STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CONTINENTAL CONTRACTING COMPANY, LLC,

Plaintiff,

Case No. 22-001718-CB

-v-

Hon. Annette J. Berry

FSI 4, LLC,

Defendant.

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 2/2/2024

PRESENT: Honorable Annette J. Berry
Circuit Judge

This civil matter is before the Court on a motion for partial summary disposition filed by Defendant FSI 4, LLC ("FSI 4"). For the reasons stated below, the Court grants in part and denies in part the motion.

I. BACKGROUND

Defendant sought to develop property located at 1450-1480 Townsend Street, Detroit, Michigan 48214, which are also known as the St. Charles Residences, into luxury condominiums ("the Project"). FSI 4 originally hired McCarthy & Smith, Inc. ("McCarthy & Smith") as the

general contractor for the Project. In April 2017, McCarthy & Smith entered into a subcontract with Plaintiff Continental Contracting Company, LLC ("Continental" or "CCC") to provide painting work for the Project. Pursuant to the contract, Continental was to be paid $101,200, not including approved change orders. [Defendant's Exhibit C, "Standard Agreement between Constructor and Subcontractor," p. 14]. As of January 28, 2019, the value of the subcontract, including approved change orders, was $119,357.00. [Defendant's Exhibit D].

On February 5, 2019, FSI 4 terminated for convenience its contract with McCarthy & Smith. O'Brien Construction Company, Inc. ("O 'Brien") was then hired as the general contractor in place of McCarthy & Smith to oversee the completion of the Project. At that time, Continental had billed McCarthy & Smith $54,560.00 to its Subcontract with McCarthy & Smith. According to Defendant, only $24,552.00 of that amount had been paid because of issues relating to the quality of Continental's work.

In an affidavit, executed by Mike D'Agostino, Construction Manager for FSI 4, D'Agostino stated:

> After termination of the McCarthy & Smith contract, CCC assumed McCarthy & Smith's obligation to complete the remainder of the painting work for FSI 4, directly. This contractual obligation was limited to work that was not completed at the time of McCarthy and Smith's termination.
>
> [Defendant's Exhibit F, ¶ 4].

D'Agostino also stated:

> After CCC completed its work on the Project, a punch list (a list of required corrections) was created and provided to CCC during a walk-through of the Property. Rather than correct its errors, CCC abandoned work on the Project on March 25, 2019. Thereafter, FSI 4 hired another painter to complete the work at issue and fix the mistakes left behind by CCC. The cost to complete the Punch List items was approximately $88,240.50, more than the $39,389.54

> that CCC represented to FSI 4 that it was owed for work done after McCarthy and Smith's termination.
>
> [Id, ¶ 5].

Thus, as D'Agostino explains, FSI 4 believed that Continental was obligated to complete the remainder of the work not yet completed at the time of McCarthy & Smith's termination. He also stated that, when another painter was hired, the cost to complete and correct the errors noted in the Punch List was $88,240.50 when Continental abandoned the project.

In an email dated March 13, 2019 and sent early in the morning from Dan Grace, O'Brien's Project Manager, to Continental, Grace stated: "…. we have been sending an email notice to you …requesting work be completed in an expeditious manner while increasing the quality of the work. To date, the units that need to be turned over (301, 102, and 101) are not finished, and the work that has been done is not up to the quality expected by Banyan and OCC." [Defendant's Exhibit I]. Moreover, Defendant's Exhibit J shows that the Punch List included 102 items. In another email sent later the same day, Grace notified Continental that it was in default for its failure fix its mistakes, that a different contractor would be hired to complete the work, and that Continental would be charged for any costs associated with the default. [Defendant's Exhibit K].

Plaintiff Continental claims that "Defendant and its agents represented to CCC that its contract with McCarthy & Smith was being assumed in order to convince CCC to remain on the Project and, at the same time, Defendant and its agents agreed to pay CCC for the remaining labor and materials CCC provided to the Project." [Plaintiff's Response, Exhibit 2]. Plaintiff contends that this is evidenced by emails and letters exchanged between Continental's Project Manager, Frank Sallaku, wherein Sallaku claimed that the unpaid balance of the contract was $76,949. [Id]. Continental also quotes one sentence from the top of a form in its Exhibit 2, which states: "The

Phase 1 subcontracts are in process of being assigned to Banyan." This is a form that O'Brien requested that the subcontractors complete in order for it to take over as the general contractor. This statement alone does not indicate that Continental's subcontract was being assigned to any other entity.

Continental argues that it repeatedly demanded payment from Defendant, while Defendant refused. Continental also alleges that the Punch List items were not required under the contract and that any purported faulty work was due mostly because of Defendant's carpenters and drywall contractors, "who failed to perform their services according to industry standards." [Plaintiff's Response, p. 3].

On February 11, 2022, Continental filed a complaint against Defendant FSI 4. The complaint includes four claims: (Count I) Breach of Contract; (Count II) Unjust Enrichment; (Count III) Promissory Estoppel; and (Count IV) Innocent Misrepresentation. Now before the Court is FSI 4's motion for partial summary disposition.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Defendant bases its motion on MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party ". . . may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. Id.; *Quinto, supra* at 363. Finally, a "reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden, supra* at 121.

III. DISCUSSION

Preliminarily, the Court notes that FSI 4's motion for partial summary disposition does not specify which part of Continental's complaint it seeks summary disposition. In its motion, FSI 4's arguments concentrate primarily on the parties' contracts and contract principles, particularly with regard to assignments. In its reply brief, FSI 4 does address estoppel and unjust enrichment, but does not mention innocent misrepresentation. Hence, the Court will only address breach of contract, promissory estoppel, and unjust enrichment.

A. Breach of Contract

FSI 4 first argues that, while Continental contends that FSI 4 assumed McCarthy & Smith's obligations when FSI 4 terminated McCarthy & Smith for convenience, there is no valid assignment of the subcontract to FSI 4. FSI 4 further asserts that an assignment would only have been effective had it terminated McCarthy & Smith pursuant to the primary contract "for cause." The contract between McCarthy & Smith and Continental provides in relevant part:

10.5 CONTINGENT ASSIGNMENT OF THIS AGREEMENT

> The Constructor's contingent assignment of this Agreement to the Owner, as provided in the prime agreement, is effective when the Owner has terminated the prime agreement for cause and has accepted the assignment by notifying the Subcontractor in writing. This contingent assignment is subject to the prior rights of a surety that may be obligated under the Constructor's bond, if any. The Subcontractor consents to such assignment and agrees to be bound to the assignee by the terms of this Agreement, provided that the assignee fulfills the obligations of the Constructor.
>
> [Emphasis added].

Continental's claim for breach of contract relates to both a breach and to contract interpretation. To prevail on a claim for breach of contract, the plaintiff must establish by a preponderance of the evidence that (1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach. *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016) [Footnote omitted]. Thus, this is first a matter of contract interpretation and, second, whether Continental has met its burden to establish a genuine issue of material fact. MCR 2.116(C)(10).

"The primary goal of contract interpretation is to honor the parties' intent. When the contract is unambiguous, the parties' intent is gleaned from the actual language used." *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 57; 698 NW2d 900 (2005) [Citations omitted]. "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.*" *Rory v Continental Ins Co,* 473 Mich 457, 468; 703 NW2d 23 (2005) [Emphasis in original].

A contract will be susceptible to only one interpretation if it is clear and unambiguous, however inartfully worded or clumsily arranged. *Farm Bureau Mut Ins Co v Nikkel, et al,* 460 Mich 558, 566; 596 NW2d 915 (2003). On the other hand, a contract is ambiguous if its words

may reasonably be understood in different ways. "When contractual language is unambiguous reasonable people cannot differ concerning the application of disputed terms to certain material facts, and summary disposition should be awarded to the proper party." *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 393; 837 NW2d 439 (2013) [Citations and quotation marks omitted].

With respect to the existence of an assignment, "[t]he assignee has the burden of proving that there was a valid assignment, in order to show that he or she has a cause of action. Conversely, the burden is on the party who asserts nonassignability to demonstrate that the contract contains some language manifesting the intention of the parties that it shall not be assigned." 6 Am Jur 2d Assignments § 146.

Here, there is no contract between FSI 4 and Continental. The governing contract is between Continental and McCarthy & Smith. As long as a contract is clear and unambiguous, the contract must be enforced as written. *Rory, supra.* There is no dispute that McCarthy & Smith were terminated for convenience and not "for cause." Hence, no assignment occurred because the contract clearly states that an assignment would only occur if McCarty & Smith had been terminated "for cause." "Furthermore, '[c]ontractors, subcontractors, and their employees are generally held not to be the third-party beneficiaries of the contract between the general or supervisory contractor and the project owner.'" *Badiee v Brighton Area Sch*, 265 Mich App 343, 369; 695 NW2d 521 (2005), quoting *Dynamic Construction Co v Barton Malow Co,* 214 Mich App 425, 428; 543 NW2d 31 (1995).

Finally, as FSI 4 claims, no assignment exists between it and Continental. "A valid assignment occurs when the assignor 'manifest[s] an intent to transfer and must not retain any control or any power of revocation.'" *Wallace v Suburban Mobility Authority for Regional*

Transportation, ___Mich App___; ___ N.W.2d___ (2023) at *2, quoting *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004). The *Burkhardt* court explained:

> There is little case law in this state regarding what elements are necessary to create an assignment. In *Weston v Dowty,* 163 Mich App 238, 242; 414 NW2d 165 (1987), this Court opined "there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned." Further, Michigan's version of the statute of frauds requires that an assignment of "things in action" be "in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise...." MCL § 566.132(1)(f). Thus, under Michigan law, a written instrument, even if poorly drafted, creates an assignment if it clearly reflects the intent of the assignor to presently transfer "the thing" to the assignee. *Hovey v Grand Trunk W R Co,* 135 Mich 147, 149; 97 NW 398 (1903).
>
> *Burkhardt v Bailey*, 260 Mich App 636, 654–655; 680 NW2d 453 (2004) [Emphasis added].[1]

There is no evidence here that demonstrates an intent on the part of FSI 4 to "vest in" Continental "a present right" to have its contract between it and McCarthy & Smith assigned to FSI 4. There is also no evidence of a written assignment. Because Continental is claiming a debt owed to it by FSI 4, this action is a "thing in action," which requires a written assignment. No such writing exists. Therefore, no claim for breach of contract exists because there is no contract, i.e.

---

[1] A chose in action is defined as follows:

> **1.** A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. **2.** The right to bring an action to recover a debt, money, or thing. **3.** Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit. — Also termed *thing in action*; *right in action.*
>
> CHOSE, Black's Law Dictionary (11th ed 2019).
>
> [Emphasis added] [Italics in original].

See also, *In re Beatrice Rottenberg Living Tr.*, 300 Mich App 339, 357; 833 NW2d 384 (2013) (The right to demand repayment of a loan or debt is a "chose in action," and therefore an item of intangible personal property.).

an assignment, between Continental and FSI 4. *Bank of Am, NA, supra.* As to Continental's claim for breach of contract (Count I), there is no genuine issue of material fact that an assignment was created. Accordingly, the Court grants FSI 4 summary disposition as to the breach of contract claim.

B. Unjust Enrichment

FSI 4 contends that "the painting work at issue was governed by CCC's subcontract with McCarthy & Smith, pursuant to which CCC was obligated to correct the mistakes that it refused to fix before abandoning the Project." Conversely, Continental argues that FSI 4 has no legal right to refuse to pay for work done by Continental because all the work done was "performed at the direction of the Defendant and/or its representatives on the Project." Continental further argues that FSI 4 "received the benefit" and, as a result, FSI 4 is obligated to pay Continental.

