

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

**DE-CAL, INC,
Plaintiff,**

v.

**Case No. 14-139971-CK
Hon. James M. Alexander**

**LEE INDUSTRIAL CONTRACTING, INC,
Defendant.**

OPINION AND ORDER FOLLOWING BENCH TRIAL

This matter is before the Court on Plaintiff's Complaint. This case stems from a dispute over the payment of six invoices issued by Plaintiff to Defendant. The following facts are uncontested as provided in the parties' Joint Final Pretrial Order.

Plaintiff is a mechanical contractor with a principal place of business in Warren, MI. Defendant is an open shop, non-union contractor that provides turn-key construction services to companies who renovate, relocate or expand their manufacturing plant facilities. Defendant's principal place of business is in Pontiac, MI.

In 2012, Defendant began a project for non-party Inergy Automotive Systems to relocate or reconfigure eight blow-mold machines and related handling equipment. These machines are used to manufacture plastic parts.

The same year, Defendant contracted with Plaintiff and other subcontractors to provide mechanical construction services related to the installation of the Inergy blow-mold equipment using union labor. Pursuant to Defendant's request, Plaintiff furnished said services in connection with the Inergy project.

On October 19, 2012, Plaintiff submitted a quote to Defendant to perform the material handling portion on four blow-mold machines. The quote was for \$285,000, but this quote was never accepted or authorized by Defendant. Instead, Defendant authorized Plaintiff to perform material handling work on a single machine, known as Blow Mold Machine 404, on a time-and-materials (T&M) basis.

Defendant paid 24 invoices within 60 days of their submission, as was the parties' practice. Sometime later, however, Plaintiff sent an additional six invoices to Defendant. These invoices were never paid and are identified as follows:

Plaintiff's Exhibit 2 – Invoice #512003120312, dated 12/25/2012 (\$13,929.28)

Plaintiff's Exhibit 3 – Invoice # App 10, dated 6/25/2012 (\$5,320.40)

Plaintiff's Exhibit 4 – Invoice # App 12, dated 6/25/2012 (\$8,936.63)

Plaintiff's Exhibit 5 – Invoice # 09242012, dated 10/25/2012 (\$1,887.05)

Plaintiff's Exhibit 6 – Invoice # 51200710211028, dated 12/25/2012 (\$692.53)

Plaintiff's Exhibit 7 – Invoice # 51200712142012, dated 12/25/2012 (\$42,239.93)

Plaintiff claims that these invoices total \$73,005.82 and is suing to recover this amount under a breach of contract and, in the alternative, an unjust enrichment theory.

The Court conducted a two-day bench trial on April 27 and June 11, 2015. At trial, the Court heard the testimony of Terry Shelswell, Inergy's Director of Facilities; Gregory Lozon, Plaintiff's Project Manager on the Inergy project; Brian Martin, Plaintiff's Controller; and Jennifer Causbie, Defendant's Finance Manager.

Following trial, the parties were directed to file proposed findings of fact and conclusions of law, which were filed on June 26, 2015.

The Court has considered the trial testimony and reviewed the exhibits and post-trial submissions of the parties. Based on the foregoing, the Court issues this Opinion and Order as its findings of fact and conclusions of law, pursuant to MCR 2.517.

I. Introduction

According to the parties Proposed Joint Final Pretrial Order, Plaintiff's theory of this case is that Defendant hired it because it could supply union labor as required by Inergy. Plaintiff ultimately performed and was paid for over \$1 million worth of work for Defendant in 2012. This work was performed under purchase orders and work was authorized on a T&M basis.

Plaintiff claims that it satisfactorily performed all work for Defendant, but a portion of this work went unpaid. Plaintiff now seeks payment for the unpaid work. Plaintiff alleges that Defendant was paid for this work by Inergy, but has retained the payments for Plaintiff's unpaid work for itself.

Plaintiff seeks \$73,005.82 based on the six unpaid invoices on its breach of contract claim. In the alternative, should the Court find that Invoice No. 51200712142 for \$42,239.93 did not derive from an express contract, Plaintiff seeks \$71,250 for the value of the work performed on Blow Mold Machine 404, for a total of \$102,015.90 (comprised of \$30,765.90 for the other five invoices, plus \$71,250 on invoice 51200712142).

