

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

**WHITE CONSTRUCTION CO, INC,
Plaintiff,**

v.

**Case No. 15-150556-CB
Hon. James M. Alexander**

**ADR CONSULTANTS, LLC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s motion for summary disposition. Plaintiff filed this action seeking payment for services provided as a subcontractor to Defendant on a public blight demolition project.

Defendant was a contractor retained by the Michigan Land Bank (“MLB”) “to institute, manage and oversee certain blight demolition programs within . . . Michigan.” Part of this program sought to eliminate blighted residential homes in Pontiac.

As required by Defendant’s contract with MLB, Defendant subcontracted out the actual demolition work, including some work to Plaintiff. The parties’ relationship was governed by a September 2014 Demolition & Abatement Services Agreement, which described the properties marked for demolition and projected cost.

The parties do not dispute that Plaintiff performed various demolitions that it was not fully paid for. Defendant, however, argues that Plaintiff performed nonconforming demolition work that resulted in MIOSHA and DEQ violations. Defendant also claims that Plaintiff did not properly clear asbestos containing materials from the worksites.

Defendant claims that these violations also led to the MLB refusing to authorize payment for some Plaintiff work. Defendant then relied on Plaintiff to get supporting documentation in order to justify MLB's payment for said work, but Plaintiff was unable to provide the same.

Defendant claims that it was subsequently terminated as a MLB contractor, but due to outstanding monies owed (including to Plaintiff), has a current suit against MLB pending in the Court of Claims (Case No. 15-177-MK).

Plaintiff then filed its current Complaint, alleging a single claim for breach of contract and seeking \$128,373 in damages.

In response to Plaintiff's Complaint, Defendant filed the present motion for summary disposition – arguing Plaintiff's suit is barred by a pay-when-paid clause in the parties' contract. And Defendant argues since it has not yet been paid by the Michigan Land Bank, Plaintiff's claim fails as a matter of law. Defendant also argues that Plaintiff must pay any of Defendant's costs in defending this case under an agreement-not-to-sue clause.

To this end, Defendant now moves for summary disposition under MCR 2.116(C)(8) and (C)(10), which respectively test the legal and factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A (C)(8) 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; *Lepp*, 190 Mich App at 730.

Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).¹

This motion presents a dispute over the effect and validity certain provisions found in the parties' contract. Michigan law is well-established that "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "Under 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." *Id.* at 594.

Defendant argues that Plaintiff's Complaint should be dismissed based on two provisions contained in the parties' September 8, 2014 Services Agreement – a "pay-when-paid" clause and an agreement-not-to-sue clause. The "pay-when-paid" clause is found in paragraph 17.17 and provides:

The payments under this Agreement are contingent upon receipt of funds by ADR from MLB. ADR reserves the right to delay payment until receipt of adequate funds from MLB, without penalty or interest.

And paragraph 17.10b provides:

[Plaintiff] agrees to not bring claim against ADR for any reason. In the event of any claim by [Plaintiff] or thirdparty against ADR, the [Plaintiff] shall pay for full reasonable costs of ADR defending such claims, but at the [Plaintiff's] expense, and shall indemnify ADR against any loss, cost, expense or liability arising out of such claim, whether or not such claim is successful.

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).

Based on the unambiguous language in these provisions, Defendant argues that Plaintiff's Complaint should be dismissed and Defendant awarded its costs and fees associated with defending this case.

In response to Defendant's motion, Plaintiff argues that the agreement-not-to-sue clause found in paragraph 17.10b is unenforceable as illusory, unconscionable, and violates Michigan law on limitations to bringing breach of contract claims. Plaintiff also argues that the "pay-when-paid" clause found in paragraph 17.17 is not a condition precedent to payment that prohibits Plaintiff's claim.

1. The "pay-when-paid" clause.

The Court will first address the validity of the "pay-when-paid" clause. As stated, this clause provides that "The payments under this Agreement are contingent upon receipt of funds by ADR from MLB. ADR reserves the right to delay payment until receipt of adequate funds from MLB, without penalty or interest."

Plaintiff argues that this provision is really a provision that allows delayed payment for a reasonable period of time, citing the "seminal case for pay-if-paid or pay-when-paid" clauses, *Thos J Dyer Co v Bishop Intern Engg Co*, 303 F2d 655, 656 (CA 6 1962). In *Dyer*, the parties' contract provided:

The total price to be paid to Subcontractor shall be . . . (\$115,000.00) lawful money of the United States, no part of which shall be due until five (5) days after Owner shall have paid Contractor therefor

The defendant contractor argued that this provision meant that it paid only if it received payment from the owner. The plaintiff subcontractor, on the other hand, argued that the payment term only delayed "postponed until the happening of a certain event, or for a reasonable period of time if it develops that such event does not take place." *Dyer*, 303 F2d at 659.

The Sixth Circuit then examined caselaw from Ohio and Kentucky that the parties submitted in support of their respective positions and ruled that:

paragraph 3 of the subcontract is a reasonable provision designed to postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor. To construe it as requiring the subcontractor to wait to be paid for an indefinite period of time until the general contractor has been paid by the owner, which may never occur, is to give to it an unreasonable construction which the parties did not intend at the time the subcontract was entered into. *Dyer*, 303 F2d 655 at 661 (internal citation omitted).

The Court did so by relying heavily on the notion that the disputed contract did not expressly provide that the subcontractor assumed the risk that it would not be paid if the owner went insolvent.

The Court notes that the *Dyer* case is nonbinding federal authority that has only been cited in a single, unpublished Michigan case. In that case, *Walbridge Aldinger Co v Angelo Iafrate Const Co*, an unpublished opinion per curiam of the Court of Appeals, issued July 25, 2013 (Docket No. 308223), the Court of Appeals analyzed *Dyer* and *BMD Contractors, Inc v Fidelity and Deposit Co of Maryland*, 679 F3d 643 (CA 7 2012) – a Seventh Circuit case that cautioned about an overly strict application of *Dyer*.

The *Walbridge* Court reasoned:

As noted in *BMD Contractors, Inc. v. Fidelity and Deposit Co. of Maryland*, 679 F3d 643, 649–650 (CA 7, 2012), although *Dyer* is the “leading case” regarding the necessity of “explicit language shifting the risk of nonpayment to the subcontractor,” courts must be careful not to construe *Dyer's* requirement that there be explicit language with a requirement that the parties use particular language:

We do not disagree that to transfer the risk of upstream insolvency or default, the contracting parties must expressly demonstrate their intent to do so; that is the rule from *Dyer*. But by clearly stating that the contractor’s receipt of payment from the owner is a condition precedent to the subcontractor’s right to payment, the parties have expressly demonstrated exactly that intent. Adding specific assumption-of-risk language would reinforce that intent but is not strictly necessary to create

an enforceable pay-if-paid clause. *Dyer* does not hold otherwise. *Walbridge*, supra at *6.

The provision at issue in the *Walbridge* case certainly implicated the risk-assumption focus in the reasoning of *Dyer* and *BMD*:

ARTICLE XXII—PAYMENTS : Subcontractor acknowledges that it has considered the Owner’s solvency and Owner's ability to perform the terms of its contract with Contractor before entering into this Subcontract. Subcontractor acknowledges that it relies on the credit and ability to pay of the Owner, and not the Contractor, for payment for work performed hereunder. Subcontractor is entering into this Subcontract with the full understanding that Subcontractor is accepting the risk that the Owner may be unable to perform the terms of its contract with Contractor. Subcontractor agrees that as a condition precedent to Contractor’s obligation to make any payment to Subcontractor, the Contractor must receive payment from the Owner. Upon written request by Subcontractor, Contractor will provide subcontractor access to all information in Contractor's possession, if any, regarding the Owner’s solvency and ability to perform the terms of Owner's contract with Contractor.

In the event that the Contractor does not receive all or any part of the payment from the Owner in respect of Subcontractor’s Work, whether because of a claimed defect or deficiency in the Subcontractor's Work or for any other reason, the Contractor shall not be liable to the Subcontractor for any sums in respect thereto. In the event the Contractor shall incur any cost or expense of any nature in preparing for the prosecution of, and prosecuting any claim against the Owner, whether by means or negotiations, arbitration or legal action, arising out of the Owner’s refusal to pay the Contractor for Work done by the Subcontractor, Contractor shall be entitled to deduct such costs and expenses from the amount due Subcontractor. *Walbridge*, supra at *5.

The provision in this case makes no mention of Plaintiff’s assumption of the risk of insolvency of MLB. In fact, the clause also provides that “ADR reserves the right to delay payment until receipt of adequate funds from MLB, without penalty or interest.” But it does not address whether Plaintiff assumes the risk of nonpayment or insolvency of MLB.

And in its Reply Brief, other than quoting the language contained in the parties’ written Agreement, Defendant offers no legal authority or reasoning on the validity or effect of the disputed clause.