Whether a specific party has been unjustly enriched is generally a question of fact. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). "However, whether a claim for unjust enrichment can be maintained is a question of law…" *Id.* "Unjust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another. No person is unjustly enriched unless the retention of the benefit would be unjust." *Tkachik v Mandeville*, 487 Mich 38, 47–48; 790 NW2d 260 (2010) [Internal citations and quotation marks omitted]. In other words, "[a] claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22–23; 831 NW2d 897 (2012).

There is no contract between FSI 4 and Continental. Moreover, there is no assignment of Continental's subcontract to FSI 4. Therefore, there is no express contract covering the same

subject matter. *Belle Isle Grill Group v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Hence, the Court may consider whether Continental has established a claim against FSI 4 for unjust enrichment.

In the case at bar, Continental claims that it has provided a benefit to FSI 4 for which it has not been paid. In a letter, Continental offered three options to FSI 4:

> 1. Time and Material Work
> Continental will continue to paint on this project should the owner and Constructor agree to pay us on a time and material basis for all work in the building that have patch work done to it. Any wall which was patched has to be paid for to be repainted. The hourly rate for this work shall be $60.01/hour per our UofM Approved Labor Rate (See document named "Labor Rate"). However, we do recognize that some of the painting work conducted prior to corrective patching was not what it should have been, but not defective enough to warrant complete repaint free-of-charge. To account for this, we will only bill for 75% of the cumulative amount of time and material work. See Document named "Option #1 - Agreement" for full terms.
>
> 2. Mutually-Agreed-Upon Termination of Contract
> Should the owner and Constructor decide against option #1, Continental would like to mutually terminate the contract for this project and move on. As of today, the unpaid balance of this contract is $76,949. This does not include the extra work conducted after the change of Constructor. The document named "Extra Time & Material Compilation" details the hours and materials spent on extra work since the change of Constructor. The amount of this work totals $39,389.54 (see document "Time & Material Quote"). The combined total due is $116,338.54. We are willing to offer the owner and Constructor a 25% discount of this total to help with future painting to be completed by others, which puts the final invoice at $87,253.90 with a full unconditional waiver from Continental. See document named "Option #2 - Agreement" for full terms.
>
> 3. Non-Mutually Termination and Future Steps
> Should the owner and Constructor decide against both options #1 and #2, we have no other choice but to terminate this agreement on the grounds of breach of contractual agreement. We will be pursuing any and all available remedies allowed by law to collect

> on the total outstanding amount of $116,338.54. Furthermore, liens will be placed on the property as a whole, and on the individual units as allowed by the Michigan Construction Lien Act of 1980 until all disputes are resolved.
>
> [Plaintiff's Response, Exhibit2] [Emphasis added].

After its offer of these three choices, although somewhat unclear, it appears that FSI 4 has not agreed to any of the three options. In his affidavit, D'Agostino stated, "Rather than correct its errors, CCC abandoned work on the Project on March 25, 2019. Thereafter, FSI 4 hired another painter to complete the work at issue and fix the mistakes left behind by CCC. The cost to complete the Punch List items was approximately $88,240.50, more than the $39,389.54 that CCC represented to FSI 4 that it was owed for work done after McCarthy and Smith's termination." [Defendant's Exhibit F, ¶ 5].

Thus, there is a factual question as to whether FSI 4 received a benefit and whether the allegation that Continental's painting work was substandard was an excuse to refuse to pay for the alleged outstanding amounts. Therefore, there is a genuine question of material fact as to whether FSI 4 was unjustly enriched. MCR 2.116(C)(10). Accordingly, FSI 4 is not entitled to summary disposition.

C. Promissory Estoppel

FSI 4 asserts that Continental has not provided any authority supporting the proposition that promissory estoppel is applicable to a statement made by O'Brien, which is a non-party. FSI 4 also argues that Continental's reliance on the statement by O'Brien that Phase I subcontracts are in the process of being assigned is "patently unreasonable" because the email "was a mere request for information."

To prevail on a theory of promissory estoppel, a plaintiff must show: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). To support a claim of estoppel, a promise must be definite and clear. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993). A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in believing that a commitment had been made. *Id.*

Although O'Brien is a non-party, it may be an agent of FSI 4 as its general contractor. The issue of whether a property owner has retained control over the manner in which a contractor is to perform work sufficient to give rise to an agency relationship is primarily a question of fact, even where there is a written agreement defining the relationship between the parties. *Thon v Saginaw Paint Mfg Co*, 120 Mich App 745, 749; 327 NW2d 551 (1982). See also *Meretta v Peach,* 195 Mich App 695, 697; 491 NW2d 278 (1992) ("Where there is a disputed question of agency, any testimony, either direct or inferential, tending to establish agency creates a question of fact for the jury to determine."); *Central Wholesale Co v Sefa,* 351 Mich 17, 26; 87 NW2d 94 (1957) (The apparent authority of an agent to act on behalf of the principal is to be determined by viewing all of the facts and circumstances, and ordinarily this is a question of fact for the jury.). Therefore, there is a genuine issue of material fact whether O'Brien, a non-party, had authority to act on FSI 4's behalf.

As to whether Continental's reliance on the email statement is reasonable, while the mistakes in Continental's work may allegedly have cost almost $100,000.00 in re-work, there is

also a question of fact whether Continental's work was substandard or was within industry standards. Neither party has submitted expert evidence of industry standards or what constitutes "workmanlike manner."[2] Hence, whether Continental's reliance on O'Brien's email is reasonable is also a genuine issue of material fact. Therefore, summary disposition regarding the claim of promissory estoppel is not warranted.

IV. CONCLUSION

No claim for breach of contract exists because there is no contract, i.e. an assignment, between Continental and FSI 4. *Bank of Am, NA, supra.* Accordingly, as to Continental's claim for breach of contract (Count I), there is no genuine issue of material fact that an assignment was created.

There is a factual question as to whether FSI 4 received a benefit and whether the allegation that Continental's painting work was substandard was an excuse to refuse to pay for the alleged outstanding amounts. Therefore, there is a genuine question of material fact as to whether FSI 4 was unjustly enriched. MCR 2.116(C)(10).

Whether Continental's reliance on O'Brien's email is reasonable is also a genuine issue of material fact. Therefore, summary disposition regarding the claim of promissory estoppel is not warranted.

For the reasons stated in the foregoing opinion,

---

[2] See *Douglas v Milbrand*, 302 Mich 227; 4 NW2d 528 (1942) (Where a plaintiff in an affidavit for summary judgment claimed that a balance was due for lathing and plastering done by plaintiff, that work was done in good faith and accepted without reservation and that any discoloration in plaster was caused by faulty construction of roof which was not water tight, an affidavit of merits wherein defendant stated that the plaintiff failed to complete the work, that work was defective in specified particulars, that discolorations were not caused by roof, and that defendant's damages exceeded amount claimed by plaintiff, presented issues of fact requiring a trial on the merits, and plaintiff was not entitled to summary judgment.).

IT IS ORDERED that the motion for partial summary disposition filed by Defendant FSI 4, LLC is hereby **GRANTED** as to Plaintiff Continental Contracting Company, LLC's claim for Breach of Contract (Count I);

IT IS FURTHER ORDERED that that the motion for partial summary disposition filed by Defendant FSI 4, LLC is hereby **DENIED** as to Plaintiff Continental Contracting Company, LLC's claim for Unjust Enrichment (Count II);

IT IS FURTHER ORDERED that that the motion for partial summary disposition filed by Defendant FSI 4, LLC is hereby **DENIED** as to Plaintiff Continental Contracting Company, LLC's claim for Promissory Estoppel (Count III);

IT IS FURTHER ORDERED that this **DOES NOT RESOLVE** the last pending claim and **DOES NOT CLOSE** the case.

IT IS SO ORDERED.

DATED: 2/2/2024

/s/ Annette J. Berry
February 2, 2024
Circuit Judge