

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Michigan Circuit Court.

AKM TRUCKING, INC., a Michigan corporation, Plaintiff,

v.

PETRO ENVIRONMENTAL TECHNOLOGIES, INC., an Ohio corporation, and Mark Mather, and individual, jointly and severally, Defendants.

**No. 2004-4081-CK.**

March 3, 2005.

Mantese and Associates, P.C., [Gerard Mantese](#) (P34424), Mark C. Rossman (P63034), Troy, MI, for Plaintiff.

Beals Hubbard, PLC, [John A. Hubbard](#) (P39624), Anthony R. Pacsano (P60173), Farmington Hills, MI, for Defendants.

*OPINION AND ORDER*

CHRZANOWSKI, J.

\*1 Defendants have filed a motion for summary disposition pursuant to [MCR 2.116\(C\)\(7\), \(8\), and \(10\)](#). Plaintiff requests the Court deny Defendants' motion.

Plaintiff filed its complaint against Defendants on September 29, 2004. Plaintiff's complaint alleges breach of contract in count 1, quantum meruit in count 2, unjust enrichment in count 3, and breach of the Michigan Builders Trust Fund Act in count 4. [\[FN1\]](#)

[FN1](#). The Act is now referred to as the Michigan Building Contract Fund Act. The Court will refer to the Act as the Builders' Trust Fund Act.

Defendants contend that summary disposition of Plaintiff's complaint is appropriate pursuant to the doctrine of res judicata. Defendant Mark Mather (hereinafter "Defendant Mather") contends that summary disposition is appropriate on Plaintiff's claims against him as the Court lacks personal jurisdiction over him. Defendants also contend that Plaintiff has failed to allege a cause of action based upon the Builders' Trust Fund Act as the contract at issue was not for building construction, and further that Plaintiff failed to

allege Defendants diverted funds contrary to the Act. Defendants further contend that a surety bond should be imposed on Plaintiff.

Plaintiff contends that it filed its complaint in this matter based upon "various agreements" between the parties in relation to the construction of a road to a landfill. Plaintiff contends that Defendants failed to pay in accordance of their agreement relating to providing gravel, leases of a loader and bulldozer, and the splitting of wages of an employee. Plaintiff contends that the previous lawsuit that ended in arbitration, and the lawsuit to modify the arbitration award was based upon a separate "soil contract" relating to the landfill, and therefore not related to the instant lawsuit. Plaintiff contends that Defendants are liable under the Builders' Trust Fund Act, and that this Court has personal jurisdiction over Defendant Mather.

The Court will first address Defendants' motion for summary disposition based upon res judicata. The doctrine of res judicata is a manifestation of the recognition that interminable litigation leads to vexation, confusion, and chaos for the litigants, resulting in the inefficient use of judicial time. [ABB Paint Finishing, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.](#) 223 Mich.App. 559, 562, 567 N.W.2d 456 (1997). A subsequent action is barred by res judicata when (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) both actions involve the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. [Ditmore v. Michalik](#), 244 Mich.App. 569, 576, 625 N.W.2d 462 (2001). The applicability of the doctrine of res judicata is a question of law subject to review de novo on appeal. [Id.](#), at 574, 625 N.W.2d 462.

This is the fourth lawsuit between the parties. In 2002, Plaintiff filed a complaint against Defendant's based upon Defendants' alleged breach of the March 22, 2001 written contract relating to the delivery of soils to the landfill. The written contract provides that Plaintiff was "to provide soils at site and place as directed by Petro Environmental". The written contract does not refer to providing gravel, leases of a loader and bulldozer, or the splitting of wages of an employee. Pursuant to an arbitration clause in the written agreement, the matter was placed before an arbitrator for

decision. Since the allegations contained in this matter do not arise out of the written contract between the parties, the allegations in this matter could not have been raised in the 2002 lawsuit and the subsequent arbitration proceeding as this matter is not arbitrable. Consequently, the doctrine of res judicata does not bar the instant claims. [\[FN2\]](#)

[FN2](#). The 2002 matter was ultimately decided by the arbitrator in Plaintiff's favor. Plaintiff thereafter filed another lawsuit on February 25, 2004 to modify the arbitrator's damage award. The 2004 matter also fails to bar the instant claim as it relates solely to the written soil agreement between the parties. The parties were also involved in a district court action where Defendant filed a third party complaint against Plaintiff seeking indemnification. Pursuant to [MCR 2.203\(E\)](#), and [Salem Industries, Inc. v. Mooney Process Equipment Co.](#), 175 Mich.App. 213, 437 N.W.2d 641 (1989), Plaintiff was not required to file a counterclaim in the district court action.

\*2 The Court will next address Defendants' motion for summary disposition of Plaintiff's claim under the Builders Trust Fund Act. In order to state a civil cause of action under the Builders' trust fund act, a plaintiff need only show that the contractor received payment for building construction purposes and that the contractor retained or used those funds "for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement...." [M.C.L. § 570.152](#). [DiPonio Const. Co., Inc. v. Rosati Masonry Co., Inc.](#), 246 Mich.App. 43, 52, 631 N.W.2d 59 (2001).

Plaintiff has alleged that it was in a contractor/subcontractor relationship with Defendant for the purposes of building a road to the landfill. However, the Court is satisfied that the subject of building a road to a landfill does not satisfy the statutes' requirement that the contract be for "building construction purposes". The statute is clear that it only involves the "building construction industry", and relates to funds paid "for building construction purposes". Since this matter does not involve building construction, the Builders' Trust Fund Act is inapplicable. Consequently, Defendants'

motion for summary disposition of Plaintiff's claims under the Builders' Trust Fund Act should be granted. This conclusion also requires the Court to grant Defendant Mather's motion for summary disposition of Plaintiff's claims for lack of jurisdiction, as Plaintiff's argument that the Court has limited personal jurisdiction over Defendant Mather is dependent upon its claim based upon the Builders' Trust Fund Act. The Court is further satisfied that Defendant's motion for a bond should be denied.

Based upon the reasons set forth above, Defendants' motion for summary disposition is GRANTED IN PART AND DENIED IN PART. Defendants' motion for summary disposition of Plaintiff's claim for breach of the Michigan Builders Trust Fund Act is GRANTED. Petro Environmental's motion for summary disposition based upon res judicata is DENIED. In compliance with [MCR 2.602\(A\)\(3\)](#), the Court states this *Opinion and Order* does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

2005 WL 525156 (Mich.Cir.Ct.)

END OF DOCUMENT