[Cite as *Advantage Renovations, Inc. v. Maui Sands Resort, Co., L.L.C.*, 2012-Ohio-1866.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Advantage Renovations, Inc.

Plaintiff

v.

Maui Sands Resort, Co., LLC, et al.

Appellee

[Mosser Construction, Inc.

Appellant]

Court of Appeals No. E-11-040

Trial Court No. 2008-CV-0894

DECISION AND JUDGMENT

Decided: April 27, 2012

* * * * *

Lawrence D. Pollack and Alan W. Scheufler, for appellee RBS Citizens, N.A. d.b.a. Charter One.

Jeffrey J. Perkins and Carter Neff, for appellant

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Mosser Construction, Inc., appeals from a grant of summary judgment entered in favor of appellee, RBS Citizens, N.A. d.b.a. Charter One ("Charter

One"), on April 19, 2011. Because we conclude that there is a genuine issue of material fact as to whether a guarantee contract was formed between Charter One and Mosser, we reverse and remand.

{¶ 2} In March 2007, appellant was hired by Maui Sands Resort Company, Brighton Sandusky Limited Partnership, and Brighton Manor Company ("the owners") to construct a $17.4 million complex in Sandusky, Ohio. The complex was to include a water park and several hotels. Appellant was one of two general contractors on the project; the other was Advantage Renovations, Inc. Each contractor had distinct duties and projects it was responsible for in the venture.

{¶ 3} To finance the new complex, the owners secured a $15.4 million loan from appellee in exchange for the mortgage on the property. Appellee's employees admitted this type of construction project – a combined water park and hotel complex – was outside of their realm of expertise or experience, and that because of this, it was considered a more risky venture from the start. Despite this, the loan and project went forward, in part due to the efforts of Jim Gesing, a relationship manager and vice president at the bank.

{¶ 4} As in most construction loans, the money for the loan was held by the bank in an undistributed loan account. When money was needed to cover costs on the construction project, the owners would submit draw requests to the bank, and the bank would inspect the progress on the construction project and pay the owners directly. The owners would then pay the contractor for its work.

{¶ 5} Because of this type of payment relationship, banks usually do not deal directly with contractors. However, appellant's Chief Financial Officer, Al Mehlow, is a former bank loan officer. Mehlow attempted to establish a more direct relationship with appellee by calling the bank on numerous occasions to confirm the amount of the loan and how much of the funds remained in it at various points during the construction project. After obtaining permission from the owners to talk to a third party – specifically, appellant – about the loan, loan administrator R.J. Quinn had three relevant conversations with Mehlow.

{¶ 6} The first two took place in February and March 2008. Both times, Mehlow told Quinn about rumors regarding cost overruns and asked if there were sufficient loan funds explicitly "dedicated, reserved, or earmarked" for appellant. Mehlow admits he may not have used that exact language. Quinn told Mehlow there was enough money remaining in the proposed budget to cover the remaining costs but did not guarantee appellant would be paid if it continued to work. Further, the loan funds continued to be held in a single account; no escrow account ever was formed to hold funds specifically for appellant only.

{¶ 7} After hearing from Mehlow about the potential cost overruns, Quinn did not investigate the rumors or report them to his supervisors. In April 2008, the owners themselves notified Quinn's supervisors that the project was significantly over budget, and they specifically told appellee not to tell appellant about the overruns, presumably to prevent appellant from stopping work.

{¶ 8} Shortly thereafter, appellee notified the owners their loan was in default; however, appellee continued to disperse loan funds when requested so that the complex would still open in time and generate revenue, thus preventing the loan from failing entirely. Gesing, who was "ultimately responsible for the project" at the bank, was particularly invested in ensuring the project opened on schedule; he told other employees that he was concerned about losing his job if the loan failed.

{¶ 9} In May 2008, the owners requested all additional loan funds be paid out directly to them. Several bank employees thought the request was unusual since the remaining funds are generally not paid out until final draw requirements have been met, none of which had been satisfied yet. Despite this, Gesing and three others authorized the release of the funds to the owners.

{¶ 10} In June 2008, Mehlow called Quinn a third and final time to ask why appellant had not been paid yet for work already performed and inspected. Quinn told Mehlow that "there were no loan funds, but there were other sources in the budget for the project that were sufficient to cover his contract and the remaining costs that were on the budget to complete."[1] He told Mehlow "what the other sources were, and that they kept the budget in balance; that the other sources were going to be sufficient to pay him, Mosser's contract, and the other costs associated in the project." Despite Quinn's

[1] All of Charter One's employees' depositions are sealed in order to conceal the bank's internal procedures and the employees' personal information. Since the June 2008 conversation between Quinn and Mehlow does not implicate those concerns, the relevant language is quoted directly from Quinn's deposition.

assurances, no additional funds existed at the time, nor have any additional funds existed since then.

{¶ 11} The complex opened briefly but is now permanently closed, and both general contractors remain unpaid for a large portion of their work. In particular, appellant has not been paid for $1.63 million of work it performed, $60,000 of which was incurred after the final conversation between Quinn and Mehlow when Quinn assured Mehlow there was other funding to pay for appellant's work.

{¶ 12} On September 20, 2008, Advantage Renovations, Inc., filed a foreclosure action against the Maui Sands Properties. Appellant and appellee were both named as defendants in that action. On October 29, 2008, appellant filed cross-claims against appellee. After several revisions and the trial court's denial of appellee's motion to dismiss, appellant filed its third amended cross-claim on October 1, 2010, including claims for breach of oral contract, promissory estoppel, negligent misrepresentation, and unjust enrichment. On October 15, 2010, appellee moved for summary judgment on all claims. The motion was granted on April 19, 2011. Appellant now appeals and asks this court to consider the following four assignments of error:

> 1. The trial court erred in granting summary judgment in favor of Charter One on Mosser's cross-claim for breach of contract.
>
> 2. The trial court erred in granting summary judgment in favor of Charter One on Mosser's promissory estoppel cross-claim.

> 3. The trial court erred in granting summary judgment in favor of Charter One on Mosser's cross-claim for negligent misrepresentation.
>
> 4. The trial court erred in granting summary judgment in favor of Charter One on Mosser's cross-claim for unjust enrichment.

A. Standard of Review

{¶ 13} On review, appellate courts employ the same standard for summary judgment as 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).

{¶ 14} 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), paragraph one of the 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 pleading, 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 202 (1986).

B. Breach of Contract

{¶ 15} Appellant asserts in its first assignment of error that an oral guaranty contract between Mosser and Charter One was formed during Mehlow's conversations with Quinn. As an initial matter not raised by the parties, the statute of frauds does not bar appellant from enforcing any oral promise made by appellee. R.C. 1335.05 states that a promise to "answer for the debt * * * of another" is unenforceable unless contained in a writing signed by the party against whom the promise will be enforced. "However, there are two exceptions to this rule: (1) when the new promisor agrees to become 'primarily liable' on the debt, or (2) when the 'promisor's leading object is to subserve his own business or pecuniary interest.'" *GEM Indus., Inc. v. SunTrust Bank*, 700 F.Supp.2d 915, 919 (N.D.Ohio 2010) (internal marks omitted), quoting *Wilson Floors Co. v. Sciota Park, Ltd.*, 54 Ohio St.2d 451, 459, 377 N.E.2d 514 (1978).

{¶ 16} Assuming appellee made an enforceable oral promise to pay appellant, this promise seems to fall into the second exception. Again, for the purposes of summary judgment, we must view the evidence in a light most favorable to the non-movant. *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993). When viewed in appellant's favor, the facts suggest that appellee told Mehlow additional funds were available in order to keep appellant from walking off the job and increasing appellee's potential financial liability for completing the complex.

{¶ 17} First, the most obvious source of funds to repay appellee and the loan was from the complex opening in time for Memorial Day weekend, which would not happen if appellant walked off the job due to nonpayment. Further, if the loan failed entirely, appellee would have been obligated to take over both of the general contractors' contracts and pay them for their services directly, regardless of how over-budget the project was. Finally, appellee and its employees had a vested interest in ensuring the loan did not fail completely, as evidenced by its payout of the remaining loan funds to the owners after the loan was in default. It may be inferred that appellee stood to benefit from the payout because it ensured the owners had sufficient funds to flexibly pay for the most necessary portions of the construction in order to get the complex up and running in a timely fashion. Therefore, so long as there was an enforceable oral promise to pay appellant, the statute of frauds does not bar enforcement because appellee made its promises in order to serve its own pecuniary business interests.

{¶ 18} With respect to whether there was an enforceable oral promise, appellant asserts a valid contract was formed between Mosser and Charter One through the conversations Mehlow and Quinn had. A contract is generally defined as a promise that is actionable upon breach; it requires "'an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.'" *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F. Supp. 409, 414 (N.D.Ohio 1976). An oral agreement is enforceable when the terms of the agreement are sufficiently particular. *Id.* at ¶ 15. The "[t]erms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.'" *Id.*, quoting *Rutledge v. Hoffman*, 81 Ohio App. 85, 75 N.E.2d 608 (1st Dist.1947), paragraph one of the syllabus. Complete clarity in every term of the agreement is unnecessary because all agreements have some degree of indefiniteness and uncertainty. *Id.* at ¶ 17; *Rutledge* at 86 ("[S]eldom, if ever, does the evidence in proof of an oral contract present its terms in the exact words of offer and acceptance found in formal written contracts. And no such precision is required."). Instead, the goal in enforcing oral contracts is simply to hold people to the promises they make. *Kostelnik* at ¶ 17, quoting 1 Corbin, *Contracts*, Section 4.1, 530 (Perillo Rev.Ed.1993).

{¶ 19} In considering the conversations between Mehlow and Quinn where the alleged contract was formed, the trial court relied heavily on two cases, *GEM Industrial*, *Inc.* and *Wilson Floors Co.* Because these two cases are so pivotal to the outcome of this case, their facts bear repeating.

{¶ 20} In *GEM Industrial*, a general contractor performed work on a project financed by three separate entities and was not paid for several months. To ensure it would be paid eventually, the contractor had a conference call with the three financiers. At that meeting, the only thing discussed was that there were additional sources of funding in place to pay construction costs and what those sources were. The district court held that, although the financiers stated in general terms that they promised to pay the contractor, the evidence was too vague to support the existence of an enforceable contract. *GEM Indus.*, 700 F.Supp.2d at 921.

{¶ 21} The court was especially concerned with the terms of the alleged agreement. It stated that not only had essential terms such as "price, duration, or timing of payments" not been agreed on, but also that the parties had not agreed on the fundamental question of *who* would pay the contractor for its work. *Id.* at 921-22. Because there were three financiers with differing financial commitments, it was unclear whether the contractor had three separate contracts with each of them, or whether there was one contract with each of them jointly liable for payments. *Id.* at 922. The court ultimately ruled that "[s]uch uncertainty about the identity of the parties to the contract and their relative obligations is fatal" to the claim. *Id.*

{¶ 22} In contrast, in *Wilson Floors*, when a subcontractor was not paid in timely installments, it walked off the job. Because the loan funds had been completely dispersed at that point, the bank had to decide if it would be most beneficial for it to lend more money to the owners, foreclose on the mortgage and pay the subcontractor's contract itself, or do nothing. The bank determined that foreclosing and paying the subcontractor directly would result in higher costs to itself, so it chose to extend further credit. In a meeting with the subcontractor, the bank "assured [the subcontractor] that if it returned to work, it would be paid." *Wilson Floors*, 54 Ohio St.2d at 453.

{¶ 23} The subcontractor ultimately was not paid for its work and sued the general contractor and owners. It received a judgment against them, but when they failed to satisfy the judgment, it sued the bank directly. The Ohio Supreme Court held that the statute of frauds did not prevent the subcontractor from enforcing the bank's oral guarantees to pay. *Id.* at 460. In ruling that there was an enforceable oral contract, the court placed little importance on the fact that the agreement had several indefinite terms, such as who was to pay the subcontractor, how much the subcontractor would be paid, and on what basis the subcontractor could bill. *See id.* Instead, "[s]o long as the promisor undertakes to pay the subcontractor whatever his services are worth irrespective of what he may owe the general contractor, and so long as the main purpose of the promisor is to further his own business or pecuniary interest, the promise is enforceable." *Id.* at 459, citing 3 Williston, *Contracts*, Section 481, 466-67 (3d Ed.1960).

{¶ 24} The trial court in the present action ultimately held that *GEM Industrial* seemed more factually similar to the present case than *Wilson Floors*; however, *GEM Industrial* is a federal district court case, whereas *Wilson Floors* is an Ohio Supreme

Court case. Accordingly, we base our analysis on the guidance provided in *Wilson Floors*.

