

PREPARED BY THE COURT

MILLENNIUM COMMUNICATIONS
GROUP, INC,

Plaintiff,

vs.

LESSNER ELECTRIC COMPANY, INC.
and ROBERT LESNER,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO.: UNN-L-3195-16

CIVIL ACTION

OPINION

Thomas J. Cotton, Esq., Schenck, Price, Smith & King, LLP for Plaintiff Millennium Communications Group, Inc.

Glenn C. Slavin, Esq., Slavin & Morse, LLC for Defendants Lessner Electric Company, Inc and Robert Lessner.

Opinion By: The Hon. Robert J. Mega, J.S.C.

The present matter is before the Court on Plaintiff Millennium Communications Group, Inc.'s (hereinafter "Millennium") motion for partial summary judgment and Defendants Lessner Electric Company, Inc. ("Lessner") and Robert Lessner (hereinafter "Mr. Lessner") (collectively "Defendants") cross-motion for partial summary judgment. The motions are opposed.

I. Facts

By way of background, the underlying matter arises out of a contract dispute between the parties for work performed during the construction of the Union County Family Courthouse in Elizabeth, New Jersey (the "Project"). Lessner, the Project's prime electrical contractor, hired Millennium to serve as its low-voltage electrical sub-subcontractor on the Project.

Pursuant to Purchase Order 3920, Millennium was to provide a "complete turnkey tele/data and security camera infrastructure in accordance with [Lessner's] contract, plans, specifications and addendums [...]." Certification of Thomas J. Cotton, Esq. ("Cotton Cert."), Ex. A. The initial contract price was \$151,218.00. *Id.* Subsequent to the entry of the contract, the parties entered into various change orders. *See* Cotton Cert., Ex. C. The contract and change orders totaled \$201,397.00. *See* Cotton Cert., Ex. D. However, according to the "PURCHASE ORDER

NOTES[,]” the contract is “[m]onthly progressive.” Cotton Cert., Ex. A. This means that Millennium was to issue invoices for labor and materials and to be paid by Lessner based on percentage of completion. The contract also called for 10% retainage. Id.

Plaintiff issued invoices for labor and materials totaling \$148,512.12. Cotton Cert., Exs. E and F. Lessner claims that Millennium issued invoices seeking payment for work it had not performed. As such, of the \$148,512.12, Lessner only paid Millennium \$90,746.23. Cotton Cert., Ex. E. The outstanding invoices amount to \$57,765.89. It is undisputed that Lessner’s last payment toward the outstanding amount was made on May 25, 2016.

Lessner contends that Millennium abandoned the Project, refusing to return unless and until they were paid for invoices they claim were due and owing. In or around September 2016, before Millennium completed its assigned work, Lessner terminated its contract with Millennium. Lessner then retained a company called Alliance to complete the remaining work on the Project.

Mr. Lessner, Lessner’s Vice President, was deposed in connection with this matter. Mr. Lessner testified that in his capacity as Vice President he was the decision maker as to the issuance of payment to the project subcontractor. In relevant part, Mr. Lessner testified during his deposition that in matters of overbilling, payment of invoices is withheld when percentages of completion are below that invoices sought. Mr. Lessner claimed that Millennium had too many personnel on the project, too soon, which may have accounted for why their invoices were inflated. Mr. Lessner also stated the general contractor’s, APS, termination and replacement lead to delays on the Project for everyone involved.

At the time of its termination, Millennium claims that it completed 70% to 75% of the assigned labor under the contract. Lessner claims that Millennium completed anywhere from 45% to 50% of the assigned labor under the contract. Lessner does not challenge the sufficiency of Millennium’s completed work. However, as previously noted, Lessner claims that Millennium issued invoices for work it had not yet performed on the Project. While Lessner admits that it received all payments due from the general contractor, it denies that any such sums are due to Millennium as they were used to complete Millennium’s outstanding work and included amounts that would have been paid to Millennium had they fulfilled their contract.

II. Parties' Arguments

A. Millennium's Arguments in Support of Partial Summary Judgment

In seeking partial summary judgment, Millennium contends that when Lessner's payment of \$90,746.23 is discounted by the \$77,598.23 in materials Millennium provided at the project's outset, Lessner only paid Millennium as though its progress on the Project was 11%. Millennium argues that this amounts to a 39% difference between what Lessner has paid and what Defendants admit Lessner owes. Accordingly, Millennium seeks \$48,281.52.

Millennium argues that it should be granted partial summary judgment as to certain aspects of its unjust-enrichment claim. Millennium claims that Lessner received the benefit of 50% of its work, but only compensated it as that it had completed 11%. According to Millennium, this 39% discrepancy is a benefit that cannot be retained by Defendants without just compensation.

Moreover, Millennium contends it should be granted partial summary judgment with respect to certain aspects of its claim under the Prompt Payment Act, N.J.S.A. 2A:30A-2(b). Millennium again asserts that there is no dispute that it completed at least 50% of the assigned labor. Millennium highlights that Lessner has been paid by the prime contractor and there is no dispute as to the satisfaction of the work Millennium performed on the Project. As such, Millennium concludes it is entitled to \$48,281.52 in compensatory damages, attorney's fees, and interest.

Furthermore, Millennium argues that it should be granted partial summary judgment with respect to certain aspects of its claim under the Construction Trust Fund Act, N.J.S.A. 2A:44-148. Millennium contends that Lessner's undisputed failure to pay it for work performed on the Project is all that is needed to prove this claim. Additionally, Millennium argues that Mr. Lessner is personally liable for its claim as he admitted that he made the decision to refuse to pay Millennium.

B. Lessner's Arguments in Opposition to Millennium's Motion for Partial Summary Judgment and in Support of its Cross-Motion for Partial Summary Judgment

In opposition, Defendants initially argue that genuine issues of material fact preclude this Court from granting Millennium's motion for partial summary judgment. Defendants highlight the deposition testimony of Mr. Lessner and Lessner's employees who claim that Millennium was billing ahead of its work performance. Defendants therefore contend that the

very nature of the parties' completing claims preclude the entry of summary judgment in this matter.

As to Millennium's unjust enrichment claim, Defendants argue that the aforementioned factual disputes preclude entry of summary judgment.

Further, Defendants argue that its refusal to pay Millennium's invoices is in complete harmony with the Prompt Payment Act as Millennium's invoices are disputed. Defendants again argue that the Millennium's invoices do not correspond with the actual progress of their work. Accordingly, Defendants contend that payment was properly withheld.

Defendants further argue that Lessner has not violated the Construction Fund Act as it is not applicable in the case at bar. Defendants contend that the Construction Fund Act does not apply to a contract dispute between parties, at arm's length, who freely negotiated their agreements. Further, Defendants argue that Mr. Lessner should be dismissed as a named defendant in this action as he was acting in his corporate capacity. Defendants contend that naming him as an individual is nothing more than an effort to harass and "press inappropriate leverage" by Millennium.

Lastly, Defendants seek to dismiss Millennium's claim for delay damages in this case. Defendants argue that the parties' agreement does not indicate that delay damages are an available remedy. Defendants also contend that Millennium's claim for any delay damages should be with APS, not Lessner.

C. Millennium's Arguments in Reply to Lessner's Opposition and in Opposition to Lessner's Cross-Motion

In reply, Millennium reiterates its argument that the limited relief it seeks in its motion for partial summary judgment is warranted by the undisputed facts in this case.

In opposition, Millennium argues that Defendants' cross-motion should be denied. Millennium initially argues that Defendants' cross-motion seeks summary judgment of contested issues.

Millennium contends that its claim under the Construction Trust Fund Act is proper. At the very least, Millennium posits that it has satisfied the prima facie element of the Construction Fund Act and its claim should not be dismissed at the summary judgment stage.

Millennium also argues that its claim for delay-damages should not be dismissed. Millennium contends that it is axiomatic that a breach-of-contract defendant is liable to plaintiff for all consequential damages arising from his breach. Millennium further contends that it is likewise axiomatic that delay damages arise as a consequence from a construction defendant's breaches of a construction contract. Millennium notes that Lessner cites to no legal authority and contends none exists that delay damages are not permitted unless expressly authorized in a contract. Further, Millennium notes that it did not seek summary judgment as to this claim because that facts surrounding same are disputed. Millennium argues that Lessner has failed to prove an absence of material fact as to its delay damages claim and it should therefore not be dismissed.

III. Legal Discussion and Analysis

R. 4:46-2 provides that a court should grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits submitted on the motion, reveal that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment as a matter of law. In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court set forth a new standard for summary judgment. The Court held that trial courts must determine whether an alleged disputed issue of fact is genuine by deciding:

...whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of a non-moving party. ... The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court *should not hesitate* to grant summary judgment. If there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered *insufficient* to constitute at "genuine issue of material fact" for purposes of R. 4:46-2.

Id. at 540 (citations omitted, emphasis added). As such, a summary judgment motion should be denied only when the non-moving party puts forth evidence that creates a genuine issue of material fact. Id.

A defendant's self-serving assertion alone will not create a question of material fact sufficient to defeat a summary judgment motion. Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 225, 232 (App. Div. 1999), certif. den. 163 N.J. 74 (2000). When the matter arises out of plaintiff's motion for summary judgment, the defendant's version of facts is assumed to be true, giving

defendant – the non-moving party - the benefit of all favorable inferences that version supports. Gerber v. Springfield Board of Ed., 328 N.J. Super. 24, 80 (App. Div. 2000) (citation omitted).

Reviewing the underlying record with the foregoing principals in mind, this Court finds that genuine issues of material fact exist as to Millennium’s actual percentage of completion of its work on the Project. Millennium contends that it completed 70% to 75% of the assigned labor under the contract. Lessner claims that Millennium completed anywhere from 45% to 50% of the assigned labor under the contract. Lessner claims that Millennium was billing ahead of its actual progress and invoicing for work it had not yet performed. Millennium argues that Defendants have conceded to the 50% completion figure, however a further review of the deposition testimony calls this claim into question.

