

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

TRI-US SERVICES, INC., a Michigan
corporation,

Plaintiff,

vs.

Case No. 13-02580-CKB

HON. CHRISTOPHER P. YATES

DEVELOPERS DIVERSIFIED REALTY
CORP., an Ohio corporation; GS II GREEN
RIDGE, LLC, a Delaware limited liability
company; BRE DDR GRANDVILLE
MARKETPLACE, LLC, a Delaware limited
liability company; and BG WALKER LLC,
a Michigan limited liability company,

Defendants.

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OPINION AND ORDER DENYING DEFENDANTS' MOTION
FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

West Michigan offers a salubrious climate that includes four true seasons – a vibrant spring, a sun-drenched summer, a breathtaking fall, and a snow-filled winter. Through it all, merchants have to provide for lawn care, snow removal, and other seasonal chores. To meet those needs, companies such as Plaintiff Tri-Us Services, Inc. (“Tri-Us”) furnish such services to businesses. Tri-Us worked diligently caring for shopping centers operated by Defendant Developers Diversified Realty Corp. (“DDR”) for years, at first receiving payments directly from DDR, and later through a DDR-assigned intermediary, Oxford Property Services (“Oxford”). This mutually beneficial relationship continued until Oxford filed for bankruptcy protection in 2013. At that point, Tri-Us sought recompense from DDR, but DDR refused. Thus, Tri-Us filed this action to recover for the work it performed at DDR shopping centers. Upon review, the Court concludes that this dispute must be resolved at trial.

I. Factual Background

The defendants have requested summary disposition under MCR 2.116(C)(10), which ““tests the factual sufficiency of the complaint[,]” Corley v Detroit Board of Education, 470 Mich 274, 278 (2004), and requires the Court to consider “the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Id. Thus, in setting forth the factual background of this dispute, the Court must present the record in the light most favorable to Plaintiff Tri-Us.

Beginning in the 1990s, Tri-Us performed a variety of parking-lot maintenance services at shopping centers run by DDR. Until 2008, those parties maintained a straightforward arrangement in which Tri-Us did the work and DDR paid the bills. But in 2008, DDR altered that relationship by interposing Oxford between itself and Tri-Us. As a result, Tri-Us signed contracts with Oxford for work at DDR properties, and Oxford paid Tri-Us with funds supplied by DDR. In the midst of this transition, a DDR representative assured Tri-Us President Robert Simons that everything would “run the same” and DDR would ensure that Tri-Us would be paid for its work. See Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Disposition, Exhibit A (Deposition of Robert L. Simons at 29-32). And as the transition unfolded, Tri-Us continued to deal primarily with DDR by taking instructions from DDR personnel and negotiating contracts with representatives of DDR. Id., Exhibits C, G, H & I. From the perspective of Tri-Us, Oxford simply functioned “like a third party billing service.” Id., Exhibit B (Deposition of Jennifer Lynn Simons Schillim at 6). That is, Tri-Us would enter invoices in the Oxford fmPilot system, “DDR would then approve them, and then they would be in Oxford’s system to be ready for approval for payment and then, at the end, payment.” Id., Exhibit B (Deposition of Jennifer Lynn Simons Schillim at 6).

In 2013, Oxford filed for bankruptcy protection at a time when Plaintiff Tri-Us had invoices in process that amounted to approximately \$40,000. Consequently, Tri-Us filed this action against Defendant DDR and several shopping-center owners seeking payments on its outstanding invoices. Tri-Us contends that DDR must be held liable for breach of contract or promissory estoppel, while the shopping-center owners have an obligation to Tri-Us on an unjust-enrichment theory.¹ All of the defendants subsequently moved for summary disposition under MCR 2.116(C)(8) and (10), but their motion plainly relies upon materials beyond the complaint, so the Court shall address the motion as a request for relief pursuant to MCR 2.116(C)(10).