But another federal case cited by Plaintiff, *Jervis B Webb Co v Kennedy Group*, No. 07-10571, 2008 WL 2036819, at *1 (ED Mich May 9, 2008), does acknowledge that Michigan enforces pay-if-paid clauses, citing *Berkel & Co Contractors v Christman Co*, 210 Mich App 416; 533 NW2d 838 (1995). The *Berkel* Court reasoned:

The contract clearly provides that all payments to the subcontractor are to be made only from equivalent payments received by [the construction manager] for the work done, “the receipt of such payments by the [the construction manager] being a condition precedent to payments to the subcontractor.” The following section of the contract, dealing with final payment, also clearly conditions payment to [the subcontractor] upon the payment by the owners to [the construction manager]. *Berkel*, 210 Mich App at 419.

The *Berkel* Court rejected the argument that the provision was simply “a provision that postpones payment for a reasonable amount of time” – instead, finding that the same was a clear condition precedent to payment that was not satisfied. *Id.*

Such appears the case here. While the Court recognizes the sound reasoning of the Sixth Circuit in *Dyer*, the same is not binding on Michigan trial courts. But *Berkel* is (despite Defendant’s failure to cite it). The clause in this case is similar to that in *Berkel*. Plaintiff expressly agreed that “The payments under this Agreement **are contingent upon** receipt of funds by ADR from MLB.”² This language creates a condition precedent to payment, which is enforceable under *Berkel*.

Because the pay-if-paid clause is enforceable, the only question becomes whether Defendant has received money from MLB for work performed by Plaintiff. On this issue, the parties present competing evidence. Plaintiff, in Exhibits 4 and 5 to its Response, claim that MLB issued payments of \$65,887 and \$7,900 to Defendant for work it performed.³

² “Contingent” is defined as “Possible, but not assured; doubtful or uncertain; **conditioned upon the occurrence of some future event which is itself uncertain, or questionable.**” Black’s Law Dictionary, Sixth Edition (emphasis added).

³ Although, on their face, it isn’t apparent what exactly these payments were for.

Defendant, on the other hand, cites to the Affidavit of its managing member, Barry Ellentuck, who claims that Defendant has not received any monies for Plaintiff work that were not forwarded to Plaintiff.

Based on this competing evidence, the Court finds that summary disposition of this claim is improper because there is a factual dispute whether Defendant has received payment for work performed by Plaintiff, which is a condition precedent to Plaintiff's claim.

If Defendant has received such payment, then Plaintiff's suit may proceed (but only to the extent of any payments received). But if Defendant has not received any such payment, Plaintiff's lawsuit fails because it has not established a condition precedent to its lawsuit.

2. The agreement-not-to-sue clause.

Next, Defendant argues that Plaintiff's claim is barred by paragraph 17.10b of the parties' Agreement, which provides that "[Plaintiff] agrees to not bring claim against [Defendant] for any reason." Defendant, again, fails to cite any authority regarding the validity of this provision.

In its Response, Plaintiff argues that this provision is unenforceable and void as illusory and an unreasonable elimination of the statute of limitations. Plaintiff also argues that the provision is unconscionable.

With respect to its illusory argument, Plaintiff cites *Hess v Cannon Tp*, 265 Mich App 582, 592; 696 NW2d 742, 748 (2005), for the proposition that "The essential elements of a valid contract are the following: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation."

With respect to the final element, "mutuality of obligation means that both parties to an agreement are bound or neither is bound." *Bernstein, Bernstein, Wile & Gordon v Ross*, 22 Mich

App 117, 121; 177 NW2d 193 (1970). Further, “a contract lacks mutuality when one party is obliged to perform, but not the other.” *Jaye v Tobin*, 42 Mich App 756, 760; 202 NW2d 712 (1972).

Based on the foregoing authority, Plaintiff argues that Defendant does not have to perform at all under the contract based on the covenant not to sue. This is so, Plaintiff argues, because Defendant can rely on the above provision to defeat any claim of nonperformance under the contract, and this is also despite the fact that payment is an essential term of the contract.

As stated, other than citing the provision, Defendant does not provide any authority or reasoning regarding the validity of the agreement-not-to-sue provision. But Michigan law is clear that, “A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Because Defendant fails to cite any authority regarding the validity of the agreement-not-to-sue provision, the Court finds that Defendant has failed to establish its entitlement to judgment as a matter of law.⁴

For the foregoing reasons, Defendant’s motion for summary disposition based on paragraph 17.10b of the Agreement is DENIED.

IT IS SO ORDERED.

March 8, 2016
Date

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

⁴ The Court need not address the parties’ paragraph 9.01 or 9.02 termination arguments as neither of these sections modifies the pay-when-paid clause in 17.17. Rather, 9.01 and 9.02 simply, respectively, provide a method for **calculation** of damages or amount of payment (and not when or if payment should be made).