Defendant, on the other hand, claims that it is not obligated to pay Plaintiff for the six invoices "because Plaintiff failed to submit its invoices for said work in a timely manner." Defendant claims that the parties had a specific manner for Plaintiff to submit invoices for payment, and Plaintiff failed to follow these procedures. Without following said procedures, Defendant was unable to invoice Inergy for the payment because it had no Plaintiff invoice to

base such a request on.

Defendant also argues that much of the “unpaid work” was not even authorized by it. Rather, Inergy authorized the work itself, but it wanted the invoices for the work to come through Defendant (with a modest markup for Defendant), so that Inergy did not have to pay multiple subcontractors. In any event, Defendant claims that it was not paid for any T&M work that was not billed to Inergy.

Further, Defendant claims that, when it was closing out its job with Inergy, it specifically asked Plaintiff for any outstanding invoices, so they could be submitted to Inergy for payment. But Plaintiff failed to provide any invoices on this final request. Instead, after the job was closed and all payments made, Plaintiff then submitted the “allegedly outstanding invoices.” But at this point, it was too late for Defendant to go back to Inergy for payment.

II. Findings of Fact

Defendant’s agreement with Inergy required it to install eight blow-mold machines and associated equipment at Inergy’s facility. Defendant was ultimately paid for the install of all eight machines. The initial quote (or “Proposal”) from Defendant to Inergy totaled \$2,365,000, but it included some work on Inergy’s Adrian facility that is not at issue in this case. (P. Ex. 11).

The final Purchase Order totaled \$2,110,000 and just pertained to Inergy’s Huron Township facility. Under Inergy’s agreement with Defendant, Inergy would pay the predetermined and agreed amount as each blow-mold machine was installed. The amount paid was provided in the Purchase Order Maintenance and Requisition Maintenance documents. (P. Ex. 12).

On November 13, 2012, Defendant issued a Proposal to Inergy for the installation of the

material handling system to the 404 blow-mold machine. The subsequent Requisition required Defendant to utilize union labor to install the 404 blow-mold machine. (P. Ex. 16). Around February 22, 2013, per the Proposal and Requisition, Inergy paid Defendant \$98,195 for this work. (P. Ex. 19).

According to Mr. Shelswell, Plaintiff was not permitted to do work directly for Inergy. Rather, Inergy would have approached the contractor in charge of that area of work – in this case, apparently Defendant. The Court has had the opportunity to observe the Mr. Shelswell’s demeanor and assess his credibility. Based on the same, the Court specifically finds that Mr. Shelswell’s testimony on this issue lacked some credibility. When answering these questions, Mr. Shelswell slightly fidgeted and stammered. This left the Court with the impression that he was adjusting his answers to say what was supposed to happen at the facility under the agreements, and not what actually happened.

On this point and in contrast, Mr. Lozon testified that Inergy would direct Plaintiff to do work at times, but it would ask Plaintiff to bill this work through Defendant. “Per Randy” or “Per Rich” was used on daily Labor and Material Vouchers to indicate work that was authorized or requested by Inergy to be billed through Defendant.¹ (P. Ex. 2). And this was not necessarily work that Defendant asked Plaintiff to perform.

The Court finds Mr. Lozon’s testimony more helpful and credible on the issue of whether Inergy would direct Plaintiff to do work and bill Defendant. His testimony on this issue was precise, specific, and included details. As a result, the Court finds that the parties’ practice included allowing Inergy to direct Plaintiff to accomplish certain jobs on site and bill Defendant for the same.

¹ Randy and Rich Walker were Inergy employees.

According to Mr. Lozon, Defendant hired Plaintiff for two separate projects at Inergy's site: (1) install blow-mold machine 404 on a firm-price basis, and (2) provide resin handling on a T&M basis. Mr. Lozon also testified that Defendant gave Plaintiff a Purchase Order for the installation of the blow-mold machine. While Mr. Lozon testified that the 404 install was at a fixed price, Plaintiff actually billed on a T&M basis. (P. Ex. 7).

As Plaintiff provided services, Plaintiff (via Mr. Lozon) would provide Defendant spreadsheets on amounts owed via email to his contact at Defendant (Rich Jovanovich). These emails often preceded formal invoices and were provided as a courtesy.