While Millennium argues that it has not been compensated for the percentage of work it completed, at this time it is unclear to the Court exactly what that number is. In this regard, the very nature of the dispute before the Court and the discrepancies as to what work was actually completed precludes entry of summary judgment on Millennium’s unjust enrichment claim. To prove a claim for unjust enrichment, a party must demonstrate that the opposing party “received a benefit and that retention of that benefit without payment would be unjust.” VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). The factual disputes highlighted in the parties motion papers and at oral argument make it unclear exactly what benefit – on a percentage basis - Lessner received from Millennium, but that Millennium was not compensated for. This matter shall be determined by a jury, not this Court. As such, Millennium’s motion for partial summary judgment as to unjust enrichment is denied.

Summary judgment is also premature as to Millennium’s claim for damages under the Prompt Payment Act. The Prompt Payment Act, N.J.S.A. 2A:30A-1 and 2A:30A-2, applies to agreements and contracts to improve real property. In relevant part, N.J.S.A. 2A:30A-2(b) states:

If a subcontractor or subsubcontractor has performed in accordance with the provisions of its contract with the prime contractor or subcontractor and the work has been accepted by the owner, the owner's authorized approving agent, or the prime contractor, as applicable, and the parties have not otherwise agreed in writing, the prime contractor shall pay to its subcontractor and the subcontractor shall pay to its subsubcontractor within 10 calendar days of the receipt of each periodic payment, final payment or receipt of retainage monies, the full amount received for the work of the subcontractor or subsubcontractor based on the work completed or the services rendered under the applicable contract. In the case of ongoing work on the same project for which partial payments are made, the

amount of money owed for work already completed shall only be payable if the subcontractor or subsubcontractor is performing to the satisfaction of the prime contractor or subcontractor, as applicable.

N.J.S.A. 2A:30A-2(b).

As previously mentioned, Millennium's percentage of completion on the Project is disputed and is unclear at this juncture. While Millennium presents a relatively narrow claim in its motion, its calculation of damages relies upon the aforementioned disputed 50% completion figure. Despite Millennium's claim to the contrary, this figure is disputed. Accordingly, based on the foregoing, this portion of Millennium's motion is denied.

Turning to Millennium's claim under the Trust Fund Act, the Court is not inclined to grant summary judgment in favor of Millennium at this time.

Under the Trust Fund Act:

All money paid by the state of New Jersey or by any agency, commission or department thereof, or by any county, municipality or school district in the state, to any person pursuant to the provisions of any contract for any public improvement made between any such person and the state or any agency, commission or department thereof, or any county, municipality or school district in the state, shall constitute a trust fund in the hands of such person as such contractor, until all claims for labor, materials and other charges incurred in connection with the performance of such contract shall have been fully paid.

N.J.S.A. 2A:44-148.

"This act [...] protects those who have claims for labor, material and other charges incurred in fulfilling that contract between the governmental body and its contractor." Montefusco Excavating & Contractor Co. v. County of Middlesex, 82 N.J. 519, 525 (1980). "This, money paid by the government to a public contractor constitutes a trust fund for its laborers and materialmen." Id.

Despite Lessner's claims to the contrary, it appears that the Project falls within the plain meaning of the Trust Fund Act. However, the Court finds that Lessner has raised genuine issues of material fact as to whether Millennium is owed funds for work it performed on the Project. That being said, the Court is not persuaded by Lessner's arguments that it has paid out all monies it received in relation to the Project and this claim should therefore be dismissed. Pursuant to the statute all funds paid out in connection with the Project would be subject to the protection of the Trust Fund Act. Accordingly, whether Lessner paid out these monies or not is immaterial.

Furthermore, questions of fact exist as to whether these funds were properly withheld from Millennium. Moreover, Lessner's argument that Mr. Lessner should be dismissed from the case because he acted in his personal capacity is equally unavailing. The plain language of the Act does not distinguish an individual acting in their individual or professional capacity. Defendants cite to no case law whatsoever to support the arguments raised in their papers and during oral argument. As such, the Court is not inclined to dismiss Millennium's claim under the Trust Fund Act or dismiss Mr. Lessner from this action. Accordingly, Millennium's cross-motion for summary judgment is denied.

Lastly, the portion of Lessner's motion seeking to dismiss Millennium's claim for delay damages is denied. While a contract may contain a no delay damages provision, Lesser fails to support its argument that a contract must indicate delay damages are an available remedy to the parties of a contract in order for them to pursue same. The Court is unaware of any decision, unpublished or otherwise, that supports this argument. As such, Millennium is not precluded from pursuing this claim.

IV. Conclusion

In sum, based on the foregoing, both Millennium's motion for partial summary judgment and Defendants' cross-motion for partial summary judgment are **DENIED**.

/s/ Robert J. Mega

The Hon. Robert J. Mega, J.S.C.

Dated: October 10, 2018