

**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 DZI’s motion for summary disposition.¹ According to its Second Amended Complaint, Plaintiff hired Defendant DZI as the “general contractor” on a larger project that included 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/or improperly installed for several reasons” outlined in Plaintiff’s Complaint. To correct the problems, Plaintiff claims that it was forced to incur over \$200,000 in post-installation costs. And, Plaintiff claims, the estimated cost to fully repair the HVAC system going forward is “approximately \$650,000.” To recover these costs, Plaintiff sued DZI on a breach of contract theory.

DZI now moves for summary disposition of said claims under MCR 2.116(C)(8) and

¹ On October 19, DZI filed a “Supplemental Brief in Support of its Motion.” But the Court will not consider the same because its filing did not conform to either the September 1 or October 13 Summary Disposition Scheduling Orders that governed briefing.

(C)(10) – arguing that Plaintiff’s claim fails because DZI, as a construction manager, “had no control over either the HVAC design or installation, and therefore could not breach [any duty to properly design and/or install the HVAC system.” And, DZI argues, Plaintiff can cite to no contractual provision of its contract with DZI. Rather, DZI claims, [co-Defendant Mechanical Design & Installation (“MDI”)] designed the system, and DZI had no authority over the process.

To its end, DZI now moves for summary disposition under MCR 2.116(C)(8) and/or (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).² And a (C)(10) motion tests the factual support for a plaintiff’s claims. *Id.*³

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).

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v*

2 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).

Further, “[w]hen 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).

3 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich 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.

Ingall, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

On May 16, 2011, Plaintiff and DZI executed a “Standard Form of Agreement Between Owner and Construction Manager as Constructor” to govern their relationship. As part of said Agreement, the parties incorporated DZI’s April 26, 2011 Construction Management quote.

But, DZI claims, “[t]here is no language in the Construction Management Contract that required DZI to claim responsibility for Level One’s HVAC installation, as DZI had no power to influence the installation, only to ensure it was done on time and within budget.” DZI further argues that Plaintiff “fails to provide any facts to support its claim” that DZI breached the contract “and has been unable to point to any section of the contract it believes DZI breached.”

Despite this argument, Plaintiff’s Second Amended Complaint (at ¶ 20) alleges that DZI breached the Agreement in the following ways(emphasis added):

- a. DZI failed to exercise the skill and judgment in furthering the interests of Plaintiff; failed to furnish efficient construction administration, management services and supervision; failed to furnish at all times an adequate supply of workers and materials; and failed to perform the Work in an expeditious and economical manner consistent with Plaintiff’s interests **per Section 1.2 of the Contract.**
- b. DZI failed to advise Plaintiff on proposed site use and improvements, selection of materials, and building systems and equipment **per Section 2.1.2 of the Contract.**
- c. DZI failed to provide recommendations consistent with the Project requirements to Plaintiff on constructability **pursuant to Section 2.1.2 of the Contract.**

DZI's motion is based on the argument that Plaintiff mischaracterizes it as a "general contractor" rather than what it actually acted as – a "construction manager." This difference, DZI argues, defines the duties that DZI would have with respect to the HVAC design and install. If considered a "general contractor," DZI argues that it would have "duties beyond those merely stated in the contract."

But, DZI argues, "there is no requirement in the text of the contract for DZI [to] direct the work to be done by other parties." Further, DZI's original bid for the project didn't include any HVAC work. And DZI claims that Plaintiff "represented to DZI that MDI would be responsible for the progress of the HVAC installation, and DZI would only have to keep track of the status of the project in return for a 1% fee for the HVAC work in addition to DZI's original bid amount."

By the time DZI entered into its contract with Plaintiff, DZI claims that Plaintiff had already solicited bids for HVAC work – retaining the power to choose the HVAC subcontractor under §2.3.2.1 of the Construction Manager Contract. And DZI claims that it did not learn that Plaintiff chose Level One until the day DZI started on the project.

Article 5 of the Construction Management Agreement is titled "Compensation for Construction Phase Services." It provides that Plaintiff "shall pay the Construction Manager for the Contract Sum in current funds for Construction Manger's performance of the Contract." It goes on "[t]he Contract Sum is the Cost of Work . . . plus the Construction Manger's Fee."

The "Construction Manger's Fee" is then defined as "Cost Plus Four and one half percent (4.5%) on all subcontractors and Cost Plus Ten percent (10%) on all general Conditions, Cost Plus one percent (1%) on HVAC for the initial phase of the HVAC."

It appears that DZI's summary request is based on the argument that it had nothing to do with the HVAC installation, which Plaintiff coordinated. And DZI generally claims that its small

1% fee (compared to managing general construction costs at 4.5%) was solely to “keep track of the status of the [HVAC] project.”

DZI’s argument is cumbersome and requires the Court to read ambiguity into the contract and then resolve that ambiguity in DZI’s favor in order to produce a result favorable to DZI. In fact, DZI’s Brief states as much. Speaking of the “work” DZI was required to perform under the contract, DZI argues:

The most important definition regards the “Work” contracted for that is mentioned throughout both AIA contracts. Section 1.1.3 requires DZI to provide the services required by the agreement documents to fulfill its contractual obligations. **The definition is ambiguous, but the rest of the contract documents encompassing the agreement provide an understanding of the intent of the parties.** (DZI Brief at 11).

In other words, in these three sentences, DZI argues that “the most important” contract term is ambiguous, but the Court should turn to other documents to determine the intent of the contracting parties.

But this is not a question for summary disposition because it is well settled that “[u]nder ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Yet DZI’s argument is founded on the proposition that the crux of this case depends on an ambiguous term that requires examination of other documents to determine the true intent of the parties.

In any event, Plaintiff responds that DZI subcontracted with Level One to install the

HVAC system. In support, Plaintiff attaches DZI's "Subcontractor Agreement" with Level One. And, Plaintiff claims, Level One agreed to perform said work for the direct benefit of DZI. Also, under the Subcontractor Agreement, DZI was in charge of HVAC timelines and must approve any modifications to the HVAC project. Finally, Level One's payment for its work came from DZI. In support, Plaintiff cites to the Subcontractor Agreement (and the Affidavit of Scott Myers, Level One's Construction Manager).

The Court finds odd DZI's argument that its title dictates its duties under the contract. The parties have a contract. Regardless of whether said contract refers to DZI as the "Construction Manager" or the "General Contractor," the contract's terms define the rights and obligations of the parties thereto.

DZI's argument almost seems to walk the line between arguing ambiguity in the contract and claiming it didn't breach the agreement's clear terms – before falling on the side of ambiguity in the term "work." But the Court is unconvinced that ambiguity is an issue at this time.

Plaintiff's Complaint specifically identifies the sections of the contract it alleges that DZI breached. DZI's specific job title is not a question for the jury. But, according to Plaintiff's Complaint, whether DZI breached Sections 1.2 or 2.1.2 is the question.

In any event, because DZI's summary request is based on reading ambiguity into a contract and then requesting resolution of the same in DZI's favor, summary disposition is inappropriate and DENIED.

IT IS SO ORDERED.

October 26, 2016
Date

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