With respect to the installation of each blow-mold machine, Plaintiff proposed a price of \$71,250 per blow-mold machine. (P. Ex. 13). Although Plaintiff quoted four machines total, Defendant verbally authorized Plaintiff to go ahead with the work with respect to blow-mold machine 404. There was, however, no written purchase order issued, and therefore, no agreed fixed price.

Ultimately, Inergy apparently determined that it was not going to use union labor for any other blow-mold machine installs. As a result, Plaintiff only installed machine 404.

Mr. Lozon testified that he contacted Defendant's Project Manager (Mr. Jovanovich) via email on February 25, 2013 regarding then-existing outstanding invoices. All six of the invoices at issue in this case were among those listed. (P. Ex. 9). And Mr. Jovanovich responded to Mr. Lozon the next day (February 26, 2013), stating "Sorry Greg, they had given these to me weeks ago. I totally forgot about them, I will get them handled this week." (P. Ex. 10).

The Court specifically finds that Defendant had notice of the six outstanding invoices no later than February 26, 2013 – the date of Mr. Jovanovich's email response to Mr. Lozon's February 25, 2013 email. While Defendant attempted to attack the veracity of the email because

Mr. Jovanovich's response appeared to show no attachment, its attack fell short.

In context, it is apparent that Mr. Lozon references the attachment, stating "As you can see on the resin handling there are some pretty old invoices." Indeed, the attachment includes a resin-handling section showing unpaid invoices from the previous May and June (2012).

And Mr. Jovanovich's response indicates that he was able to view the attachment, stating, "Sorry Greg, they had given these to me weeks ago. I totally forgot about them, I will get them handled this week." Mr. Jovanovich would not be referring to the invoices ("them") unless he could view them.

Mr. Lozon testified that Plaintiff was only paid when it sent an invoice to Defendant. Mr. Martin testified that these invoices are always sent out because, otherwise, it wouldn't be paid. And Mr. Martin claimed that each invoice was actually mailed to Defendant. Jennifer Causbie testified that Plaintiff would both email and mail its invoices to Defendant. Ms. Causbie testified that Defendant paid Plaintiff on Net 60-Day terms. And there was no express agreement that Plaintiff must submit invoices to Defendant for payment within a certain amount of time.

And Mr. Jovanovich's February 26, 2013 response email is further evidence that the parties did not necessarily follow a strict schedule of immediate invoice submission and payment within 60 days. This is so because Mr. Jovanovich's email specifically references the attachment that contains some unpaid invoices up to eight months old. And he admits that these months-old invoices were "given these to me weeks ago" and he would "get them handled this week."

In other words, Defendant didn't have any problem paying the old invoices. As a result, the Court rejects Defendant's claim that the parties had some strict schedule and Plaintiff's failure to adhere to that invoicing schedule is its own downfall. This isn't the evidence before the Court. While most invoices were submitted and paid within 60 days, for unknown reasons,

when Plaintiff submitted the six disputed invoices, Defendant didn't immediately pay. But, according to the February 26 email, payment of months-old invoices presented no concern to Defendant.

Mr. Martin testified that he called Jennifer Causbie in February or March 2013 to inquire about some unpaid invoices. Then in May 2013, Plaintiff signed a Partial Conditional Waiver – indicating an outstanding balance owing on the Inergy project of \$44,025.44, which Defendant ultimately paid. (D. Ex. WWW).

Mr. Martin also testified that he signed the Waiver in May 2013 thinking that he was just signing on the \$44,025.44 due on the three identified invoices (10252012, 10142012, and App 11). (D. Ex. WWW).

The three invoices identified on the May 2013 Waiver (10252012, 10142012, and App 11) are all identified on the outstanding AR Invoice List provided to Defendant in February 2013. (D. Ex. WWW; P. Ex. 9). But Mr. Martin also testified that, when he signed the May 2013 Waiver, he believed that Plaintiff was paid in full. In contrast, Mr. Lozon testified that he wasn't sure if the May 2013 payment was a final accounting that settled all amounts owing Plaintiff for work on the Inergy project.

But based on its plain terms, the Court finds that the waiver only pertains to the “construction lien” in the amount of \$44,025.44 based on the three identified invoices. In other words, by signing the same, Plaintiff was only **waiving its construction lien** and not releasing its claim for any amounts due under unidentified invoices.

Ms. Causbie testified that there were only about four invoices in May 2013 totaling some \$40,000. She learned of them from Mr. Jovanovich. And she believed the May 2013 payment to be the final payment to Plaintiff on the Inergy project.

Ms. Causbie testified that she first saw the disputed invoices about four to five months after the May 2013 “final payment.” She also claimed that Plaintiff never submitted these invoices for payment.

But Mr. Lozon had a conversation with Mr. Jovanovich around September 2013 about disputed balance. Up until this conversation, however, Plaintiff had apparently not asked about the outstanding \$73,000 that Plaintiff claimed it was owed (despite the \$44,000 payment in May 2013).

Brian Martin testified that there remains \$73,005.82 due and owing as of February 2014. (P. Ex. 1). Under Plaintiff’s, normal invoicing procedure, Mr. Martin or a couple other people in the office will prepare the Contract Invoice that are sent out the same date as indicated or the next business day. Plaintiff attaches the supporting or backup documentation to the Invoice. All invoices, including the unpaid invoices, were sent out within days of the date appearing on the face.

While Ms. Causbie disputed ever receiving said invoices, the Court finds that it is more probable than not that Plaintiff mailed each of the disputed invoices within days of the date appearing on the face thereof. This finding is bolstered by Mr. Jovanovich’s email that he previously received the February 2013 list including the disputed invoices “weeks ago” and “forgot about them.”

Further, Mr. Lozon testified that he usually sent email breakdowns to Mr. Jovanovich before the actual invoices were mailed. As a result, it is also more probable than not that Defendant received such emails for the actual invoices before receiving any formal invoices.

The Court has had the opportunity to observe the witnesses’ demeanor and assess their credibility. Based on the same, the Court specifically finds that Mr. Lozon’s testimony was

particularly helpful. He is no longer a Plaintiff employee and has no reason to be less than forthcoming with his account of events. He was detailed and thoughtful when answering.

And while the Court will stop short of saying that Ms. Causbie was less than credible, whether or not she physically saw the disputed invoices is inconsequential. This is so because the parties' practice was for some invoices to be sent to Mr. Jovanovich for approval before ever being entered into Defendant's system. In fact, Ms. Causbie testified as much.

Considering all of the testimony and other evidence, the Court finds that Plaintiff mailed the disputed invoices to Defendant for payment within days of the date of the face of each. But Defendant did not make the required payment under the parties' agreements.

While Defendant attempts to challenge whether the work was ever performed in its Proposed Findings of Fact and Conclusions of Law, the Court finds that Plaintiff presented evidence that, by a preponderance of the evidence, establishes the work was actually completed.

This evidence comes from the detail contained in the invoices themselves and Plaintiff's business records. Each invoice includes supporting documentation that details the work done and the names of persons doing said work – including the amount of hours worked. This evidence establishes that the disputed invoices were only issued for work actually completed by Plaintiff on the Inergy project.²

The Court is also leery of Defendant's argument because it specifically mischaracterizes evidence presented at trial. For example, Defendant argues, with respect to the installation of blow-mold machine 404 (P. Ex. 7), that "[t]here was absolutely no testimony to support [Plaintiff's] contention that [Defendant] was paid for this work, or any testimony related to this invoice at all." But this isn't true.

² With respect to exhibit 6, Defendant partially paid this invoice – only leaving a balance owing of \$692.53. It would not have paid the overwhelming majority of the invoice amount for work that was not completed.

Mr. Lozon testified that Plaintiff performed this work installing blow-mold machine 404 and invoiced Defendant \$42,239.93 for said work. He further testified that Mr. Jovanovich specifically gave the green light on Plaintiff's work on this part of the project. And Mr. Shelswell testified that Inergy paid Defendant \$98,195 for the installation of 404. (see also P. Ex. 19).

Finally, it is undisputed that Plaintiff **did not** have to submit invoices within a specific amount of time in order to be paid for work performed. Had Defendant wished such a provision exist, it could have so contracted. But it did not.

As a result, assuming arguendo that Plaintiff did not submit the disputed invoices within days of their date, it was still able to do so eight months after the invoice date (the earliest disputed invoice was dated June 2012, and Defendant received them no later than February 2013).

Finally, there was also no evidence that the parties' agreed that Inergy must pay Defendant for the work before Defendant paid Plaintiff. Regardless of whether Inergy paid Defendant, the parties' agreement was that Defendant paid Plaintiff for the work performed on the Inergy project. Even Inergy testified as much.

As a result, it does not matter whether Inergy ultimately paid Defendant for the portion of work covered by the disputed invoices. In other words, there is no such precondition on Defendant's obligation to pay Plaintiff for work performed on the project.

III. Conclusions of Law

Based on the above findings of fact, the Court makes the following conclusions of law.

A. Breach of Contract (Count I)

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

In this case, Defendant contracted with Plaintiff to provide mechanical construction services related to the installation of the Inergy blow-mold equipment using union labor in Inergy's Huron Township facility.

Plaintiff performed said work at Defendant's or Inergy's direction as the parties' practice allowed. Plaintiff then invoiced Defendant for each job portion, which Defendant was required to pay.

Although Defendant paid some 24 additional invoices without problem, for unknown reasons, Defendant failed to fully pay the six above-identified disputed invoices despite Plaintiff's mailing the same within days of the date appearing on the face of each.

Assuming arguendo that Defendant did not receive the invoices within days of the date appearing on the face of each, at the very latest, Defendant knew of the disputed invoices by February 26, 2013. The parties' agreement did not include any timeframe by which to submit invoices, so even if Defendant had not received the same before February 2013, it was still required to pay Plaintiff on these invoices.

Plaintiff fully lived up to its end of the bargain. It provided the services as directed. Defendant, however, failed to live up to its end of the bargain by making full and complete payment on the same.

As a result, the Court finds that Defendant breached the parties' agreements by failing to pay invoices: #512003120312 for \$13,929.28; #App 10 for \$5,320.40; #App 12 for \$8,936.63;

#09242012 for \$1,887.05; #51200710211028 for \$692.53; and #51200712142012 for \$42,239.93.

Plaintiff's damages are equal to the total amount of said invoices, or \$73,005.82. This, would put Plaintiff in the same position had Defendant performed as promised.

B. Quantum Meruit/Unjust Enrichment (Count II).

Although unnecessary to resolve Plaintiff's alternative unjust enrichment claim since the Court has found that Plaintiff prevailed on its breach of contract claim, the Court will briefly address the same.

Assuming arguendo that the Court did not find Plaintiff successful on its breach of contract claim, it would have awarded the same amount an unjust enrichment theory.

With respect to an unjust enrichment claim, our Supreme Court has held: "Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Michigan Educ Emples Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999), quoting Restatement Restitution, § 1, p 12.

Michigan courts have established that "The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US)*, 202 Mich App 366, 375; 509 NW2d 791 (1993); citing *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991).

In this case, Plaintiff provided a benefit to Defendant by performing mechanical construction services related to the installation of the Inergy blow-mold equipment using union

labor in Inergy's Huron Township facility. Defendant requested and obtained this benefit because it had a contract with Inergy to complete the underlying project.

It would be inequitable to allow Defendant to not pay Plaintiff for work that it performed under Defendant's or Inergy's direction (as permitted under the parties' agreement and course of conduct).

And the proper measure of damages would be \$73,005.82 – the amount that Defendant retained by not paying Plaintiff for services rendered.

The Court will also note that it would specifically reject Plaintiff's argument that it would be entitled to \$71,250 for the work performed installing blow-mold machine 404. This amount would have only been valid had Defendant accepted Plaintiff's formal proposal. But Defendant did not accept said proposal. Instead, the parties billed on a T&M basis.

IV. Summary/Conclusion

For all of the foregoing reasons, the Court finds that Plaintiff has established its entitlement to judgment on its Count I for Breach of Contract. Based on the same, the Court enters a judgment against Defendant in the amount of \$73,005.82.

Because it has so held, the Court will dismiss Plaintiff's Count II as an alternative request for relief.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

August 25, 2015
Date

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