

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

**26500 NORTHWESTERN, LLC,
Plaintiff,**

v.

**Case No. 15-149985-CB
Hon. James M. Alexander**

**LEVEL ONE HVAC SERVICES, INC, ET AL,
Defendants.**

OPINION AND ORDER RE: MOTION TO DISMISS

This matter is before the Court on Defendant Level One HVAC Services' motion for summary disposition. According to its First Amended Complaint, Plaintiff hired Defendant DZI as the general contractor for the installation of the HVAC system in Plaintiff's commercial office building. In turn, Plaintiff claims, DZI subcontracted with Level One to "design and/or install" said system.

Plaintiff alleges, however, that after completion of the project, it learned that the HVAC system "was improperly designed and faultily installed for several reasons" outlined in Plaintiff's Complaint. And Plaintiff attributes several of these reasons to Level One's work.

Plaintiff alleges that it directly contacted Level One multiple times to correct the HVAC issues, but Level One failed to ever fix the core problems. As a result, Plaintiff claims that it was forced to hire a different company to correct the faulty design and installation of the system. And Plaintiff now seeks damages accordingly.

On these general allegations, Plaintiff filed the present Complaint alleging claims against Level One for (Count II) breach of contract/third-party beneficiary, (Count IV) unjust

enrichment, and (Count V) promissory estoppel.

Level One now moves for summary disposition of said claims under MCR 2.116(C)(8) and (C)(10) – arguing that it is entitled to dismissal because (1) there was no contract between it and Plaintiff, (2) it never made any direct promise to Plaintiff, and (3) the Subcontractor Agreement between it and DZI was not entered into for the direct benefit of Plaintiff.

A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Such a motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).¹

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.

¹ “When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

The crux of Level One's motion is that it was a subcontractor doing work on the HVAC system under a written agreement with DZI. As a result, Level One argues, it has no place in Plaintiff's lawsuit.

A. Breach of Contract/Third-Party Beneficiary (Count II)

Level One first argues that Plaintiff's breach of contract/third-party beneficiary claim fails because there was no contract between Plaintiff and Level One and the Subcontractor Agreement was not for Plaintiff's direct benefit.

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).

Initially, Level One claims that Plaintiff has failed to attach any contracts between the parties, on which, to base its breach of contract claim. But it appears that, in its initial motion, Level One failed to appreciate that there are two components to Plaintiff's breach of contract claim.

First, Plaintiff alleges that it was the third party beneficiary of the Subcontractor Agreement between Level One and DZI. This contract was apparently in the possession of Level One – as it attached said contract to its motion. As a result, it was unnecessary for Plaintiff to attach said contract to its Complaint. MCR 2.113(F)(1)(b).

Plaintiff also alleges a separate, August 9, 2012 contract. And Plaintiff claims that this agreement was an oral contract “to repair the defectively installed and/or designed HVAC system.” In support, Plaintiff refers to Exhibit 4 attached to its Response. But there are no actual exhibits attached (just the place marker for Exhibit 4).

In any event, Level One attached an Invoice dated August 9, 2012 to its Motion – claiming the same to be an invoice for regular maintenance directly between it and Plaintiff.

The Court will note that Level One disputes any oral contract exists between it and Plaintiff – despite Plaintiff’s Complaint allegations otherwise. Because Level One challenges Plaintiff’s factual allegations, Level One’s motion may not be considered under the (C)(8) standard – which requires the Court to accept Plaintiff’s factual allegations as true. As a result, the Court may only analyze Level One’s motion under the (C)(10) standard.

In support of its claim that there was no oral contract for the repair of the HVAC system, Level One attaches the Affidavit of Scott Myers, its Construction Manager, who claims no such agreement.

In response, Plaintiff presents no **evidence** to refute Level One’s claim. Rather, Plaintiff simply makes allegations and denials in its filings. This is insufficient to establish that a genuine issue of material fact exists that precludes summary disposition under the (C)(10) standard. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

For the foregoing reason, the Court finds that Plaintiff has failed to establish that any material fact is in dispute regarding the existence of an oral contract with Level One for the repair of the HVAC system. As a result, Level One is entitled to summary disposition of Plaintiff’s Count II to the extent that the same is based on an alleged oral contract for the repair of the HVAC system.

Next, Level One argues that Plaintiff was not an intended third-party beneficiary of the Subcontractor Agreement between DZI and Level One. The Revised Judicature Act provides, at MCL 600.1405, provides:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

With respect to this statute, our Supreme Court has reasoned:

A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise “directly” to or for that person. By using the modifier “directly,” the Legislature intended “to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.” *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003); citing MCL 600.1405; *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999).

The *Koenig* Court held, “section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation “directly” to or for the person.” *Koenig*, 460 Mich at 676-677.

Amongst others, both parties cite to *Vanerian v Charles L Pugh Co, Inc*, 279 Mich App 431; 761 NW2d 108 (2008) in support of their respective positions. In that case, the plaintiff homeowner’s basement flooded – causing damage to her wood basement floor. The homeowner’s insurance company hired Pugh Company to repair the plumbing, sewer system, and the wood floor in the homeowner’s basement.

But when the homeowner met with a Pugh representative, he “suggested to plaintiff that if she already had a flooring contractor, she should contact that person again to make the repairs.” *Vanerian*, 279 Mich App at 433. The homeowner then directly contacted the defendant flooring company, who had previously done some work on her home.

The defendant flooring company then contracted with the Pugh to replace the homeowner's floor. Sometime later, her basement flooded again, and the new floor buckled and became unusable. The homeowner then filed a lawsuit against the Pugh and the defendant flooring company on the allegation that she was an intended third-party beneficiary of the contract between Pugh and the flooring company.

Analyzing MCL 600.1405 and *Schmalfeldt*, 469 Mich 422, the Court of Appeals reasoned:

It cannot reasonably be disputed that the promises made by defendant [flooring company] in the contract to tear out the old damaged floor and to supply and install a new floor were for plaintiff's benefit. All the work under the contract expressly related to repairs in plaintiff's basement. Indeed, plaintiff and defendant discussed the project with each other at the time the contract was formed at the behest of Pugh, and plaintiff and defendant agreed that defendant would replace her maple floors with oak floors. Defendant undertook to do something directly for plaintiff. *Vanerian*, 279 Mich App at 434.

The *Vanerian* Court continued "plaintiff was not an incidental beneficiary; the whole and singular purpose of the contract was to secure repairs to the flooring in plaintiff's basement. The focus of the contract is on restoring plaintiff's property; defendant promised to do the work directly for plaintiff." *Vanerian*, 279 Mich App at 436.

The Court further reasoned "the Pugh-[flooring company] contract specifically designates plaintiff as an intended beneficiary of the promise, i.e., the promise is to remove and replace flooring in the basement of plaintiff's home." *Vanerian*, 279 Mich App at 437-38. As a result, the Court concluded that the plaintiff homeowner was an intended third-party beneficiary.

Plaintiff claims that this case "fits squarely within the facts of *Vanerian*," citing to the Subcontractor Agreement's identification of Plaintiff as the "Project Owner" and the building as the "Project."

But, as Level One argues, said contract specifically identifies that it is for DZI's direct benefit, providing that Level One "shall provide the services identified herein to [DZI]." Level One also points out that Plaintiff does not identify any direct promise made to it by Level One. Further, Plaintiff does not allege that it knew of or met with Level One before the Subcontractor Agreement was executed.

This case is unlike *Vanerian* in all of these, important respects. As a result, the Court is unconvinced under an objective standard that Level One made any direct promises to Plaintiff such that Plaintiff is entitled to third-party beneficiary status. party is able to enforce the contract. *Schmalfeldt*, 469 Mich at 428. The Court, therefore, GRANTS Level One's motion for summary disposition under (C)(10) as to Plaintiff's Count II to the extent it is based on third-party beneficiary status.

B. Unjust Enrichment (Count IV)

Level One next argues that it is Plaintiff's unjust enrichment claim fails as a matter of law. Generally, "in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the 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." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006); citing *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

Level One argues that Plaintiff has not pled and cannot establish that it received any benefit from Level One. Rather, Plaintiff's contract was with DZI. As a result, DZI is the party that provided the benefit to Plaintiff and the party that Plaintiff paid the contract price. The Court agrees.

Plaintiff argues that this claim was “pled in the alternative in the event the Court determines that no contractual relationship existed between Plaintiff and Level One.” While that may be true, this does not (on its own) mean that the claim is legally valid. And beyond this statement, Plaintiff offers no legal argument why its unjust enrichment claim should survive summary disposition.

Because Plaintiff paid DZI the contract price and DZI provided the benefit to Plaintiff, the Court finds that Plaintiff’s unjust enrichment claim against Level One fails as a matter of law. Therefore, the Court GRANTS Level One’s motion for summary disposition of said claim and dismisses Plaintiff’s Count IV.

C. Promissory Estoppel (Count V)

Next, Level One seeks summary disposition of Plaintiff’s promissory estoppel claim.

The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).

Further, “[t]he promise must be definite and clear, and the reliance on it must be reasonable.” *Zaremba Equip*, 280 Mich App at 41; citing *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993).

Level One argues that Plaintiff has failed to allege any promise to support such a claim – particularly when Plaintiff had a contract with DZI, and DZI had a separate Subcontractor Agreement with Level One. The Court agrees.

But Plaintiff fails to present any **evidence** of any promise made by Level One to the Plaintiffs. Rather, Plaintiff simply relies on allegations or denials in its filings.

For the foregoing reason and viewing all evidence in the light most favorable to Plaintiff, the Court finds that Defendant is entitled to judgment as a matter of law. Therefore, the Court GRANTS the Level One's motion as it relates to Plaintiff's Count V for promissory estoppel.

D. Summary/Conclusion

To summarize, Level One's motion for summary disposition is GRANTED in its entirety, and Plaintiff's Complaint (as to Defendant Level One only) is DISMISSED.

IT IS SO ORDERED.

May 25, 2016
Date

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