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

SIMPLY CLEAN JANATORIAL SERVICES, LLC,
Plaintiff/Counter-Defendant,

v.

Case No. 18-167815-CB
Hon. James M. Alexander

LANCASTER VILLAGE CONSUMER HOUSING COOPERATIVE, INC.,
Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

v.

RONDA BRINKER, and DARRELL MCCLOUD,
Third-Party Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Third-Party Defendant Ronda Brinker's motion to recuse and for summary disposition, and Plaintiff/Counter-Defendant Simply Clean's motion for partial summary disposition.

According to its Complaint, Simply Clean claims that the parties entered into a September 26, 2016, contract and change order whereby Simply Clean would remove 577 door thresholds throughout Defendant Lancaster's property. Simply Clean claims the work was complete in January 2017; and alleges that despite acknowledging the project's completion, Lancaster has failed to pay $43,275 for the same.

On these general allegations, Simply Clean filed its complaint on claims titled (Count I) account stated; and (Count II) quantum meruit.

In response, Lancaster filed a Counter Complaint against Simply Clean, and a Third-Party Complaint against Third-Party Defendants, Ronda Brinker and Darrell McCloud. In said complaints, Lancaster, a housing cooperative, alleges that Brinker, a former Lancaster Board Member, entered into contracts with Simply Clean and McCloud, owner of Simply Clean, without consulting Lancaster's management company, Professional Property Services, Inc. (PPS). Further, Lancaster argues that Brinker failed to disclose her personal relationship with McCloud to the Board Members or PPS prior to or during the contracting periods.

Lancaster alleges that Brinker used her position as Secretary of Lancaster's Board to unilaterally enter into a service agreement with Simply Clean and McCloud. As stated, Lancaster claims that Brinker did this without disclosing her conflict of interest, and with the intent to personally benefit from the agreement. Further, Lancaster argues that Brinker prevented Lancaster or PPS from soliciting competitive bids for the project. Lancaster also argues that Brinker, McCloud, and Simply Clean fraudulently executed additional contracts and change orders to Lancaster's detriment.

Lancaster alleges that under the service agreement, Simply Clean was required to obtain and secure all necessary permits, but failed to do the same. Lancaster claims that Simply Clean subcontracted out portions of the labor under the contract. Lancaster further claims that it paid for all the work performed by Simply Clean and/or subcontractors despite several objections. Lancaster argues that Simply Clean materially breached the terms of the service agreement, failed to act with due diligence and in a workman-like manner, and failed to reasonably supervise the work performed by subcontractors.

On these general allegations, Lancaster filed its Counter Complaint against Simply Clean on claims titled (Count I) breach of contract; (Count II) unjust enrichment; (Count III) fraudulent misrepresentation; (Count IV) silent fraud; (Count V) innocent misrepresentation; (Count VI) negligence; (Count VII) concert of action; (Count VIII) civil conspiracy; (Count IX) declaratory relief; and (Count X) injunctive relief.

Lancaster filed its Third-Party Complaint against Brinker and McCloud on claims titled (Count I) breach of fiduciary duty (Brinker); (Count II) breach of contract (Brinker); (Count III) breach of contract (McCloud); (Count IV) unjust enrichment (Brinker and McCloud); (Count V) fraudulent misrepresentation (Brinker and McCloud); (Count VI) silent fraud (Brinker and McCloud); (Count VII) innocent misrepresentation (Brinker and McCloud); (Count VIII) negligence (Brinker and McCloud); (Count IX) negligence (McCloud); (Count X) concert of action (Brinker and McCloud); (Count XI) civil conspiracy (Brinker and McCloud); and (Count XII) declaratory relief (Brinker and McCloud).

I. Third-Party Defendant, Brinker's Motion to Recuse

As previously stated, Brinker now moves to recuse Randall Pentiuk and the law firm Pentiuk, Couvreur, & Kobiljak, PC (PCK) as the attorney of record for Lancaster due to a conflict of interest. Brinker argues that she and Pentiuk "spoke by phone," and Brinker asked for advice regarding removing PPS as Lancaster's management company. Brinker claims that Pentiuk asked her to forward documents, which she did via text message. Brinker further alleges that Pentiuk did offered advice, but "was unable to offer her full advice to resolve" the issues the Board was having with PPS.

Brinker also claims that non-party Sonya Williams had conversations with Pentiuk regarding her concerns with PPS. Williams alleges that she and Pentiuk discussed Simply Clean and McCloud's work product as it relates to the contracts at issue in the present case. Williams stated that Pentiuk indicated that "he would look into the matter."

Finally, Brinker argues that PPS is the "true moving party in this action." Brinker alleges that Pentiuk, the attorney for Lancaster, also represents PPS. Brinker argues that Pentiuk cannot "advise one party to an action as to how to get PPS of Michigan to pay its bills and then provide adequate services and represent to the opposing party in the same action as to why they didn't pay their bills . . . that is the conflict."

In her motion, Brinker does not cite any law or provide a legal basis as to why Pentiuk should be disqualified.[1] For the purposes of this motion, the Court will assume Brinker believes that Pentiuk should be disqualified based on MRPC 1.9, which provides:

> MRPC 1.9(a) provides:
>
> > A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former consents after consultation.
>
> Further, MRCP 1.9(c) provides:
>
> > A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
> >
> > (1) use information relating to the representation to the disadvantage of the former client except as where Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known.

Michigan law establishes that "[t]he party seeking disqualification [of opposing counsel] bears the burden of demonstrating specifically how and as to what issues in the case the

[1] It is well established that "[t]rial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).

likelihood of prejudice will result." *Rymal v Baergen*, 262 Mich App 274; 319; 686 NW2d 241 (2004); quoting *Kubiak v Hurr*, 143 Mich App 465, 471; 372 NW2d 341 (1985). This is so because "the Court must be sensitive to two overriding interests -- preservation of the integrity of the adversary process; and solicitousness for a client's right to be represented by counsel of his choice." *Dalrymple v National Bank & Trust Co*, 615 F Supp 979, 985 (WD Mich 1985); see also *Smith v Arc-Mation, Inc*, 402 Mich 115, 118; 261 NW2d 716 (1978).

Pentiuk argues that Brinker's allegations do not amount to any ethical violations, a conflict of interest, or an attorney-client relationship. Further, Pentiuk argues that if the communication occurred as Brinker alleges in her affidavit, she would be have included the referenced documentation, and has failed to do the same. Pentiuk also argues that the text messages Brinker relies on were regarding a prayer service at board meetings, which has no bearing on the present case. Pentiuk argues that Brinker's motion is a "procedural tactic of harassment," not a legitimate claim to recuse PCK.

Here, Brinker has failed to establish, specifically, "how and as to what issues in the case the likelihood of prejudice will result." Brinker's argument centers on the allegations that she communicated her concerns with PPS to Pentiuk, and he offered her some advice based on the same. Brinker has not set forth any factual or legal basis as to how these conversations regarding PPS would result in prejudice. Beyond that, PPS is not even a party to this action. Further, there is no evidence before that Court that suggests Pentiuk or PCK represent PPS.

For these reasons, the Court finds that, just because Pentiuk or an employee of PCK may have had conversations regarding PPS, it does not give rise to a conflict of interest or an attorney-client relationship between PCK and Brinker that would prevent PCK from representing Lancaster. As such, Brinker's motion to recuse Pentiuk and PCK is DENIED.

II. Third-Party Defendant, Brinker's (C)(7) Motion.

Next, Brinker moves for summary disposition pursuant to MCR 2.116(C)(7). A (C)(7) motion considers whether a claim is barred, among other grounds, by an agreement to arbitrate.

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). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes v Holmes*, 291 Mich App at 594.

Further, in Michigan, "a 'question of arbitrability' is an issue for judicial determination unless the parties unequivocally indicate otherwise." *Gregory J Schwartz & Co v Fagan*, 255 Mich App 229, 232 (2003). MCL 691.1686(1) provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract." And "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." MCL 691.1686(2).

In her motion, Brinker argues that the Court should enforce the unambiguous arbitration provision found in Simply Clean and Lancaster's written agreement at Paragraphs 34-35. They provide:

> 34. In the event a dispute arises out of or in connection with this Agreement, the Parties shall attempt to resolve the dispute through face-to-face consultation.
>
> 35. If the dispute is not resolved within a reasonable period after a face-to-face consultation, then any or all outstanding issues may be submitted to mediation in accordance with any statutory rules of mediation. If mediation is unavailable or is not successful in resolving the entire dispute, any outstanding issues will be submitted to final and binding arbitration in accordance with the laws of the State

> of Michigan. The arbitrator's award will be final, and judgment may be entered upon it by any court having jurisdiction within the State of Michigan.

In response to the motion, Simply Clean argues that the dispute at issue does not involve the service agreement, but rather a change order, which does not contain an arbitration provision. Based on the same, Simply Clean argues that the case should not be dismissed for arbitration.

Lancaster, in response, argues that (1) Brinker has no right to arbitration; (2) if she did have the right to arbitration, Brinker failed to preserve the same; (3) Brinker's demand for arbitration is untimely; and (4) Brinker is not a party to the contract that she relies upon for her demand. The Court agrees.

Here, Brinker is not a party to the contract between Simply Clean and Lancaster that she references to support her demand for arbitration. "It goes without saying that a contract cannot bind a nonparty. Arbitration, which is a matter of contact, cannot be imposed on a party that was not legally or factually a party to the agreement wherein an arbitration provision is contained." *AFSCME Council 25 v. Wayne County*, 292 Mich App 68, 80; 811 NW2d 4 (2011). (Internal citations omitted). A nonsignatory of an arbitration agreement "can still be bound by an agreement pursuant to ordinary contract-related principles, including incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel." *Id.* at 81. There is no evidence that any of these principles apply such that Brinker would be bound, or able to enforce, the arbitration provision between Simply Clean and Lancaster.

Further, pursuant to MCR 2.111(F)(3), "[a]ffimative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." Affirmative defenses include "the existence of an agreement to arbitration." MCR 2.111(F)(3)(a). "A defense not asserted in the responsive pleading or by motion as provided by these rules is waived." MCR 2.111(F)(2).

Even if Brinker was able to establish that she was able to enforce the arbitration provision, she waived her right to do the same. Brinker filed her Answer to Defendant/Third-Party Plaintiff's Complaint and Affirmative Defenses on October 18, 2018. Brinker did not include "the existence of an arbitration provision" as an affirmative defense. Based on the same, any right Brinker may have had to arbitration was waived.

For the foregoing reason, Brinker's motion for summary disposition under (C)(7) is DENIED.

III. Plaintiff's (C)(10) Motion

In its response to Brinker's (C)(7) motion, Simply Clean moved for partial summary disposition of its account stated claim against Lancaster pursuant to MCR 2.116(C)(10). A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[2]

Simply Clean argues that it performed all of the required threshold removals pursuant to the September 26, 2016, threshold change order. Further, Simply Clean claims that Lancaster's Board promised to provide payment based on the same. As such, Simply Clean argues an account stated became due in the amount of $43,050.

In support of its motion, Simply Clean attaches: (1) the Threshold Change Order; (2) Lancaster Board Meeting March 10, 2018 Minutes; (3) Ronda Brinker's affidavit; and (4) Sonya Williams' affidavit.

In response, Lancaster argues there is no evidence of an account stated. Further, Lancaster argues that it is entitled to summary disposition as to Plaintiff's complaint for account

[2] 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.

stated and quantum meruit under MCR 2.116(I)(2) based on Plaintiff's failure to obtain and possess the requisite licenses for the construction project pursuant to MCL 339.2412.

In support of its position, Lancaster attaches (in relevant part) Simply Clean and McCloud's answers to Lancaster's interrogatories and requests to admit. In their answers, Simply Clean and McCloud admit that Simply Clean, McCloud, or any employee of Simply Clean, were not licensed residential builder(s) or residential maintenance and alteration contractor(s). They further admit that during the time the work for Lancaster was performed, they did not apply for a residential builder license or a Maintenance and Alteration Contractor license with LARA.

The residential builders act states:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. MCL 339.2412.

In applying MCL 339.2412, the Supreme Court has held that an unlicensed builder is not entitled to contractual or "equitable relief because any such relief would allow equity to be used to defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction. *Stokes v. Millen Roofing Co.*, 466 Mich 660, 673; 649 NW2d 371 (2002).

Here, Simply Clean does not provide any evidence that it was licensed during the performance of the work done at Lancaster's residential property. [3] In fact, to the contrary, Simply Clean and its owner, McCloud both admit they did not possess the requisite licenses

[3] Although not required, Plaintiff did not file a reply brief rebutting the arguments in Defendant's response brief.

during the work. As such, Simply Clean may not bring or maintain an action for the collection of compensation for the performance of an act or contract for which a license is required.

Based on the foregoing, Defendant's motion for summary disposition under (I)(2) is GRANTED, and Plaintiff's complaint is dismissed.[4] Plaintiff's motion for partial summary disposition under (C)(10) is DENIED.

IV. Summary

To summarize, (1) Third-Party Defendant Ronda Brinker's motion to recuse is DENIED, (2) Third-Party Defendant Ronda Brinker's motion for summary disposition pursuant to (C)(7) is DENIED, (3) Plaintiff Simply Clean's motion for summary disposition pursuant to (C)(10) is DENIED, and (4) Defendant Lancaster's motion pursuant to (I)(2) is GRANTED and Plaintiff's Complaint is DISMISSED in its entirety.

IT IS SO ORDERED.

April 10, 2019
Date

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

[4] Assuming arguendo, Plaintiff's claim for quantum meriut survived Defendant's motion; the Court would still dismiss the same. To establish a claim for unjust enrichment, a plaintiff must show: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the defendant's retention of the benefit. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Where an express contract exists between the parties, a contract cannot be implied in law which covers the same subject matter. *Cascade Elec Co v. Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976). Here, Plaintiff's claim for quantum meriut is simply a restatement of his breach of contract claim. As such, the claim would be dismissed as an express contract exists between the parties.