{¶ 25} According to the analysis in *Wilson Floors*, the two conversations between Quinn and Mehlow in February and March 2008 do not meet the elements of a contract. Quinn advised Mehlow that there was money in the loan's proposed budget to cover appellant's costs for the remainder of the project; however, he in no way obligated the bank to pay for those costs or stated anything to the effect of "if you work, you will be paid," as occurred in *Wilson Floors*. Quinn was simply advising Mehlow of the current amount left in the loan at the time. Accordingly, there was no mutual assent to an agreement that appellee would pay appellant for the costs of construction, and at that point, there was no enforceable oral agreement between the two parties.

{¶ 26} The conversation in June 2008 is more problematic. In that conversation, Quinn truthfully told Mehlow there were no additional funds in the bank loan to pay appellant. As in Quinn's first two conversations, he simply advised Mehlow how much money was left in the loan budget. His statements regarding additional sources of funding, however, present a material question of fact as to his motivation in the misstatement and the legal effect the misstatement had with respect to potentially creating an enforceable oral contract.

{¶ 27} Construing the evidence in a light most favorable to appellant, Quinn made the misstatements in order to induce appellant to continue its work on the complex. By misstating the source of funds available and by actively concealing that the loan was already in default, appellee's comments edge closer to "if you work, you will be paid," and as the Ohio Supreme Court stated in *Wilson Floors*, that is sufficient to form an oral guarantee contract.

{¶ 28} In holding the terms of the agreement too indefinite to form an enforceable contract, the trial court found it important that there was no agreement on who was to pay appellant, how much, or on what basis it would be paid. However, none of those factors were clear in *Wilson Floors*, and that did not prevent the formation of an enforceable agreement. *GEM Industrial* saw a problem with not formally agreeing upon a price, duration, or timing of payments; however, this case is not controlling, and the Ohio Supreme Court in *Wilson Floors* found the lack of those same facts immaterial.

{¶ 29} Furthermore, the problem in *GEM Industrial* was that multiple financiers were potentially responsible for different percentages of the overall liability. *See GEM Indus.*, 700 F.Supp.2d at 922. Here, though, there is only one entity – appellee – allegedly responsible for the outstanding liability to appellant. Further, this is unaffected by the fact that the owners are still primarily liable for the outstanding liability to appellants. *Wilson Floors*, 54 Ohio St.2d at 459-460 ("[I]t is of no consequence that * * * the original obligor remains primarily liable or that the [contractor] continues to look to the original obligor for payment * * *. [I]t is not required to show as a condition precedent for enforceability of the oral contract that the original debt is extinguished."). Accordingly, there is a material issue of fact as to whether appellee's misstatements rose to the level of “if you work, you will be paid,” and appellant’s first assignment of error is well-taken.

C. Promissory Estoppel and Negligent Misrepresentation

{¶ 30} Appellant’s second and third assignments of error regarding promissory estoppel and negligent misrepresentation depend entirely on the resolution of its oral contract claim as discussed in the first assignment of error. The elements for promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance on the promise, and (3) injury by relying on the promise. *Patrick v. Painesville Commercial Properties*, 123 Ohio App.3d 575, 583, 704 N.E.2d 1249 (11th Dist.1997); *Talley v. Teamsters, Chauffeurs, Warehousemen, and Helpers, Local No. 377*, 48 Ohio St.2d 142, 146, 357 N.E.2d 44 (1976), quoting Restatement of the Law 2d, Contracts, Section 90 (1973). Therefore, the promissory estoppel claim turns on whether the June 2008 conversation rose to the level of a promise and oral guarantee or not; if it did not, the first element of this claim is not met, and promissory estoppel cannot exist here.

{¶ 31} Further, the elements of negligent misrepresentation are: (1) supplying false information relating to a past or existing fact, (2) in the course of a business, professional, or employment setting, (3) to another for their guidance in a business transaction, (4) which the other justifiably relies upon to their detriment, and (5) the person supplying the false information fails to exercise reasonable care or competence in obtaining or communicating the information. *Delman v. City of Cleveland Heights*, 41 Ohio St.3d 1, 4, 534 N.E.2d 835 (1989), quoting 3 Restatement of the Law 2d, Torts, Section 552(1) (1965). The duty to exercise reasonable care does not arise unless there is a special duty or relationship between the parties, such as a fiduciary duty, a contractual duty, or a professional relationship between service provider and customer. *See id.* at 2; *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220 (4th Cir. 2002) (holding that banks do not have a duty of care to noncustomers that the bank does not have a direct relationship with). Here, whether there was a duty of reasonable care owed to appellant is also dependant on the outcome of appellant's oral contract claim. If the parties entered into an oral guarantee contract, appellee was no longer dealing with appellant at arm's length as with normal noncustomers. Accordingly, there is a genuine issue of material fact regarding whether the elements of promissory estoppel and negligent misrepresentation may be met by appellee's alleged promises. Appellant's second and third assignments of error are well-taken, conditioned on the successful resolution of the oral contract claim.

