

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

**AUBURN HILLS TAX INCREMENT FINANCE AUTHORITY,
Plaintiff,**

v.

**Case No. 15-149357-CB
Hon. James M. Alexander**

**HAUSSMAN CONSTRUCTION COMPANY, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant Mayotte Group's motion for summary disposition. This case involves the design and construction of a parking garage owned and operated by Plaintiff and located in Auburn Hills.

In its Complaint, Plaintiff claims that, on June 11, 2011, it contracted with Defendant Haussman Construction for the design and construction of the Parking Deck. Defendant Dennis Burt is the principal, majority shareholder, and President of Haussman. Under the terms of an August 8, 2011 contract with Haussman, Mayotte provided professional architectural services on the project.

Plaintiff generally claims that, "[a]lthough Haussman was paid the full amount of the Deck Agreement contract sum, less \$13,408.93 withheld as retainage, Haussman failed to pay its subcontractors on the Project, which then made claims on these funds against [Plaintiff]." As a result, Plaintiff was forced to pay the subcontractors, which resulted in its paying twice for the same work. Plaintiff also claims that Haussman did not complete the project on time, which entitles

Plaintiff to liquidated damages under the contract.¹

As to Mayotte, Plaintiff claims that Mayotte was (1) “responsible to provide administration of the Deck Agreement until issuing a final Certificate for Payment,” (2) “to report . . . any known deviations from the construction schedule,” and (3) “to review, evaluate, and certify the amounts due to Haussman and was to issue Certificates for Payments in such amounts.”

Because Plaintiff claims that Mayotte failed to do so, which ultimately resulted in project delays (and possible liquidated damages recovery against Haussman) and duplicate payments to subcontractors, Plaintiff alleges claims of (Count VI) professional negligence and (Count VII) negligent misrepresentation against Mayotte.

Mayotte now moves for summary disposition of said claims under MCR 2.116(C)(10) – generally arguing that it did not have any duty to administer the construction or approve payments to Haussman.

A (C)(10) motion tests the factual support for a 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.

As stated, Mayotte argues that it is entitled to dismissal of Plaintiff’s Complaint because Plaintiff cannot identify the source of any duty that Mayotte was obligated to notify Plaintiff of its

¹ Plaintiff is suing Haussman and Burt on claims of breach of contract, unjust enrichment, liquidated damages, fraud, and conversion.

right to assess liquidated damages against Haussman or approve payment claims.

In its Response, Plaintiff claims that Mayotte's duty arose contractually. Specifically, Plaintiff cites to §2.3.2 of the contract between Haussman and Mayotte. This provision provides that "[t]he services [Mayotte] and its consultants shall provide are designated in Exhibit B of this Agreement."

Exhibit B of the Agreement is AIA Document A133-2009 "Standard Form of Agreement Between Owner and Construction Manager as Constructor." But Plaintiff fails to identify any provision of said Agreement that requires Mayotte to assess Plaintiff's right to liquidated damages or approve payment claims.

Plaintiff also identifies §2.3.11 of the Mayotte-Haussman contract – purportedly for the proposition that Mayotte was required to execute project certifications for payments. But, as Mayotte points out, any duty under the Mayotte-Haussman contract was specifically owed to Haussman – not Plaintiff.²

Plaintiff also claims that Mayotte was required to administer Plaintiff's contract and was to be Plaintiff's representative during construction. But Plaintiff has failed to establish where this concept comes from. Plaintiff has no direct contract with Mayotte. Rather, Haussman was placed in charge of the project.

In fact, Plaintiff's Executive Director during the parking structure project, Thomas Tanghe, testified at deposition that Plaintiff required the contractor to retain the architect, and that Plaintiff did not want the architect to work directly for it. (Tanghe Dep. at 26). Mr. Tanghe further testified that Plaintiff did not ask Mayotte to administer the contract, and Mayotte did not promise to do so.

² Plaintiff does not argue that it is entitled to third-party beneficiary status. But, assuming arguendo that it did, the Court would reject the notion because Plaintiff has not alleged that Mayotte made any direct promises to Plaintiff to

(Tanghe Dep. at 35). Rather, Plaintiff's contact for the project was the construction manager, Haussman. (Tanghe Dep. at 35-36).

With regard to the payment certifications, Mr. Tanghe testified that he was responsible to review the payment applications, and Mayotte was never consulted on the certifications. (Tanghe Dep. at 44-45).

Plaintiff presents no **evidence** to the contrary. Rather, Plaintiff simply relies on allegations in its filings. But this is insufficient to survive summary disposition under the (C)(10) standard. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Plaintiff has failed to present any evidence establishing that it was Mayotte's duty to administer the construction or approve payments to Haussman. Rather, all evidence before the Court establishes that Plaintiff, itself, actually approved payments and relied on Haussman to administer the construction project.

Finally, Plaintiff argues summary disposition is premature because discovery remains open until June 1. Indeed, summary disposition under (C)(10) is usually premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). But June 1 is only one week away, and Plaintiff fails to identify any outstanding discovery that would specifically apply to whether Mayotte owed Plaintiff a legal duty as alleged. As a result, the Court rejects Plaintiff's discovery argument.

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court finds that there are no material questions of fact in dispute such that Mayotte is

do anything. MCL 600.1405; *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003).

entitled to judgment as a matter of law. As a result, Mayotte's motion for summary disposition is GRANTED, and Plaintiff's Complaint as to Defendant Mayotte only is DISMISSED.

IT IS SO ORDERED

May 25, 2016 _____
Date

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