay a subcontractor. Plaintiff asserts that the payment clause in the Agreement is a pay-when-paid provision which only allows defendant a reasonable time to make payment to plaintiff. Plaintiff also contends that even if its breach of contract claim fails, plaintiff has asserted claims for account stated, unjust enrichment², and for prejudgment interest. Plaintiff asks this Court to grant it summary judgment in this case.

Defendant argues that a clause contained in a subcontract setting forth a condition precedent for payment to a subcontractor once general contractor is paid by owner is valid and enforceable. Defendant contends that based upon the valid, unambiguous language in the Agreement and the fact that the owner has not paid defendant the remaining monies due it, plaintiff's claims fail and defendant is entitled to judgment as a matter of law. Defendant further

²"When there is a valid, enforceable contract, the doctrine of unjust enrichment is not applicable." *University Hospitals of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 130, 2002 Ohio 3748. Therefore, since there is a valid, enforceable contract in this case, plaintiff's unjust enrichment claim fails.

argues that the Agreement in this case governs the relationship between the parties and since the Agreement provides a condition precedent provision, plaintiff's claim for an account stated fails as defendant does not owe plaintiff money. Also, since there is a valid Agreement in this matter, defendant contends that plaintiff's claim for unjust enrichment is inapplicable. Defendant asks this Court to deny plaintiff's motion for summary judgment and grant it summary judgment on its cross-motion.

It is now for the Court to determine whether summary judgment is appropriate in this case.

In order to recover upon a breach of contract claim, a plaintiff must prove "the existence of a contract, performance by plaintiff, breach by the defendant, and damage or loss to the plaintiff." *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 483.

"In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132 (1987). "Common words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St. 2d 241, 246 (Ohio 1978). "Furthermore, where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Id.*

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The Tenth District Court of Appeals of Ohio in *Fontbank, Inc. v. CompuServe, Inc.*, 138

Ohio App. 3d 801, 808 (Ohio Ct. App., Franklin County 2000) provides further guidance of the law applicable in this case. It held::

" 'Contract integration,' provides that a written contract which appears to be complete and unambiguous on its face will be presumed to embody the final and complete expression of the parties' agreement. *Cleland v. Cleland* (1958), 7 Ohio Op. 2d 206, 79 Ohio L. Abs. 566, 568, 152 N.E.2d 914; *Ayres v. Cook* (1941), 37 Ohio L. Abs. 224, 227, 46 N.E.2d 629. See, also, *Burton*, supra, (stating that the parties to a written contract are presumed to have expressed their intent through the language employed in the contract). That is, a written contract will be presumed to be a complete 'integration' of the parties' agreement. This presumption is strongest where a written agreement contains a merger or integration clause expressly indicating that the agreement constitutes the parties' complete and final understanding regarding its subject matter. *Burton*, supra." *Id.* at 808.

It is undisputed in this case that plaintiff and defendant entered into a valid, enforceable Subcontract Agreement in January, 2007 which set forth the rights and responsibilities of the parties. It is also undisputed that plaintiff was a subcontractor and defendant was the general contractor under the Agreement for electrical work to be performed by plaintiff at a pool facility at the Holiday Inn on Tollgate Road, City of Maumee, Lucas County, Ohio. The dispute in this matter lies with the interpretation of a provision in the Agreement for payment contained within Section 4(c). Specifically, Section 4(c) provides as follows:

"(c)The Contractor shall pay to the Subcontractor the amount due under paragraph (a) above only upon the satisfaction of all four of the following conditions: (I) the Subcontractor has completed all of the Work covered by the payment in a timely and workmanlike manner and the Subcontractor is not otherwise in default under this Subcontract, (ii) the Owner has approved the Work performed by the Subcontractor and has approved Contractor's request for payment for work performed by Subcontractor, (iii) the

Subcontractor proves to the Contractor's sole satisfaction that the Project is free and clear from all liens and claims arising out of its work and provides Contractor with a complete notarized original of the "Subcontractor Release and Waiver of Claims and Affidavit" in the form attached as Exhibit "C" hereto, and (iv) the Contractor has received payment from the Owner for the Work performed by Subcontractor. **RECEIPT OF PAYMENT BY CONTRACTOR FROM THE OWNER FOR WORK PERFORMED BY SUBCONTRACTOR IS A CONDITION PRECEDENT TO PAYMENT BY CONTRACTOR TO SUBCONTRACTOR FOR THAT WORK.** (Exhibit A attached to Plaintiff's Motion for Summary Judgment, Section 4, p.3).

Plaintiff contends that Section 4(c) in the Agreement is a "pay-when-paid" provision while defendant argues that it is a "pay-if-paid" provision. Understanding the difference between "pay-when-paid" and "pay-if-paid" provisions is necessary when examining the cross-motions for summary judgment in this case.

There is a distinction between "pay-when-paid" and "pay-if-paid" contract provisions. The Eighth District Court of Appeals of Ohio in *Chapman Excavating Co. v. Fortney & Weygandt, Inc.*, 2004 Ohio 3867 (Ohio Ct. App., Cuyahoga County July 22, 2004), examined this distinction and found that:

"Under a 'pay-if-paid' provision, the general contractor is required to pay a subcontractor only if the owner pays the general contractor; the risk of owner non-payment falls upon the subcontractor. Cf. *Kalkreuth Roofing & Sheet Metal v. Bogner Constr. Co.* (Aug. 27, 1998), Perry App. No. 97 CA 59, 1998 Ohio App. LEXIS 4694. Under a 'pay-when-paid' clause, however, a general contractor agrees to pay a subcontractor within a period of time after the general is paid by the owner, and the risk of owner non-payment falls upon the general contractor. *Power & Pollution Services, Inc. v. Suburban Power Piping Corp.* (1991), 74 Ohio App.3d 89.

The Court discussed 'pay-when-paid' contract provisions in *Power & Pollution Services, Inc. v. Suburban Power Piping Corp.*, *supra*.

In that case, the court held that a 'pay-when-paid' clause 'does not set a condition precedent to the general contractor's duty to pay the subcontractor, but rather constitutes an absolute promise to pay, fixing payment by the owner as a reasonable time for when payment to the subcontractor is to be made.' " *Id.* at P22-P23.

In *Thos. J. Dyer Co. v. Bishop International Engineering Co.*, 303 F.2d 655, 659 (6th Cir. Ohio 1962), the United States Court of Appeals, Sixth Circuit, analyzed a "pay-when-paid" provision in a subcontractor agreement and found that:

"We come to the crucial issue in the case, namely, whether, as contended by the appellant, paragraph 3 of the subcontract is to be construed as a conditional promise to pay, enforceable only when and if the condition precedent has taken place, which in the present case has not occurred, or, as contended by the appellee, it is to be construed as an unconditional promise to pay with the time of payment being postponed until the happening of a certain event, or for a reasonable period of time if it develops that such event does not take place." *Id.* at 659.

In our case, Section 4(c) of the Subcontract Agreement sets forth the four conditions for plaintiff to meet in order for plaintiff to receive payment from defendant for the work performed. The fourth condition provides that "the Contractor has received payment from the Owner for the Work performed by Subcontractor." (Exhibit A attached to Plaintiff's Motion for Summary Judgment, Section 4, p.3). However, the fourth condition does not stop there, but continues to read in bold print, all caps, that "**RECEIPT OF PAYMENT BY CONTRACTOR FROM THE OWNER FOR WORK PERFORMED BY SUBCONTRACTOR IS A CONDITION PRECEDENT TO PAYMENT BY CONTRACTOR TO SUBCONTRACTOR FOR THAT WORK.**" (Exhibit A attached to Plaintiff's Motion for Summary Judgment, Section 4, p.3).

Clearly, Section 4(c) of the Agreement identifies a condition precedent for payment to plaintiff and does not provide that defendant agrees to pay plaintiff within a period of time after

defendant is paid by the owner as was found in *Power & Pollution Services, Inc., supra*. Moreover, as the Sixth Circuit Court of Appeals analyzed in *Thos. J. Dyer Co., supra*, Section 4(c) in the Agreement provides a "conditional" promise to pay rather than an "unconditional" promise to pay. Thus, it is clear from the unambiguous language of the Agreement that Section 4(c) is a "pay-if-paid" provision that sets forth a condition precedent that the owner pay defendant prior to plaintiff receiving payment.

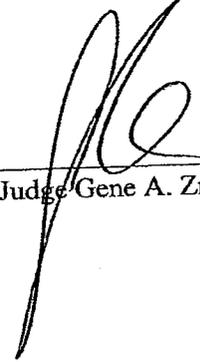
Therefore, based upon the arguments of counsel, the facts and circumstances of this case, the language of the Subcontract Agreement, Civ. R. 56(C), and all applicable case law, the Court finds defendant's Motion for Summary Judgment well-taken and GRANTED and plaintiff's Motion for Summary Judgment not well-taken and DENIED only as to plaintiff's breach of contract claim. Further, since plaintiff's prejudgment interest claim relies upon the Subcontract Agreement in this case, plaintiff's claim for prejudgment interest also fails as a matter of law. Additionally, as was previously indicated above and based upon the contract in this case, plaintiff's claim for unjust enrichment is inapplicable. Thus, plaintiff's claims for breach of contract, unjust enrichment, and prejudgment interest are hereby dismissed.

The remaining claim of plaintiff to be examined by this Court is plaintiff's claim for an account stated. However, as indicated by plaintiff in its motion, an account stated claim is generally when there is an absence of a written contract. In reviewing plaintiff's Complaint and motion in this matter, the account stated claim was pled as an alternative to plaintiff's breach of contract claim in the event this Court found the Subcontract Agreement to be unenforceable. Having found the Subcontract Agreement to be a valid and enforceable contract, plaintiff's account stated claim must also fail as a matter of law. Therefore, based upon all the above, the

Court finds defendant's Motion for Summary Judgment well-taken and GRANTED and plaintiff's Motion for Summary Judgment not well-taken and DENIED as to plaintiff's claim for an account stated. Accordingly, plaintiff's claim for an account stated is hereby dismissed.

The ruling herein is a full and complete adjudication of all claims incipient in plaintiff's complaint as they relate to defendant and a complete adjudication of all genuine issues, merits and matters in controversy between the parties with respect to any duties owed by defendant to the plaintiff. It appears there is no just cause for further delay, and that, pursuant to Civ. R. 54, Final Judgment should be entered for defendant.

3/28/12
Date



Judge Gene A. Zmuda