D. Unjust Enrichment

{¶ 32} Appellant argues in its fourth assignment of error that appellee was enriched by receiving the fully-constructed complex, and that it would be unjust for appellee to retain this benefit without paying appellant for its efforts to complete the construction on the complex. Because the equitable theory of unjust enrichment is not available where the relationship of the parties is governed by an express contract, *Sammartino v. Eiselstein*, 7th Dist. No. 08 MA 211, 2009-Ohio-2641, ¶ 14, this assignment of error also hinges upon the resolution of appellant's first assignment of error and whether an oral guarantee contract was formed between appellant and appellee.

However, unlike the second and third assignments of error, this claim may only exist if the claim of oral contract fails.

{¶ 33} The elements for unjust enrichment are: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the 'unjust enrichment' element)." *Id.*, citing *L & H Leasing Co. v. Dutton*, 82 Ohio App.3d 528, 534, 612 N.E.2d 787 (1992) and *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). Ohio law does not require that the benefitted party act improperly in some fashion before an unjust enrichment claim can be upheld; instead, unjust enrichment can result "'from a failure to make restitution where it is equitable to do so. That may arise when a person has passively received a benefit which it would be unconscionable for him to retain'" without paying compensation. *Reisenfeld & Co. v. Network Group, Inc.*, 277 F.3d 856, 860-61 (6th Cir. 2002), quoting *Cosby v. Cosby*, 141 Ohio App.3d 320, 327, 750 N.E.2d 1207 (12th Dist. 2001).

{¶ 34} Although the present situation is factually distinct, the general rule is that, when an owner has fully paid the general contractor pursuant to their contract, a subcontractor may not directly sue a project's owner, with some limited exceptions. *Id.* at 861-62 (collecting cases). These exceptions include situations when there is evidence that the owner misled the subcontractor to the subcontractor's detriment or when the owner induced a change in the subcontractor's position to the subcontractor's detriment.

Id. Here, analogously, a general contractor is trying to sue a party that is not responsible for direct payments to it. Further, appellee *did* mislead appellant to appellant's detriment and caused the appellant to not walk off the job, which was presumably a change in appellant's position prior to the June 2008 phone call. Even though appellant never actually threatened to walk off the job, the level of concern displayed by Mehlow in ensuring that appellant was paid, and paid in a timely fashion, indicates that appellant was unwilling to continue working if loan disbursements were not forthcoming. This is especially evident considering the June 2008 conversation - before which appellant had not been paid for the last several months - was described by the parties involved as "heated" until Quinn mentioned there were additional funds available.

{¶ 35} Despite this, because appellee has not received any repayment on the loan from the completed complex's brief opening, it argues that it was not enriched at all. Specifically, it claims that unjust enrichment entitles a party only to restitution of the reasonable value of the benefit conferred. *See, e.g., Reisenfeld* at 862. Since appellee believes no benefit was conferred due to the lack of repayment on the loan, it claims the unjust enrichment claim must fail because the first element of the claim is not met. Appellee bolsters its claims by stating that it owes $20 million on the complex, and the best offer to purchase the property from it is only valued around $3 million

{¶ 36} While appellee may be out a significant amount of money now, it does hold the first mortgage on the property; further, it is clear the complex would not have even been worth the $3 million it is being purchased for now had appellant and Advantage

Renovations not completed the construction on the complex. It is difficult to fathom that the market for a partially completed hotel and water park complex would be identical to an entirely completed project. Accordingly, there is a genuine issue of material fact regarding whether it is unfair for the bank have possession of a fully constructed complex without paying appellant for its work; so long as there is no oral guarantee contract found to exist between appellant and appellee, appellant's fourth assignment of error is well-taken.

E. Conclusion

{¶ 37} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed. This matter is remanded to said court for proceedings consistent with this decision. It is ordered that appellee pay the 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.

Mark L. Pietrykowski, J.	_______________________________ JUDGE
Arlene Singer, P.J.	
Thomas J. Osowik, J. CONCUR.	_______________________________ JUDGE
	_______________________________ 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.