

COMMONWEALTH OF KENTUCKY
GRANT CIRCUIT COURT
CASE NO. 16-CI-00154

ENTERED
GRANT CIRCUIT DISTRICT COURT
JAN 30 2019
BY WRAY J. JUMP, CLERK D.C.

C&S QUALITY SERVICES, L.L.C., :
Plaintiff, :
v. :
CITY OF DRY RIDGE, :
Defendant/Third-Party Plaintiff: :
v. :
HOFFMAN WATER TANK :
INSPECTION & CONSULTING :
SERVICES, INC. d/b/a :
WET OR DRY, INC., :
Third-Party Defendant :

OPINION AND ORDER

This matter is before the Court on Defendant's Motion for Partial Summary Judgment. For the following reasons, Defendant's motion will be **GRANTED IN PART AND DENIED IN PART.**

I. BACKGROUND

This case involves a contract between Plaintiff and the City of Dry Ridge to "clean and repaint" the Meeks Road Water Tower. The City hired Wet or Dry to inspect the tower, design the project, and put it out for bids. Plaintiff was the low bidder on the project and entered into a contract with the City to complete it.

The case originated because the City decided that Plaintiff completed the project fifty days late and withheld \$75,000 from Plaintiff as liquidated damages (\$1,500 per day late). In a previous Opinion and Order, the Court held that the contract's liquidated damages provisions were unenforceable and granted Plaintiff summary judgment on Count VII of its eight-count Complaint. Though it did not address the issue directly, implicit in the Court's ruling was that the City breached the contract by failing to pay

Plaintiff the \$75,000.

Therefore, Plaintiff was also entitled to summary judgment on Count I of its Complaint and on the City's counterclaim.¹ The Complaint's remaining Counts—II through VI, and VIII—are the subject of the City's current motion.²

II. ANALYSIS

A. Summary Judgment Standard.

CR 56.02 provides that “[a] party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.” CR 56.03 provides that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The Supreme Court of Kentucky has stated that “[g]ranted a motion for summary judgment is an extraordinary remedy and should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible³ for the respondent to produce evidence at the trial warranting a judgment in his favor and

¹ The counterclaim alleged that Plaintiff had breached the contract by failing to complete the work on time, and that the City was entitled to an additional \$15,000 in liquidated damages. The Court has made no findings regarding whether Plaintiff completed the project on time and need not do so. Damages are a required element of a breach of contract claim, *Metro Louisville/Jefferson County Government v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009), and if the City is not entitled to recover delay damages, then Plaintiff is entitled to summary judgment on the City's breach of contract counterclaim.

² A further motion for summary judgment from Wet or Dry remains pending.

³ “Impossible is to be used in a practical sense, not in an absolute sense.” *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 905 n.4 (2013) (citing *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992)).

against the movant.”⁴ “[T]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.”⁵ In addition, “[t]he party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial”⁶

B. There Is No Separate Cause of Action for Breach of Duty of Good Faith.

Count II of Plaintiff’s Complaint alleged that the City breached its duty of good faith and fair dealing. However, “violation of the good faith covenant alone does not give rise to an independent cause of action.”⁷ Since the Court has already ruled that the City breached the contract by failing to pay the agreed amount, and Plaintiff has identified no basis for special damages related solely to a breach of good faith,⁸ the City is entitled to summary judgment on this claim.

C. Plaintiff Did Not Rely on any of the City’s Alleged Misrepresentations.

Count IV of the Complaint alleged that the City acted fraudulently, and Count V alleged that the City negligently misrepresented facts. However, a cause of action based

⁴ *Shelton*, 413 S.W.3d at 905.

⁵ *Bituminous Casualty Corporation v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 637 (Ky. 2007) (quotations omitted).

⁶ *Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C.*, 436 S.W.3d 189, 194 (Ky. 2013).

⁷ *J.S. v. Berla*, 456 S.W.3d 19, 25 (Ky. Ct. App. 2015).

⁸ See RONALD W. EADES, KENTUCKY LAW OF DAMAGES § 18.1 (2018) (“[T]he basic purpose of contract damages is to . . . put the party in the position he or she would have enjoyed if the contract had not been breached.”); *U.S. Bond & Mortgage Corp. v. Berry*, 61 S.W.2d 293, 297 (Ky. 1933) (“[G]eneral damages, recoverable for a breach of contract, are such as may fairly and reasonably be considered as arising naturally . . . from the breach of the contract itself or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it; . . . [S]pecial [damages] are such as arise where there are special circumstances attending the making of the contract and its observance would take it out of the natural and usual course of things.”).

on fraud requires the plaintiff to allege and prove that, *inter alia*, the plaintiff reasonably or justifiably relied on the defendant's false representation,⁹ and a cause of action based on negligent misrepresentation requires the same.¹⁰ Because Plaintiff has neither alleged nor offered evidence that it acted in reliance upon any of the City's alleged misrepresentations, the City is entitled to summary judgment on these claims.

D. Plaintiff Did Not Follow the Contractual Procedures to Allow Recovery for "Increased Costs and Expenditures."

Count VI of the Complaint alleged that the City's "actions constitute interference and an intentional delay under the Contract for which [Plaintiff] is entitled to recover its increased costs and expenditures in completing the project." Plaintiff's previously filed Itemization of Damages lists \$83,912 in "increased costs" allegedly caused by the City's delay and interference.

Section 7.14.1 of the contract provided:

The Contract Price constitutes the total compensation . . . payable to the CONTRACTOR for performing the Work. **All duties, responsibilities and obligations assigned to or undertaken by CONTRACTOR shall be at his expense without change in the Contract Price.**¹¹

Section 7.14.2 provided:

The Contract Price may **only** be changed by a Change Order. Any claim for an increase or decrease in the Contract Price shall be based on written notice delivered by the party making the claim to the other party and to the CONSULTANT promptly (but in no event later than 15 days) after the occurrence of the event giving rise to the claim and stating the general nature of the claim. . . . **No claim for an adjustment in the Contract Price . . . will be valid unless submitted in accordance with this paragraph 14.2.**¹²

⁹ *PBI Bank, Inc. v. Signature Point Condominiums L.L.C.*, 535 S.W.3d 700, 714 (Ky. Ct. App. 2016).

¹⁰ *Presnell Construction Managers, Inc. v. EH Construction, L.L.C.*, 134 S.W.3d 575, 580–82 (Ky. 2004).

¹¹ (emphasis added).

¹² (emphasis added).

Section 7.27.9–11 provided:

[C]laims under Article[] 14 . . . in respect of changes in the Contract Price . . . will be referred initially to the CONSULTANT in writing with a request for a formal decision in accordance with this paragraph, which the CONSULTANT will render in writing within a reasonable time. Written notice of each such claim, dispute and other matter will be delivered by the claimant to the CONSULTANT and the other party to the Agreement promptly (but in no event later than 15 days) after the occurrence of the event giving rise thereto¹³

And Section 7.27.12 provided:

The rendering of a decision by the CONSULTANT pursuant to paragraphs 27.10 and 27.11 with respect to any such claim, dispute or other matter . . . will be a condition precedent to any exercise by the OWNER or CONTRACTOR of such rights or remedies as either may otherwise have under the Contract Documents¹⁴

It is undisputed that Plaintiff never submitted a “claim for adjustment in the Contract Price” regarding the increased costs listed in its itemized damages. It is also undisputed that Plaintiff never referred the claim to Wet or Dry for a formal decision on a change in contract price, even though the contract specifically identifies doing so as a “condition precedent.” Plaintiff’s undisputed failure to follow these procedures means that it is prohibited from seeking “increased costs and expenditures” from the City. Accordingly, the City is entitled to summary judgment on Count VI of the Complaint.

E. There Is No Unjust Enrichment Where an Express Contract Controls.

Count VIII of Plaintiff’s Complaint brings a claim for unjust enrichment. However, “[b]ecause unjust enrichment is rooted in equity and ‘law trumps equity,’ courts frequently note that unjust enrichment is unavailable when the terms of an

¹³ (emphasis added).

¹⁴ (emphasis added).

express contract control.”¹⁵ Here there is an express contract, and therefore no basis for an equitable remedy, so the City is entitled to summary judgment on this claim.

F. The City Did Not Violate the Kentucky Fairness in Construction Act.

Finally, Count III of Plaintiff’s Complaint alleged that the City violated the Kentucky Fairness in Construction Act (“KFCA”).¹⁶

K.R.S. 371.410(5) provides that “if [a] contracting entity fails to pay a contractor within thirty . . . business days following receipt of a timely, properly completed, undisputed request for payment, the contracting entity shall pay interest to the contractor . . . on the unpaid amount.” K.R.S. 371.400(11) defines “undisputed amount” as “a good faith, valid, accurate, timely request for payment which has been submitted to any entity owing money, that the recipient of the request for payment has reviewed and agrees that the money is due and owing.” K.R.S. 371.415 further provides that “[i]n any action to enforce [K.R.S. 371.410] . . . the court . . . shall award costs and reasonable attorney’s fees to the prevailing party if the losing party is deemed to have acted in bad faith.”

There is no published Kentucky case interpreting the above provisions. However, an unpublished federal case indicates that an owner’s lack of a “good faith dispute” over the amount owed to a contractor did not indicate the “bad faith” necessary to justify attorney’s fees and costs, because “Kentucky courts have generally defined [bad faith] as ‘dishonesty of belief or purpose,’ a ‘furtive design,’ or ‘some motive of self-interest or

¹⁵ *Superior Steel, Inc. v. Ascent at Roebling’s Bridge, L.L.C.*, 540 S.W.3d 770, 778 (Ky. 2017) (citations and quotations omitted).

¹⁶ K.R.S. 371.400–425.

ill will, or for an ulterior purpose.”¹⁷ In other words, an entity can be liable for interest due to a failure to pay an amount it knew was owed, without also being liable for attorney’s fees and costs.¹⁸ Furthermore, attorney’s fees and costs can only be awarded to a “prevailing party,” so if the City did not violate the KFCA, whether it acted in bad faith is irrelevant.

For the Court to grant the City summary judgment on this claim, the Court must find that there is no genuine issue regarding whether the City “fail[ed] to pay a contractor within thirty . . . business days following receipt of a timely, properly completed, undisputed request for payment.” It is undisputed that Plaintiff’s request for payment was “timely” and “properly completed,” and that the City timely paid the amount of the contract that it was not withholding as liquidated damages. The statute defines an “undisputed amount” as a request for payment that its recipient has “reviewed” and “agree[d] that the money is due and owing.” Here, the record demonstrates that the City did not agree with Plaintiff that the money is due and owing, and therefore that the request for payment was, by definition, not an “undisputed amount.”

Plaintiff points to numerous actions indicating “bad faith” on the City’s part, or in other words, that the City knew it had no legitimate basis to withhold the \$75,000. However, these actions—failing to issue a notice to proceed, delaying the project’s start

¹⁷ *D&D Underground Utilities, Inc. v. Walter Martin Excavating, Inc.*, No. 12-241-GFVT, 2015 WL 13427765, *17 (E.D. Ky. Sept. 30, 2015).

¹⁸ Plaintiff also argues that it is entitled to attorney fees and costs under “principles of equity.” However, the Supreme Court of Kentucky recently “clarif[ied] that, without a sound basis in contract or statute, a trial court may not award attorneys’ fees. The trial court is still empowered to order a party to pay attorneys’ fees as a sanction, but only when the integrity of the court is at stake.” *Seeger v. Lanham*, 542 S.W.3d 286, 295 (Ky. 2018).

until weather conditions were suboptimal, failing to timely execute the contract, failing to locate the City's own utility lines, failing to keep water from flowing into the tank, including incorrect dates in a letter—indicate incompetence rather than any “dishonest purpose” or “furtive design.”

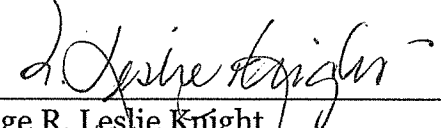
Because the City timely paid Plaintiff the amount it agreed was due, the City did not violate the KFCA, and therefore the City is entitled to summary judgment on Count III of Plaintiff's Complaint.

III. CONCLUSION

For the foregoing reasons:

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. The City is entitled to summary judgment on Counts II, III, IV, V, VI, and VIII of Plaintiff's Complaint. The City is *not* entitled to summary judgment on its counterclaim. As stated earlier, Plaintiff has already been granted summary judgment on Counts I and VII of its Complaint and on the City's counterclaim.

DATED this 30 day of January, 2019



Judge R. Leslie Knight
Grant Circuit Court

CLERK CERTIFICATION

I do hereby certify that the above Order was entered and a filed copy of the Order was mailed to the following persons this 31 day of Jan, 2019:

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WRAY J. JUMP, CLERK

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