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***1042** LIMITS ON A SUBCONTRACTOR'S RIGHT TO BRING A QUANTUM MERUIT CLAIM AGAINST THE PROPERTY OWNER

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This article will discuss the validity of a quantum meruit, or unjust enrichment claim, of a subcontractor against an owner of real property for work performed on the property pursuant to a subcontract with a general contractor. [FN1] When a subcontractor is not paid, it will often add a quantum meruit count to a complaint which also asserts a breach of contract claim against the general contractor, a Builders' Trust Fund claim against the general contractor, [FN2] and a construction lien claim against the owner. [FN3] A quantum meruit claim will not usually be the focus of the litigation unless the other claims are ineffective (for example, where the general contractor is uncollectable or the subcontractor has failed to perfect its construction lien rights against the owner). This article will discuss how Michigan courts have treated such claims.

THE CONSTRUCTION LIEN LAW AS BACKGROUND

A discussion of potential claims by a subcontractor against an owner must start with the Michigan Construction Lien Act, MCLA 570.1101, et seq. (the "Act"). The Act, which was adopted in 1980, replaced the former Mechanics' Lien Law (the "former Act") which had been in effect for approximately 90 years. The Act has the same purpose as that of the former Act: to provide a systematic means whereby an unpaid contractor or laborer will be able to recover compensation from the owner of real property improved by the labor or services of the contractor, supplier or laborer. The Act also seeks to prevent a situation where the owner must pay twice for the same work in order to clear liens filed against the property by subcontractors or suppliers with whom the owner never had any dealings.

The Act seeks to balance these sometimes conflicting goals through a series of notice and other requirements which attempt to inform the owner of the identity of parties contributing to the work on the owner's property. If these notice provisions are complied with, the owner must make sure that the subcontractors are paid; otherwise the property may be subject to the lien of one or more subcontractors. On the other hand, the subcontractor's failure to comply with the Act may result in the loss of the right to a lien.

For example, two key provisions of the Act are the requirements that (a) the subcontractor file its lien against the property with the register of deeds within 90 days after it last supplies labor or materials to the property [FN4] and (b) the lien foreclosure suit be commenced within one year of the filing of the claim of lien. [FN5] Failure to satisfy the requirements of the Act will often prompt the subcontractor to file suit against the owner on a quantum meruit theory, claiming that the owner should pay for the subcontractor's services because the owner received the benefit of the work.

***1043** AN EXPRESS AGREEMENT GENERALLY BARS A QUANTUM MERUIT CLAIM

Michigan courts have long held that a quantum meruit claim may not be asserted where an express contract covers the same subject matter. Put differently, courts will not imply a contract for the parties when an express one covering the subject matter already exists. To do so would be to rewrite the agreement of the parties. This is the first principle that may apply when a subcontractor seeks to recover against the owner on quantum meruit grounds.

A landmark case on this issue is Millar v. Macey, 263 Mich 484 (1933). In Millar, a salesman sued a furniture manufacturer for commissions owed to him under an express contract. The defendant contended that the contract required payment of commissions to the plaintiff only for sales of products manufactured by defendant. The plaintiff contended that under the contract, he was to be paid commissions not only for selling defendant's goods, and goods that were manufactured by another furniture maker, but also for the reasonable value of his services in soliciting new business for the defendant. The plaintiff never disputed the existence of an express contract.

At trial, the plaintiff testified as to the express contract and also testified as to the reasonable value of the services he rendered to the defendant in soliciting business. The jury returned a verdict in plaintiff's favor. The defendant argued before the Michigan Supreme Court that it was error for the trial court to admit evidence of the reasonable value of plaintiff's services and to instruct the jury that "if they did not find that the plaintiff was entitled to recover on the contract 'he would be entitled to recover what his services were reasonably worth' which were 'actually rendered and which were of utility and service to the defendant company in the procurement of this contract.' " Id. at 487.

The Michigan Supreme Court held that "the only issue which should have been submitted to the jury was whether or not, under the terms of the contract, plaintiff was entitled to a commission on the merchandise manufactured by [a different] company." Id. at 488. The Court reversed the trial court ruling which allowed evidence of the value of services bestowed on the defendant, because an express contract already covered the same issue:

> The law in this state seems to be well settled that where an express contract is entered into between parties, but they differ as to the terms thereof, and there is evidence tending to support the claim of each of them, it is for the jury to determine what the terms of the contract were, and there can be no recovery on the quantum meruit. Id. at 488.

The principle set forth in Millar has been reaffirmed in a number of cases in a variety of factual situations, including claims by contractors. See, e.g., Steele v. Cold Heating Co, 125 MichApp 199, 203 (1983) (where there is an express employment contract in force between the parties, a contract cannot be implied in law which covers the same subject); Cascade Electric Co v. Rice, 70 MichApp 420, 426-27 (1976) (contractor may not recover in quantum meruit against owner for work covered by contract, although it may recover under quantum meruit for items not covered by the contract). The existence of an express contract covering the same subject matter precludes the subcontractor's quantum meruit claim, even where there is a dispute as to the precise terms of the contract. See, e.g., Geistert v. Scheffler, 316 Mich 325 (1946); In re Estate of DeHaan, 169 Mich 146 (1912).

In Scholz v. Montgomery Ward & Co, 437 Mich 83, 93 (1991), the Michigan Supreme Court reiterated that "[a]n implied contract cannot be enforced where the parties have made an express contract covering the same subject matter." In Scholz, the Court found proper the termination of an at-will employee who refused Sunday work: the Court refused to find an implied contract where there was an express contract between the parties. See also Hickman v. General Motors Corp, 177 Mich 246, 251 (1989) ("Where an express contract is in force, a contract which covers the same subject cannot be implied in law").

Merely claiming that the work at issue is an extra to the contract does not permit the application of quantum meruit where the contract actually covered the work at issue. Thus, in Campbell v. City of Troy, 42 MichApp 534 (1972), the plaintiff sought recovery in quantum meruit for work that he claimed to be additional to his employment contract, arguing that it would be unjust for the defendant to receive extra services without paying for them. The Court affirmed dismissal of the claim for extra services because there was an express contract between the parties which governed the subject matter, and which included a provision covering extra work. The court stated:

> Appealing as plaintiff's argument seems, closer examination finds it to be legally flawed. A contract will be

implied only where no express contract exists. There cannot be an express and implied contract covering the same subject matter at the same time. Superior Ambulance Service v. City of Lincoln Park, 19 MichApp 655 (1969). Id. at 537-38.

***1044** Cases involving quantum meruit claims between two contracting parties are arguably different from the subcontractor's situation because the subcontractor has a contract only with the general contractor, not the owner, and is not seeking to imply a contract between parties where one already exists between those same parties. However, the Millar rationale has been applied to dismiss a subcontractor's quantum meruit claim against an owner on the ground that the law will not, in effect, replace the general contractor with the owner and enforce the payment provisions of the subcontract against the owner.

Thus, in Shurlow Tile Co v. Farhat, 60 MichApp 486 (1975), the Court of Appeals affirmed a directed verdict for an owner on the subcontractor's quantum meruit claim. The plaintiff had been hired by the general contractor to work as a subcontractor on an apartment building project. Because of the general contractor's insolvency and failure to pay, the subcontractor brought a quantum meruit claim against the owner. The court refused to imply a quasi-contract and held that where plaintiff's work was performed under an express contract with the general contractor, plaintiff could not maintain an action for quantum meruit against the owner and had "waived the protection of the lien laws designed for satisfying claims of this kind." Id. at 491. The court so concluded, despite the fact that the owner had paid some other subcontractors directly.

See also Moll v. County of Wayne, 332 Mich 274 (1952) (a contract implied in law is a legal fiction employed with caution, which the courts will never permit where an actual agreement must be proven, nor will the court substitute one promisor or debtor for another); Ginsberg v. Capital City Wrecking Co, 300 Mich 712 (1942) (supplier who dealt solely with contractor may not bring unjust enrichment claims against owner); Michigan Bell Telephone Company v. C & C Excavating Co, 87 MichApp 758 (1979) (in absence of valid contractual relationship between owner and subcontractor, owner does not take the place of general contractor who abandons project, even though owner had paid some subcontractors directly).

This issue was recently addressed by the Michigan Court of Appeals in Westinghouse Electric Co v. State of Michigan, Case No. 107224 (unpublished opinion, October 24, 1989). There, the plaintiff subcontractor's claim was dismissed on this very ground:

> In the present case, there likewise exists an express contract concerning plaintiff's construction obligations. Although the contract runs between the plaintiff and the general contractor, Granger, rather than between the plaintiff and defendant State of Michigan, it nevertheless covers the same subject matter for which the plaintiff seeks to imply a contract. Under these circumstances, the equitable relief of unjust enrichment or implied contract will not be recognized. Accordingly, the lower court properly dismissed plaintiff's claim for unjust enrichment or implied contract as failing to state a claim upon which relief can be granted.

Accordingly, a quantum meruit claim by a subcontractor against an owner violates the principle that the law will not imply a contract where one already exists covering the same subject matter.

STATUTORY INTENT AS A BAR TO A QUANTUM MERUIT CLAIM

A subcontractor's quantum meruit claim against an owner, where there has been no direct dealing between the owner and subcontractor, also appears to be inconsistent with the intent of the Michigan Construction Lien Act. Although no reported Michigan decisions directly address this question, several factors support this conclusion.

As set forth above, the Act provides a remedy (one not found at common law) for a subcontractor to recover against an owner in the event of nonpayment by the general contractor, even though there may have been no direct dealing between the subcontractor and the owner. A review of the language of the Act and the prior history of the Act, along with a review of how courts have interpreted similar provisions in other states, lead to the conclusion that, except for an action based on contract, the Act was intended as the exclusive remedy of a subcontractor and, therefore, a quantum meruit claim is not permitted.

The former Act contained a specific provision preserving the subcontractor's right to sue based on contract.

Section 570.22 of the former Act provided:

Except as herein otherwise expressly provided, nothing contained in this act shall be construed to prevent any creditor in any such contract from maintaining an action thereon at common law in like manner as if he had no lien for the security of his debt. (Emphasis added).

Thus, an unpaid contractor who directly contracted with an owner could bring a claim for breach of contract as well as a lien foreclosure action. The former Act did not interfere with any action based on contract. While no dispositive Michigan cases have been located, by failing to expressly permit quantum meruit claims, it would appear by negative implication that the legislative intent was that other common law actions not based on contract were prohibited.

The Act contains a similar provision. Section 570.1117(5) of the Act provides that: "In connection with an action for foreclosure of a construction ***1045** lien, the lien claimant also may maintain an action on any contract from which the lien arose." Again, the Legislature indicated by negative implication that common law actions not based on a contract between the parties--such as a quantum meruit action--cannot be maintained against an owner.

While no Michigan cases were located which expressly considered this question, many jurisdictions which have addressed this issue have held that the remedy provided by a construction lien statute is the subcontractor's exclusive remedy against an owner with whom the subcontractor had no contractual relation. For example, in PPG Industries, Inc v. Hayes Construction Co, 162 GaApp 151, 290 SE2d 347 (1982), a supplier brought an action against a general contractor to recover amounts that purportedly were owing to the supplier from a subcontractor. The supplier did not have any contractual relationship with the general contractor, but sought recovery from the general contractor based on the theory of unjust enrichment. The PPG Industries court rejected the supplier's claim, holding that it could not assert an unjust enrichment claim against the general contractor with whom it had no contractual relationship:

Under Georgia law, a materialman or subcontractor may not recover against an owner or general contractor with whom it has no contractual relationship, based on the theory of unjust enrichment or implied contract; rather, it is limited to the statutory remedies provided by Georgia's lien statute. 290 SE2d at 348.

The court affirmed summary judgment granted to the general contractor because the supplier had not perfected a construction lien.

In Sherman v. Meyer, 312 NW2d 373, 374 (SD1981), the Supreme Court of South Dakota held that a subcontractor's unjust enrichment claim against the owner failed to state a valid cause of action. The subcontractor had forfeited its construction lien and had no contractual relationship with the owner, thus compelling the court to state:

Absent a properly perfected mechanic's lien or privity of contract, subcontractors have no personal claim against an owner of property. 312 NW2d at 374.

The South Dakota Supreme Court also found support for its ruling in the fact that the South Dakota construction lien statute, like that of Michigan, expressly stated that the failure to properly perfect a construction lien did not affect the right of any person to recover "from the party with whom he has contracted." Id. Since the subcontractor had no contract with the owner, the Sherman court held that the subcontractor could not assert an unjust enrichment claim against the owner. [FN6]

Likewise, in Hill Behan Lumber Co v. Marchese, 1 IllApp3d 789, 275 NE2d 451 (1971), the Illinois Court of Appeals similarly ruled that the sole remedy of a supplier against the owner of the project, with whom it had no contractual relationship, was its construction lien rights:

Plaintiff also contends that it was entitled to an equitable lien on the grounds of unjust enrichment.... Our research reveals that the sole remedy of a subcontractor against the owner of premises is under the Mechanics' Lien Act 275 NE2d at 453 (citations omitted).

While some jurisdictions hold that a subcontractor may bring a quantum meruit claim against an owner, many of those jurisdictions limit the availability of such a claim to situations where the owner's direct interactions with the subcontractor are held to justify imposing an implied-in-fact contract. In Indianapolis Raceway Park, Inc v. Curtiss, 179 IndApp 557, 386 NE2d 724 (1979), the court recognized that the lack of a contractual relationship between a

subcontractor (or a person in a similar position) and the owner of the property "does not generally give rise to an action for unjust enrichment against the owner." 386 NE2d at 726. The Indianapolis Raceway court limited application of the unjust enrichment doctrine to cases where the owner "acted wrongfully or engaged in misleading conduct which resulted in unjust enrichment." Id. at 727. The court then analyzed the subcontractor's claims against the owner and found no exception to the general rule that a subcontractor cannot maintain an unjust enrichment claim against the owner, stating:

The [contract between the subcontractor and the general contractor] was an arms length transaction with the burden of [the general contractor's] fiscal responsibility more properly resting on [the subcontractor] and not on [the owner]. Id.

An additional principle of statutory construction also supports the interpretation of the Act as barring quantum meruit. It is well established by Michigan courts that where a new right is created by statute, the remedy provided ***1046** by the statute for enforcement of that right is exclusive. In Bell v. League Life Insurance Co, 149 MichApp 481 (1986), the Michigan Court of Appeals reaffirmed this rule of statutory interpretation, holding that the statutory remedy created by the Michigan Uniform Trade Practices Act was the exclusive remedy for violations of that Act:

The general rule of law in Michigan is that where a new right is created or a new duty imposed by statute, the remedy provided by the statute for enforcement of the right or for nonperformance of the duty is exclusive. 387 NW2d at 155.

See also Ohlson v. DST Industries, Inc, 111 MichApp 580, 583 (1981), (the Michigan Occupational Safety and Health Act created a new right and the remedy provided in such statute was the exclusive remedy for any violation thereof); Forster v. Delton School District, 176 MichApp 582, 585 (1989), (same holding regarding the Campaign Finance Act and the Political Activities of Public Employees Act).

Passage of the former Act created a new right--a direct lien action by a subcontractor against an owner where no contractual relationship existed. Under the holdings of Bell and Ohlson, the new remedy created by the former Act and preserved in the Act (enforcement and foreclosure of a perfected construction lien) should be considered exclusive, and any other action against the owner, with the exception of a contract claim, should be barred.

Public policy considerations also support this conclusion. If quantum meruit claims were not barred, subcontractors could simply ignore the requirements of the Act, knowing that they could always claim quantum meruit against an owner who did not enter into a contract with them, and who may already have been harmed himself by a defaulting general contractor. The purpose of the Act--to provide a statutory remedy for subcontractors and to delineate an owner's liability for such claims--would be undermined and rendered useless. Such a result surely was not intended by the Legislature. Consequently, sound public policy and a proper interpretation of the Michigan Construction Lien Act also lead to the conclusion that, absent special circumstances involving claims based on direct dealing between the owner and the subcontractor, quantum meruit claims by subcontractors against owners are generally untenable.

CONCLUSION

The Michigan Construction Lien Act gives subcontractors a powerful remedy to force payment by an owner, even though the owner has no contract with the subcontractor. The subcontractor can place a lien on the owner's real property and--in the event the owner fails to pay for services or labor--the subcontractor can foreclose the lien and cause a sale of the property. Michigan case law and statutory law strongly suggest that, absent claims arising out of direct dealing between the subcontractor and owner, these lien rights are the subcontractor's sole remedy against the owner, and quantum meruit claims by the subcontractor against the owner are generally not valid.

[FN1]. The cases use the terms "quantum meruit" and "unjust enrichment" somewhat interchangeably. For the sake of brevity, this article will use the term quantum meruit to describe this category of claims. This article will not address situations in which there may be direct dealing between the owner and the subcontractor regarding additional work not covered by the subcontract. Such instances of direct dealing may give rise to additional claims by the subcontractor against the owner, including, potentially, a quantum meruit claim, based on an implied-in-fact contract for the value of extra work not covered by the subcontract. Factual situations involving direct dealing vary

greatly and must be analyzed on a case-by-case basis. Compare Shurlow Tile v. Farhat, 60 MichApp 486 (1976) (oral promise by owner to pay subcontractor barred by the statute of frauds) with Tustin Lumber Co v. Ryno, 373 Mich 322 (1964) (owner's statement to supplier that monies to pay supplier were deposited in an escrow account created an enforceable implied promise to pay).

[FN2]. MCL 570.151 et seq.; MSA 26.331 et seq. This statute, commonly known as the "Builders' Trust Fund" Act, but actually entitled the "Building Contract Fund" Act, allows the subcontractor (as well as laborers or material suppliers) to bring an additional statutory claim against the general contractor, or other intermediate subcontractor, to recover funds paid by the owner for the subcontractor's work. This statute, however, does not allow claims to be made against the owner. See Renshaw v. Samuels, 117 MichApp 649 (1982); Koppers Co, Inc v. Garling & Langlois, 594 F.2d 1094 (6th Cir.1979).

[FN3]. MCL 570.1101, et seq.

[FN4]. MCL 570.1111.

[FN5]. MCL 570.1117.

[FN6]. See also Contelmo's Sand & Gravel, Inc v. J & J Milano, Inc, 96 AD2d 1090, 467 NYS2d 55 (1983); Dale's Service Co v. Jones, 96 Idaho 662, 534 P2d 1102 (1975); G & B Contractors, Inc v. Coronet Developers, Inc, 134 GaApp 916, 216 SE2d 705 (1975); Traubco Food Equipment Fabricators, Inc v. United Auto Workers, 123 IllApp2d 106, 258 NE2d 817 (1970); Culdbert v. Greenfield, 259 Iowa 873, 146 NW2d 298 (1966).

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