II. Legal Analysis

“Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” West v General Motors Corp, 469 Mich 177, 183 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” Id. Here, the parties appear to agree on the facts underlying their dispute, but they disagree about the result dictated by those facts. In simple terms, DDR and the other defendants believe the Court should honor the corporate form of Oxford and conclude that financial responsibility for the Tri-Us invoices rests exclusively with Oxford, whereas Tri-Us takes a functional approach by arguing that it dealt largely with DDR, rather than Oxford, so DDR cannot

¹ The defendants not only answered the complaint, but also advanced a passel of third-party claims. On June 26, 2013, the third-party defendants removed the case to the United States District Court for the Western District of Michigan, where, on October 30, 2013, United States District Judge Robert J. Jonker severed the third-party complaint, transferred that complaint to the United States District Court for the District of New Jersey, and remanded the original complaint back to this Court for resolution. Accordingly, the Court once again has plenary authority to address that complaint.

hide behind Oxford's corporate independence in order to escape liability for all of the services that DDR ordered and approved. Mindful of these competing views, the Court must address each of the three claims advanced by Tri-Us in its effort to obtain compensation for the services it provided.

A. Breach of Contract Against DDR.

In Count One of its complaint, Plaintiff Tri-Us accuses Defendant DDR of breach of contract. "A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." AFT Michigan v Michigan, 303 Mich App 651, 660 (2014). Here, Tri-Us undeniably performed work pursuant to a series of contracts but was not paid for its performance, so its damages are manifest. DDR disclaims any obligation for that apparent breach of contract, however, because it argues that, as a non-signatory to the contracts, it cannot be bound by any agreement between Oxford and Tri-Us. See, e.g., AFSCME, Council 25 v Wayne County, 292 Mich App 68, 80 (2011) ("It goes without saying that a contract cannot bind a nonparty."). But Tri-Us insists that DDR's claimed lack of involvement in the contracting process is about as clear as mud. The Court agrees.

The contracts signed by Plaintiff Tri-Us in 2008 and beyond reflect agreements with "Oxford Property Services," as opposed to Defendant DDR. See Brief in Support of Defendants' Motion for Summary Disposition, Exhibits 2-8. But those contracts further provide "that Oxford is entering into this Agreement solely in its capacity of agent on behalf of DDR, as principal[.]" Id. (Consolidated Form of Contractor's Agreement, § 10). Beyond that, those contracts all provide that "[i]n no event shall Oxford be obligated to advance any of its own funds on behalf of Owner, DDR or any other

party or to satisfy any of Owners' and/or DDRs' financial obligations or to otherwise incur any other liability on behalf of Owner, DDR, Contractor or any other party in connection with this Agreement and the Services." Id. (Consolidated Form of Contractor's Agreement, § 10). Thus, Oxford not only held itself out in each contract as an "agent on behalf of DDR, as principal," but also disclaimed any financial obligation in its own right to Tri-Us. See id. If those contract terms mean what they say, a finder of fact could readily conclude that Oxford acted as a mere agent of DDR – the principal and true party to the contract, see Riddle v Lacey & Jones, 135 Mich App 241, 246-247 (1984) – and that Tri-Us had no recourse against Oxford – a mere agent of DDR – for unpaid obligations to Tri-Us. Id. at 247 ("As an agent for a disclosed principal, defendant cannot be held liable for his principal's failure to perform."). At best, DDR has presented a contractual dispute that requires resolution of an ambiguity concerning the identity of the contracting party, *i.e.*, Oxford as signatory or DDR as a disclosed principal of Oxford. That ambiguity creates a "question of fact that must be decided by the jury." Klapp v United Ins Group Agency, Inc., 468 Mich 459, 469 (2003). Hence, the Court must deny DDR's summary-disposition motion under MCR 2.116(C)(10) on the breach-of-contract claim.

B. Promissory Estoppel Against DDR.

In Count Two of the complaint, Plaintiff Tri-Us contends that Defendant DDR must be held responsible for the outstanding invoice obligations on the theory of promissory estoppel, which our Court of Appeals has described as "a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions." Crown Technology Park v D&N Bank, FSB, 242 Mich App 538, 548 n 4 (2000). To prevail on that claim, Tri-Us must establish: "(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 in circumstances such that the promise must be enforced if injustice is to be avoided.” Novak v Nationwide Mutual Ins Co, 235 Mich App 675, 686-687 (1999). The Court must “exercise caution in evaluating an estoppel claim and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted.” Id. at 687.

Here, the deposition testimony of the president of Plaintiff Tri-Us, Robert Simons, provides enough evidence to survive Defendant DDR’s motion for summary disposition. Simons explained that he dealt only with DDR and never communicated with anyone at Oxford. See Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Disposition, Exhibit A (Deposition of Robert L. Simons at 11-13). Simons also said that, during the transition from DDR to Oxford, a representative of DDR promised him that Tri-Us would “be paid” for all of its work. See id. (Deposition of Robert L. Simons at 29-30). Indeed, as Simons put it, he “was skeptical” about Oxford, but a representative from DDR “assured me that ‘Don’t worry, it’s just a billing service.’” Id. (Deposition of Robert L. Simons at 32). Thus, a rational trier of fact could readily conclude that Simons had concerns about going forward with Oxford, but DDR allayed those concerns by promising Simons that DDR would pay for the work of Tri-Us, and Tri-Us justifiably relied upon that assurance in continuing to follow DDR’s instructions to provide various services for DDR’s benefit. Therefore, the Court must deny summary disposition to DDR under MCR 2.116(C)(10) on the promissory-estoppel claim.²

² To the extent Defendant DDR demands summary disposition because the claims for breach of contract and promissory estoppel are mutually exclusive, the Court must deny relief on that basis. A plaintiff may plead such mutually exclusive claims in the alternative “where there are questions of fact concerning the existence and terms of the contract[.]” Fodale v Waste Mgmt of Michigan, Inc, 271 Mich App 11, 36 (2006). Indeed, our Court of Appeals has permitted such an approach with respect to claims for breach of contract and promissory estoppel. Aero Taxi-Rockford v General Motors Corp, No 259565, slip op at 13-14 (Mich App May 30, 2006) (unpublished decision).

C. Unjust Enrichment Against the Shopping-Center Owners.

In Count Three of the complaint, Plaintiff Tri-Us takes aim at a different group of defendants – three shopping-center owners affiliated with DDR – by alleging that those defendants received an unjust enrichment in the form of uncompensated services from Tri-Us. “[T]o establish a claim of unjust enrichment, plaintiff must demonstrate: (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party.” Karaus v Bank of New York Mellon, 300 Mich App 9, 23 (2013). “If this is established, the law will imply a contract in order to prevent unjust enrichment.” Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 478 (2003). The viability of that claim in this case depends almost entirely upon whether the three shopping-center owners paid DDR or Oxford for the services provided by Tri-Us. If the shopping-center owners paid for the services, but DDR or Oxford failed to pass on those funds to Tri-Us as compensation for its work, then there exists no inequitable retention of a benefit by the shopping-center owners, who simply received what they paid to obtain. But if the shopping-center owners never paid DDR or Oxford for the work performed by Tri-Us, then Tri-Us can pursue a claim based on an unjust-enrichment theory.³ Surprisingly, the record contains no evidence regarding payments made by the shopping-center owners, so the Court must deny their motion for summary disposition under MCR 2.116(C)(10).

³ In seeking summary disposition on the unjust-enrichment claim, the shopping-center owners seem to conflate their roles and identities with the role and identity of Defendant DDR. To be sure, the shopping-center owners all appear to be affiliates of DDR, but the complaint separates the three shopping-center owners from DDR in asserting claims. Thus, the Court must reject the argument that the claim for breach of contract against DDR in Count One and the claim for unjust enrichment against the shopping-center owners in Count Three are mutually exclusive. The Court has seen no evidence of any contract between Tri-Us and the shopping-center owners, so those defendants are subject to suit on the implied-contract theory of unjust enrichment. See Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 194-195 (2006).

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall deny the defendants' motion for summary disposition under MCR 2.116(C)(10) in its entirety. As a result, the Court must set the matter for trial on the claims against Defendant DDR for breach of contract and promissory estoppel and against the remaining defendants for unjust enrichment.

IT IS SO ORDERED.

Dated: July 10, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge