

9

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MOUNT ZION ROMANIAN
PENTECOSTAL CHURCH,

Plaintiff,

Case No. 2014-3646-CB

vs.

DTE ELECTRIC COMPANY
f/k/a THE DETROIT EDISON
COMPANY,

Defendant.

_____ /

OPINION AND ORDER

Defendant has filed a motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied. In addition, Defendant has filed a reply brief in support of its motion.

I. Factual and Procedural History

This lawsuit stems from a utility line extension contract entered into by the parties ("Agreement"). Plaintiff contacted Defendant after acquiring real property commonly known as 11091 16 1/2 Mile Rd., Sterling Heights, MI ("Subject Property") in order to obtain electrical service. Due to the fact that the Subject Property did not have prior access to the electrical line, Defendant required Plaintiff to pay a portion of the costs to extend the electrical line to the Subject Property. On March 2, 2012, Plaintiff signed the Agreement, which governs the parties' relationship.

On October 20, 2014, Plaintiff filed its complaint in this matter. Plaintiff's complaint contains claims against Defendant for: breach of contract (Count I), unjust

enrichment (Count II), and conversion (Count III). All of Plaintiff's claims arise from its allegation that it entitled to a construction advance refund of \$17,708.24 in accordance with the Agreement.

On April 15, 2015, Defendant filed its instant motion for summary disposition. Plaintiff has since filed a response. In addition, Defendant has filed a reply brief in support of its motion. On June 8, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

Summary disposition under MCR 2.116(C)(4) is appropriate when the trial court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). For jurisdictional questions under MCR 2.116(C)(4), this Court "'determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate ... [a lack of] subject matter jurisdiction.'" *L & L Wine & Liquor Corp. v. Liquor Control Comm.*, 274 Mich App 354, 356, 733 NW2d 107 (2007).

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The

Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

In its motion, Defendant contends that this Court does not have subject matter jurisdiction over this matter. Specifically, Defendant contends that the Michigan Public Service Commission (“MPSC”) has primary jurisdiction over this matter because this case presents issues that involve the MPSC’s regulatory scheme.

In *Rinaldo’s Const Corp v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997), the Michigan Supreme Court summarized the doctrine of primary jurisdiction as follows:

Primary jurisdiction “is a concept of judicial deference and discretion.” LeDuc, Michigan Administrative Law, § 10:43, p 70. The doctrine exists as a “recognition of the need for orderly and sensible coordination of the work of agencies and of courts.” *White Lake Improvement Ass’n v. City of Whitehall*, 22 Mich App 262, 282, 177 NW2d 473 (1970). In *White Lake*, the Court of Appeals correctly noted that “[t]he doctrine of primary jurisdiction does not preclude civil litigation; it merely suspends court action.” *Id.* at 271. Thus, LeDuc notes, “[p]rimary jurisdiction is not a matter of whether there will be judicial involvement in resolving issues, but rather of when it will occur and where the process will start.” *Id.* at § 10:44, p 73. A court of general jurisdiction considers the doctrine of primary jurisdiction “whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency.” *Id.*, § 10:43 at 70.

Rinaldo’s, 454 Mich 65, at 70.

Further, “no fixed formula exists for applying the doctrine of primary jurisdiction. *Id.* However, the Michigan Supreme Court, in *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 202; 631 NW2d 733 (2001) has observed that:

While Michigan case law has unequivocally held that claims sounding in tort against public utilities are properly brought before the circuit courts, these holdings do not, expressly or by implication, preclude exercise by the MPSC of jurisdiction over those claims that have traditionally fallen within its authority. *Rinaldo's*, *supra* at 69, 559 NW2d 647, *Valentine v Michigan Bell Telephone Co*, 288 Mich 19, 25–26, 199 N.W.2d 182 (1972), and *Thomas v Gen. Telephone Directory C*, 127 Mich App 788, 792, 339 NW2d 257 (1983) (stating that under *Valentine*, if the plaintiff's claim sounds in tort, it is for the court; if it is a claim on a contract, it is for the MPSC).

Keeping the above-referenced standards in mind, the Courts in *Rinaldo's* and *Travelers* set forth three major purposes a Court should consider when deciding whether to defer to the MPSC:

First, a court should consider “the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue....” Second, it should consider “the need for uniform resolution of the issue....” Third, it should consider “the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities.” Davis & Pierce, 2 Administrative Law (3d ed), § 14.1, p 272. Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body.

Rinaldo's, 454 Mich at ; *Travelers*, 465 Mich at 198-199.

With respect to the first factor, the Court in *Travelers* held that the trial court correctly reasoned that the plaintiff's claim was one that was anticipated by MPSC's tariff, and that application of the tariff would depend on a factual inquiry best left to the determination of the MPSC. *Id.* at. 207. In this case, as in *Travelers*, the merits of Plaintiff's claims will be decided based on an interpretation of MPSC's rules. Such issues are anticipated by the rules, and as such disputes regarding how the rule(s) apply to a given situation are best resolved by relying on the expertise of the MPSC.

With regards to the second and third factors, the Court is convinced that deferral to the MPSC promotes uniformity and consistency in the application of the rules at

issue. Specifically, this matter involves a determination as to under what circumstances a customer is entitled to a construction advance refund. Consistent decisions on this issue are vital in order to allow the utility companies and their customers to making informed decisions in connection with negotiating their contractual relationships in the future. Obtaining consistent decisions is best ensured by deferring the expertise of the MPSC.

Finally, the Court in *Travelers* also recognized that trial courts should weigh whether the parties will be inconvenienced by deferring the matter at issue to the MPSC. *Id.* at 208-209. In this case, Plaintiff has asserted two claims against Defendant other than its breach of contract claim: a claim for unjust enrichment and a claim for conversion. However, the parties do not dispute the validity of the Agreement, and under Michigan law a party cannot recover under unjust enrichment when the matter is governed by a valid contract. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194-95; 729 NW2d 898, 904 (2006). Accordingly, based on the fact that it appears undisputed that the Agreement is valid, Plaintiff will not be inconvenienced by being unable to prosecute its unjust enrichment claim in this Court.

Likewise, Plaintiff will not be inconvenienced by being unable to pursue its conversion claim with this Court. Plaintiff's conversion claim is based on its allegation that Defendant has failed to return \$17,708.24 that it had an obligation to return under the Agreement. As is the case with its unjust enrichment claim, Plaintiff's conversion claim amounts to a breach of contract claim for the unpaid refund. An action arises in tort only where a duty separate and distinct from the contract exists. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 171; 809 NW2d 553 (2011). In this

case, the complained of conversion is based on the breach of a duty under the Agreement, not a duty independent of the Agreement. Consequently, Plaintiff's conversion claim fails as a matter of law. Consequently, Plaintiff will not be inconvenienced by being unable to pursue that claim with this Court.

For the reasons set forth above, all of the standards set forth in *Rinaldo's and Travelers* weigh in favor of deferring to the MPSC with respect to this matter. Consequently, Defendant's motion for summary disposition pursuant to MCR 2.116(C)(4) must be granted.

IV. Conclusion

Based on the foregoing, Defendant's motion for summary disposition pursuant to MCR 2.116(C)(4) is GRANTED. The Court states this Opinion and Order resolves all pending matters and CLOSES the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: JUL 22 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge