

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

MICHIGAN FENCE & SUPPLY COMPANY,

Plaintiff,

vs.

Case No. 2013-4498-CK

B&B CONSTRUCTION SERVICES, LLC,

Defendant.

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OPINION AND ORDER

Defendant B&B Construction Services, LLC has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff has filed a response and requests that the motion be denied.

*Facts and Procedural History*

Defendant is a general contractor. On March 2, 2011, Defendant submitted a bid to the Michigan Department of Transportation (“MDOT”) in connection with a construction project involving renovations to the Rosa L. Parks Bus Station in Detroit, MI (the “Project”). Once it obtained the Project one of Defendant’s employees, Mike Skomial, contacted Plaintiff’s estimator, Rob Roberts, and asked Plaintiff to submit a bid for some subcontractor work on the Project. Mr. Roberts and Mr. Skomial then reviewed the plans and specifications for the Project.

On March 17, 2011, Plaintiff submitted a bid to Defendant for the subcontract work and was later awarded the subcontract (the “Subcontract”). After beginning work on the Project, Plaintiff requested a change order. While the parties agree that the change order was sought to cover the installation of an interior gate, Defendant contends that the change order was sought to cover the expense of 1 of 4 gates while Plaintiff contends that the change order was sought to

cover the expense of 1 of 5 gates. Defendant allegedly sought approval for the change order from the project architect, the owner of the property and the Facilities Administration Director; however, the request was denied. Defendant did not take any additional action(s) to have the change order approved, such as litigation. Despite its request being denied and Defendant's refusal to pursue litigation on the issue, Plaintiff ultimately installed the gate in question.

On November 8, 2013, Plaintiff filed its complaint in this matter seeking to recover the cost of installing the gate in question. Specifically, Plaintiff's complaint includes claims for: Breach of Contract (Count I), Breach of Duty of Good Faith and Fair Dealing (Count II), Breach of Fiduciary Duty (Count III), and Account Stated (Count IV). On April 2, 2014, Defendant filed its instant motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied. Defendant has also filed a reply brief in support of its motion.

#### *Standard of Review*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority*, 253 Mich App 144, 161; 658 NW2d 804 (2002).

#### *Arguments and Analysis*

1) Breach of Contract

Plaintiff's breach of contract claim is based on its assertion that Defendant breached the Subcontract by failing to make payment and failing to pursue the change order further. Specifically, the parties dispute whether Defendant was required to commence litigation in connection with change the order. Defendant contends that there is no contractual provision requiring them to initiate litigation, that Plaintiff could have brought its own action against the State for unjust enrichment, and/or Plaintiff could have asked it to assign its right to pursue litigation. In response, Plaintiff contends that Defendant was required to pursue the litigation pursuant to paragraph 16.1 of the Subcontract. Paragraph 16.1 provides:

[Plaintiff] agrees to make any claim for extra work, for extension of time, for delay or for damages, if authorized herein in the same manner as provided in the Contract Documents and in such time as will enable [Defendant] to promptly submit such claims to the Owner for payment or recognition, and [Defendant] shall not be liable to [Plaintiff] on any claim not timely or properly presented, unless allowed by Owner. The timely and proper presentment of said claims are conditions precedent to any liability by [Defendant] to [Plaintiff]. Any claim for changes, delays or extra work involving compensation to be paid to [Plaintiff] must be submitted within one (1) week of the occurrences or events giving rise to said claim. No change orders will be issued for additional work of any kind unless they are approved by the Architect and Owner prior to issuance. In the event that a controversy occurs between the Owner and [Defendant] concerning the Contract with Owner or Change Order(s), then it is expressly agreed that no compensation for these items shall be due to [Plaintiff] from [Defendant] until such payment is received by [Defendant] regardless of the fact that payment is delayed to [Defendant] due to [Defendant's] negotiating with the Owner, arbitration, administrative actions, litigations, appeals, or similar activities.

While Plaintiff contends that Paragraph 16.1 requires Defendant to pursue litigation if a request for a change order is denied by the Owner and/or Architect, the Court is convinced that the unambiguous terms of the Subcontract impose no such requirement. An unambiguous contract must be interpreted according to the plain and ordinary meaning of its terms. *Meaghan v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). Further, courts may not

find ambiguity where none exists. *UAW-GM Human Resources Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 589 NW2d 411 (1998). The only reference to litigation in Paragraph 16.1 provides that Defendant is not required to pay Plaintiff for the change order until it receives payment from the Owner, even if the payment to Defendant is delayed by activities such as litigation. Although Paragraph 16.1 cites to the possibility of litigation as a manner of seeking approval for a change order, the provision does not require Defendant to pursue the change order via litigation. Moreover, because Paragraph 16.1 is the only basis Plaintiff cites in support of its contention that Defendant was obligated to pursue litigation in order to have the change order approved, Defendant's motion for summary disposition of the portion of Plaintiff's breach of contract claims related to the change order request at issue must be granted.

2) Breach of Fiduciary Duty

Plaintiff's breach of fiduciary duty claim is based on its assertion that Defendant breached its fiduciary duties by failing to pursue the change order via the Court of Claims. In its motion, Defendant contends that it is entitled to summary disposition of the breach of fiduciary duty claim as it did not owe Plaintiff a fiduciary duty. Specifically, Defendant contends that the parties were actively disputing whether a change order should be pursued.

A fiduciary relationship exists when "there is confidence reposed on one side, and the resulting superiority and influence on the other." *In re Karmey Estate*, 468 Mich 68, 74 n 3; 658 NW2d 796 (2003). However, the placement of trust, confidence, and reliance must be reasonable, and placement is unreasonable if the interests of the client and non-client are adverse or even potentially adverse. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260–261; 571 NW2d 716 (1997). When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship. *Teadt v Lutheran*

*Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). The question as to whether a fiduciary duty exists is a question of law to be decided by the Court. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39; 698 NW2d 900 (2005).

In this case, the Court is convinced that Defendant did not owe Plaintiff any fiduciary duty to pursue litigation in order to obtain approval for the change order in question. As a preliminary matter, the Court is satisfied that a fiduciary duty does not exist in this matter. While the parties both had an interest in completing the project and obtaining payment, their interests were at the very least potentially adverse. This is documented in this case as Plaintiff threatened Defendant that it would not complete the required work unless Defendant obtained the change order or paid for the additional work.

In addition, even if Defendant owed Plaintiff a fiduciary duty, the Court is satisfied that Defendant satisfied its duty by asking the Architect and Owner to approve the change order. As discussed above, the contractual duty Defendant owed in the event of a change order was limited to asking the Owner and Architect to approve the order, and to pay the Plaintiff if and when the approval and payment was received. While Plaintiff maintains that it trusted Defendant to utilize all means available to get the change order approved, it has failed to cite to any authority supporting its position that a party has a fiduciary duty to take action beyond that required by a contract covering the same subject matter. Indeed, if the parties had intended to require Defendant to pursue the approval of a change order via litigation, at its own cost, they could have done so. However, the parties did not do so, and the Court will not impose a fiduciary duty to take actions beyond those required by the Subcontract.

### 3) Good Faith and Fair Dealing

Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith. *Burkhardt v City Nat Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). In this case, Plaintiff asserts that Defendant failed to exercise its duty to seek approval of the change order in good faith by failing to pursue litigation and by failing to timely inform Plaintiff of its decision not to pursue litigation. However, Plaintiff has failed to provide any evidence that Defendant's decision was made in bad faith. Mere conclusory allegations are insufficient to create a question of fact. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006). Under these circumstances, the Court is satisfied that Defendant exercised its discretion in good faith. Accordingly, Defendant's motion for summary disposition of Plaintiff's good faith and fair dealing claim must be granted.

#### 4) Back-Charges

As a preliminary matter, it is undisputed that at Defendant retained \$71,822.13 that was due to Plaintiff. However, Defendant contends that it is entitled to back-charge \$3,626.34 from that balance. Specifically, Defendant contends that it should be able to deduct the costs it incurred in seeking to have the change order approved. First, Defendant contends that under Paragraph 14 of the Subcontract Plaintiff is liable for damages caused by breach and/or delay. However, Defendant has failed to provide any evidence that Plaintiff's delay in installing the fence caused it any damage. Accordingly, the Court is convinced that Defendant's assertion is without merit.

Next, Defendant contends that it is entitled to a back-charge under the indemnification provision in Paragraph 4.1a(4) of the Subcontract. However, that provision limits Plaintiff's obligation to indemnifying Defendant against liability imposed by the Owner. (*See* Plaintiff's

Exhibit 7.) In this case, Defendant did not incur any liability to the Owner. Therefore, Paragraph 4.1a(4) does not apply in this case.

Defendant also contends that it is entitled to a back-charge pursuant to Paragraph 7. Specifically, Defendant contends that the Subcontract precluded Plaintiff from filing a claim against the performance bond, and that any costs it incurred in defending against the improper claim are properly recoverable. Paragraph 7 provides, in pertinent part:

[Plaintiff] shall keep the premises, Owner's funds, and the work to which this Contract relates (including any payment bond given by [Defendant] to the Owner) free and clear of all claims and mechanics liens.....

In this case, Plaintiff does not dispute that it made a claim against the bond. Paragraph 4.1b provides that Defendant is entitled to recover any costs and attorney fees it incurred in removing any claim against the bond. Accordingly, the Court is convinced that Defendant is entitled to a charge-back of \$1,591.34, the amount of costs and fees Defendant incurred in connection with Plaintiff's improper claim.

#### *Conclusion*

For the reasons set forth above, Defendant B&B Construction Services, LLC's motion for summary disposition pursuant to MCR 2.116(C)(10) is GRANTED. Further, the balance Defendant owes to Plaintiff shall be reduced by \$1,591.34, the amount Defendant incurred in removing Plaintiff's improper claim against the bond. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and closes the case.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: May 9, 2014

JCF/sr

Cc: *via e-mail only*  
Bryan L. Monaghan, Attorney at Law, [bryan@bryanmonaghanlaw.com](mailto:bryan@bryanmonaghanlaw.com)  
Gary D. Quesada, Attorney at Law, [gquesada@cqlawfirm.com](mailto:gquesada@cqlawfirm.com)