

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**T.H. MARSH CONSTRUCTION CO,  
Plaintiff,**

v.

**Case No. 13-135435-CK  
Hon. James M. Alexander**

**MAPLE MANOR REHAB CENTER OF NOVI, ET AL,  
Defendants.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendants Maple Manor Rehab and J.S. Evangelista's Motion for Partial Summary Disposition. This case involves a dispute about the construction of a new nursing facility in Novi. Marsh initiated the suit after delays extended the final completion of the project well beyond the scheduled final completion date. In its Complaint, Marsh seeks, among other things, to foreclose a construction lien and recover money damages for unpaid work performed in connection with the project.

In response to Marsh's Complaint, Defendants filed an Answer and Counter-Claim – alleging that Marsh failed to meet the completion deadline and refused to pay its subcontractors – resulting in Maple Manor's inability to close its end loan.

Defendants now move for partial summary disposition seeking: (1) a court order discharging the liens, and (2) dismissal of Marsh's claim for unjust enrichment. To that end, Defendants move for summary disposition under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

### **1. Defendants' request to discharge Marsh's construction lien**

Defendants first argue that they are entitled to summary disposition of Plaintiff's Count I and a declaration that any Marsh Claim of Lien is void. In support, Defendants cite *Sacchetti v Recreation Co*, 304 Mich 185; 7 NW2d 265 (1943) for the proposition that a claim of lien filed in bad faith is void and must be discharged.

In support of their motion, Defendants argue that Marsh's refusal to pay subcontractors and suppliers, in part, led to some subcontractors filing construction liens. This, despite Maple Manor's timely payment on all applications for payment up until May 2013. Because construction liens were filed, Defendants argue that Maple Manor had no obligation to pay under the terms of the Construction Agreement. Additionally, Defendants argue that Marsh demanded payment for unapproved Change Orders. Defendants also dispute the amounts claimed on Marsh's liens.

Marsh responds that Defendants caused the numerous delays by failing, in part, to: (1) make timely payments; (2) obtain certain permits in a timely manner; (3) review and approve change orders in a timely manner; (4) obtain a DTE easement in a timely manner; and (5) furnish and pay for certain technology in a timely manner. In late April 2013, Marsh was preparing its

application for payment in the amount of \$1,172,247.16 – of which, \$942,282.54 was owed to subcontractors.

Just before Marsh submitted its May 1, 2013 application, it claims that Maple Manor indicated that it was not going to pay for all work. As a result, Marsh filed its lien based on Maple Manor's refusal to pay. Compounding the issue, Marsh argues that it could not pay its subcontractors until Maple Manor paid. As a result, Maple Manor's refusal trickled down to some subcontractors, who filed their own claims of lien. Marsh argues that its subcontractors had to do so in order to comply with the Construction Lien Act, which requires liens to be filed within 90 days of the last day providing labor or materials.

Marsh subsequently filed amended claims of lien to reflect: (1) additional amounts incurred by Marsh resulting from alleged delays, and (2) payments that Marsh made to some subcontractors.

Obviously, the parties agree about very little. Particularly relevant to the present suit, the parties disagree about the cause of the delay in completing the project and Marsh's entitlement to certain payments. While Defendants acknowledge in their Reply Brief that Marsh "raises several factual issues which are disputed," they remain committed to their argument that summary is appropriate under a (C)(10) standard. The Court disagrees.

Whether Marsh's construction liens are appropriate is so intricately intertwined with the payment dispute and cause of the construction delays as to render summary disposition wholly inappropriate. In other words, this Court cannot determine that the liens are improper until it makes factual determinations. As a result, this Court is in no position to determine Marsh's alleged "bad faith," and Defendants' motion for summary on this issue is DENIED.

## 2. Defendants' request for summary of Marsh's unjust enrichment claim

Defendants next argue that they are entitled to summary disposition of Marsh's Count III for unjust enrichment because the parties have an express contract that governs their interaction. Generally, a plaintiff's unjust enrichment claim cannot be maintained when there is an express contract covering the disputed subject matter. *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972).

Further, to the extent that Marsh claims nonpayment for additional work completed outside the Construction Agreement, Defendants cite to a provision of the said agreement that states that Marsh must obtain a fully executed Change Order before performing any work outside of the scope of work considered by the Contract. The provision further provided, "If [Marsh] performs any work prior to or without a fully executed Change Order, then [Marsh] expressly waives an claim and [Marsh] shall absorb and pay for any such cost."

Marsh responds that "[e]ven when a contract requires written change orders, the absence of written change orders does not bar relief" under an unjust enrichment/quantum meruit theory. In support, Marsh quotes *Jarosz v Caesar Realty, Inc*, 53 Mich App 402; 220 NW2d 191 (1974), for the proposition that:

Quantum meruit relief is appropriate because defendants were aware of and authorized changes, and were benefitted by plaintiff's services. **The contract requirement of written change orders does not bar relief.** The facts reveal that defendants had either waived that requirement because they knew about and verbally ordered the changes, or that this requirement did not extend to extra work. *Jarosz, supra* at 405 (emphasis added), citing *Klas v Pearce Hardware and Furniture Co*, 202 Mich 334; 168 NW 425 (1918).

Marsh claims that "Defendants demanded that Marsh complete work, and then refused to sign change orders to compensate Marsh for the changes to the scope of the work." Defendants

dispute this. The parties also dispute whether the changes directly resulted from Maple Manor's actions. Because the parties have a factual dispute about these issues, summary disposition is inappropriate.

For all of the foregoing reasons, Defendants' motion for summary disposition is DENIED in its entirety.

**IT IS SO ORDERED.**

February 5, 2014  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge