

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JACK COOPER CT SERVICES, INC.,

Plaintiff,

Case No. 22-000025-CB

-v-

Hon. Annette J. Berry

PRUDENTIAL SECURITY, INC.,

Defendant.

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,

on

this: 3/1/2024

PRESENT: Honorable Annette J. Berry
Circuit Judge

This civil matter is before the Court on a motion for summary disposition filed by Defendant Prudential Security, Inc. (“Prudential”). For the reasons stated below, the Court grants the motion.

I. BACKGROUND

Plaintiff Jack Cooper CT Services, Inc. (“Cooper”) is a nationwide logistics provider offering transportation services, yard management, vehicle inspections, claims management, and title services. One of Cooper’s locations is at 2801 Schaefer Rd., Dearborn, Michigan 48128, which is a fenced in yard housing vehicles to be held and shipped by Cooper to automobile

dealerships. The lot at issue is primarily used to store Ford lease turn-in vehicles that Cooper then transports to dealerships.

Defendant Prudential is a business located at 20600 Eureka Rd., Ste. 900, Taylor, Wayne County, MI 48180. On March 7, 2019 Plaintiff Cooper entered into a contract with Prudential to provide security services at Cooper's Dearborn location. Under the contract, Prudential was to provide employees to conduct around-the-clock security services in eight-hour shifts. The specific contract provided for one unarmed security officer during each eight-hour shift. It also provided that Prudential would "...furnish client with such number of personnel at the location(s) and during such hours as shall be mutually agreed upon from time to time. The minimum of length of an individual shift will be four (4) hours." [Plaintiff's Complaint, Exhibit A].

On April 7, 2020, eight vehicles were stolen from the lot. An unknown party cut through the fence in two different locations and drove the vehicles off the lot. A month later, on May 7, 2020, six more vehicles were stolen from the lot. At that time, John O'Hare was the Cooper's Site Manager. He testified in a deposition that Cooper's practice was to leave the keys for the cars stored in the lot in those cars, with the doors unlocked. Security guards were stationed in a small guard shack that was provided by Cooper. The windows that faced the yard were made of cloudy plexiglass.

According to O'Hare, he met with Prudential management representatives and security guards during which he trained the security guards on what he wanted. Cooper claims that the guards were to perform hourly rounds of the property "to ensure the vehicles had not been left on, to ensure there were no holes cut in the fence, and to ensure there were no intruders on the lot." [Plaintiff's Response, p. 5].

On April 8, 2020, the day after the first theft, O'Hare did a full inventory of the lot and

discovered that there were eight missing vehicles whereupon he called the Dearborn Police. O'Hare also walked the perimeter of the property. He also discovered a spot where the fence surrounding the property had been cut in two places. The guard on duty at the time of the theft was Briana Ruffin. At that time, John Noblin was her manager. Briana Ruffin testified that Robert Coulter was the head guard whom she also considered as her boss. Coulter trained her on how to do rounds of the yard. O'Hare also told her that he wanted rounds done. When she was employed at Prudential, rounds were done on foot in the afternoon after all the employees left and during the midnight shift. In the morning, the guard on duty would man the gate as automobiles were entering the lot. Briana Ruffin testified that, when she stepped out of the guard shack, she could not see the entire property and could only see certain parts of it. She stated:

When you step out the shack you could see the building to the left -
- to the right, I'm sorry, and then you can see the cars. Now, if you
go -- if you step out the shack and walk straight towards the gate
then you'll be able to see. But I never stepped to walk all the way
down, I walked around towards the middle and came back up.

[Plaintiff's Exhibit E, Briana Ruffin Deposition, p. 15, ln 13-19].

When questioned by Plaintiff's counsel, Ruffin also stated:

Q. Okay. And if you're in row A the first row to the left and you
went to the exit point over by the railroad tracks, they would have
driven those cars directly past the shack to get out of the --

A. Yes, so I would have seen it if I was up, I would have
seen it.

Q. You think it's fair to assume you were asleep when the
cars were stolen?

A. Yes.

[Id, p. 22, ln 25 – p. 23, ln 1-8] [Emphasis added].

In an affidavit, Operations Manager Noblin stated in relevant part:

...

3. The main function of the Prudential guards was to monitor the main access gate, and to be a visual deterrent.
4. When there was only overnight shift Prudential guard on duty. that guard was supposed to monitor the lot only from the guard shack, and was not supposed to leave the shack to make rounds, because of the danger that could present to the sole guard.
5. Prudential Security suggested to Jack Cooper, CTS that it hired a second guard for the overnight shift, and to provide a patrol vehicle, but in order to save money, Jack Cooper, CTS refused to pay for a second guard or for a patrol vehicle prior to the two thefts.
6. The only duty that the guard had if the guard encountered an issue such as a theft in the lot was to call the police.
7. The guard was not allowed to try to physically try to intervene with any attempted thefts.
8. Jack Cooper, CTS declined Prudential Security's offer to install a video camera system with a monitor in the guard shack.
9. The guard shack windows that faced the yard were made of plexiglass, and were old, cloudy. and very difficult to see through, especially at night.
10. The lot was not well lit, ...
11. It was very difficult to hear nearby noises in the lot area and the guard shack area ...
...
13. The thieves cut a hole in the fence in the only area where there was not a cemented pole acting as a barrier.
...
15. Jack Cooper CTS had a policy of leaving the stored vehicles unlocked with the keys inside the vehicles.

[Noblin Affidavit, Defendant's Exhibit B].

Notably, O'Hare testified that, after the thefts, a patrol vehicle and security cameras have been provided at the lot. [Defendant's Exhibit C, p. 79-80].

Robert Coulter also testified as follows:

Q. And you felt the rounds were necessary to secure the lot; is that accurate?

A. I felt it necessary, yes.

Q. Okay.

A. But it was too much for walking. Especially walking in the snow and the rain and all that, yes.

p. 18, ln 14-19

Q. Hold on. You got to let me finish my question. After you arrived and you implemented this practice of rounds it became the duty of yourself and the guards that work for you to do these hourly at the lot; correct?

A. Yes.

[Plaintiff's Exhibit D, p. 20, ln 1-6].

Q. So you would agree with me that it was your duty and all of the duties of the employees who worked for you to do hourly rounds at the lot; correct?

A. Yes.

[Id, ln 16-19].

A. No. What I'm saying is there wasn't agreement between Prudential and Jack Cooper for us to do the rounds. I implemented that on my own.

Q. Okay.

A. To do rounds.

[Id, p. 21, ln 16-20] [Emphasis added].

Q. Okay. After the thefts that we're here to talk about occurred the company started providing you guys with an Equinox to do rounds of the property; correct?

A. Yes.

Q. Okay. Did you use the Equinox to do rounds when you were working?

A. When I was working, yes.

Q. Okay. Were the other guards using the Equinox to do rounds when they were working?

A. They were supposed to.

[Id, p. 24, ln 15-24].

Q. So you believe Briana's failure to pay attention to the lot is what resulted in these thefts?

MR. CARRON: Same objections.

Go ahead.

A. Yes.

[Id, p. 32, ln 21-25] [Emphasis added].

Q. Okay. In any event, on that evening did you see any activity on the lot prior to discovering the cut fence?

A. No, sir.

[Id, p. 38, ln 5-7] [Emphasis added].

Q. And were you doing a round when you discovered the cut fence or you were just sitting in the guard shack and you said I think something might have happened; or do you have any idea what spurred your instinct?

A. The reason why I was sitting in that guard shack, the place is rat infested.

Q. The guard shack?

A. The surroundings. -

Q. Ah So you went out to check the fence because there's a lot of rats in the area?

A. There's a lot of rats in the area where I was working, where I'm sitting at.

[Id, p. 39, ln 2-13].

Q. Okay. Did you ever fall asleep in the shack?

A. Yes. I'm not going to lie about that.

Q. You think it was possible you were sleeping that night when they were stolen?

A. I probably dosed off for a minute, yes.

Q. Okay. So that's one potential theory as to what could have happened; correct?

A. Yes.

Q. Okay. You could have potentially been sleeping and the cars were stolen; is that correct?

A. Yes.

Q. Okay. Do you remember falling asleep in the shack on the evening of May 7th?

A. No. Not in the evening time, no.

Q. But you do recall sleeping in the shack on several occasions and you can't say for certain that you did not fall asleep; is that correct?

A. Yes.

[Id, p. 41, ln 2-19] [Emphasis added].

In other words, the evidence presented indicates that the guards on duty at the time of the thefts may have fallen asleep during their shifts. There was also testimony that it was difficult to hear from the guard shack because of noise from a nearby railyard. In addition, the guard shack windows were difficult to see through and rounds were to be performed on foot. Only after the thefts were cameras installed and a car was provided for guards to do rounds. Testimony also suggests that the lot is very dark and poorly lit. The guards were also not to intercede in any incident and were told to call police when anything, theft or otherwise, occurred on the lot.

In addition, the contract at issue here does not provide specifically what the single guard's duties are while on his or her guard duty. It only provides that Prudential would "furnish ... such

number of personnel at the location(s) and during such hours as shall be mutually agreed upon from time to time.” Stated otherwise, the parties would agree from “time to time” as to the number of guards and as to when the guards would be on duty.

After the thefts, Cooper filed the instant lawsuit alleging breach of contract, negligence, and unjust enrichment. Now before the Court is Prudential’s motion for summary disposition.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Prudential 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

In support of its motion, Prudential offers four arguments: (1) Cooper cannot make a claim for negligence because Prudential has no duty to Cooper that is separate and distinct from the contractual duties and there is no common law duty owed to Cooper; (2) Prudential did not breach the contract because the Limits of Liability and Indemnity section of the Service Agreement precludes liability against Prudential; (3) Cooper breached the notice provision of the contract; and (4) Prudential cannot have been unjustly enriched because there is a written and express contract between the parties.

A. Negligence

Prudential first asserts that it cannot be held liable for negligence because the contract provides for all duties owed by the parties. To establish a prima facie case for negligence, Plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Tripp v Baker*, ___ Mich App ___; ___ NW2d ___; 2023 WL 2938988 at *2.

As a tort, negligence “is an act that has long been understood as a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty.” *In re Bradley Estate*, 494 Mich 367, 381; 835 NW2d 545 (2013). Under *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465–66; 683 NW2d 587 (2004),¹ there must be a duty to a non-contracting third-party that is

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In defining the contours of this common-law duty, our courts have drawn a distinction between misfeasance (action) and nonfeasance (inaction) for tort claims based on a defendant's contractual obligations. We have held that a tort action will not lie when based solely on the nonperformance of a contractual duty.

separate and distinct from the contractual promises for a negligence claim to lie. Here, Cooper is a contracting party and Prudential's duties are specified in the contract. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 171; 809 NW2d 553 (2011) [Citation omitted] (“...when engaging in the ‘separate and distinct mode of analysis’ in *Fultz*'s analytical framework, ... courts should not permit the contents of the contract to obscure the threshold question of whether any independent legal duty to the noncontracting third party exists, the breach of which could result in tort liability.” [Emphasis added]). Thus, Prudential owes no duty to Cooper that is separate and distinct from the duties delineated in the contract.

“Misfeasance is negligence during performance of a contract. While performing a contract, a party owes a separate, general duty to perform with due care so as not to injure another. Breach of this duty may give rise to tort liability.” *Courtright v Design Irr, Inc*, 210 Mich App 528, 530; 534 NW2d 181 (1995) [Citation omitted]. “In contrast, failure to perform a contract altogether constitutes nonfeasance and gives rise only to a suit for breach of contract.” *Id.* “As this Court stated in *Fultz*, one breaches a duty that is “separate and distinct” from the contract when it creates a ‘new hazard.’” *Hill v Sears, Roebuck & Co*, 492 Mich 651, 671; 822 NW2d 190 (2012).

Here, there is no claim that Prudential's action created a “new hazard.” The hazard of theft was clearly contemplated in the contract by Prudential's promise to provide a guard to deter damage to Cooper's property. Hence, Prudential's duty was not “separate and distinct” from its contractual duties. In fact, the evidence shows that the purpose of the contract for security was to provide a deterrent to criminal activity.

Fultz v Union-Commerce Assoc, 470 Mich 460, 465–66; 683 NW2d 587 (2004) [Citations omitted] [Emphasis added].

Finally, even if Prudential owed a duty in tort, it must be shown that its negligence was the proximate cause of thefts. “[A]n individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party.” *Graves v Warner Bros*, 253 Mich App 486, 493; 656 NW2d 195 (2002). “The rationale underlying this general rule is the fact that ‘[c]riminal activity, by its deviant nature, is normally unforeseeable.’” *Id*, quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46–47; 439 NW2d 280 (1989). Thus, Cooper cannot satisfy the foreseeability element of a negligence claim, particularly in light of the fact that Prudential satisfied its contractual obligations. Accordingly, Cooper’s negligence claim fails as a matter of law. *Maiden, supra*; MCR 2.116(C)(10).

B. Breach of Contract

Prudential next argues that the Limits of Liability and Indemnity section of the Service Agreement precludes liability against Prudential because Cooper agreed that Prudential would be liable for damage resulting only from Prudential’s negligence and it was Cooper’s own negligence that resulted in the damage. Cooper’s claim for breach of contract relates to both a breach and to contract interpretation.

Preliminarily, it should be noted that a valid contract requires: (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Barclae v Zarb*, 300 Mich App 455, 471; 834 NW2d 100 (2013).

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 Cooper 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 limit on liability section of the contract, it provides in part:

Client acknowledges that Prudential Security is not an insurer and Prudential Security makes no warranty express or otherwise, that the services furnished will avert or prevent occurrences or consequences therefrom ... Client agrees that Prudential Security shall be liable only for damage resulting directly from the sole negligence of Prudential Security or its officers or employees acting within the scope of their employment and in furtherance of the performance of services to be rendered hereunder except when arising from the negligent acts or willful misconduct by Prudential Security.

Thus, pursuant to this section, damage as a direct result of Prudential's employees may be considered as a reason to hold it liable. The guard's duties as specified in the contract are only to

be present, notwithstanding the fact that O’Hare assumed that guards would make rounds. Failure to make rounds may not said to be a direct cause of the thefts. “[N]otwithstanding the predicate of an actionable wrong, damages will not be recoverable if too remote, not anticipated or not naturally the result of a breach of contract or legal right.” § 35:5. Foreseeability of damages: direct, proximate, or remote consequences, Trial Handbook for Michigan Lawyers § 35:5 (4th), citing *Barber v Kolowich*, 282 Mich 143; 275 NW 797 (1937); *Grand Rapids Booming Co v Jarvis*, 30 Mich 308; 1874 WL 3540 (1874) [Emphasis added].²

As indicated above, the parties’ contract provided for one unarmed security officer during each eight-hour shift. It also provided that Prudential would “...furnish client with such number of personnel at the location(s) and during such hours as shall be mutually agreed upon from time to time. The minimum of length of an individual shift will be four (4) hours.” [Plaintiff’s Complaint, Exhibit A]. Nothing in the contract specifies the duties of the guards. According to Coulter, a guard was to make rounds on foot pursuant to guidance from him, the head guard, Noblin, the guard manager, and O’Hare, Cooper’s site manager. Nothing in the contract specified this duty.

In fact, as Noblin averred, “When there was only overnight shift Prudential guard on duty, that guard was supposed to monitor the lot only from the guard shack, and was not supposed to leave the shack to make rounds, because of the danger that could present to the sole guard.” [Noblin Affidavit Defendant’s Exhibit B]. However, O’Hare testified that he met with Prudential

² See also *Estate of Williams by Williams v Lewis*, unpublished opinion of the Court of Appeals, issued November 21, 2017 (Docket No. 332755), 2017 WL 5615700, p *4 where the court explained:

Park had no duty to predict and prevent unforeseeable criminal behavior on its premises. In the face of foreseeable criminal acts of third parties, Park owed Williams nothing more than a duty to reasonably expedite police involvement. In other words, Park, and Advanced Security derivatively, owed Williams a duty to call the police when “a specific situation occur[ed] on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable [tenant or invitee].” *Bailey II*, 494 Mich. at 615 (quotation marks and citation omitted).

management representatives and security guards during which he trained the security guards on what he wanted. When questioned about what his expectations of the guards were when the auto lot was closed, O'Hare also stated that "[t]hey would basically do their, what we call their rounds, they would walk around the yard and just make sure that there wasn't a vehicle left on by mistake, there wasn't any cuts in the fences, there was no possibility of intruders outside of the fence line, just keeping -- basically keeping an eye on things." [Plaintiff's Response, Exhibit C, p. 41, ln 5-10]. He stated that the guards were unarmed and that the guards were supposed to call the police in the event of an incident and to notify him. [Id, p. 42, ln 2]. Nothing in the parties' contract indicates that Prudential had the duty to do rounds. It is only O'Hare's presumption that the parties contemplated these duties based on the language in the "Service" section of the contract that states: "Prudential Security shall furnish client with such number of personnel at the location(s) and during such hours as shall be mutually agreed upon from time to time." Again, this only specifies that a change in the number of guards could occur if mutually agreed upon by the parties to the contract. Again, no duties were specified in the contract. Thus, pursuant to the clear and unambiguous provision of paragraph A of the "Rates and Fees" section of the contract, Prudential fulfilled its duty to provide one unarmed guard.

Cooper, however, contends that it was only through the oral modifications to the contract that the policies and procedures used for security of the Schaefer lot were established, which were not included in the written contract. In its reply, Prudential asserts that the contract can only be modified in writing. It claims that Cooper has no admissible evidence that the contract required guards to do rounds.

The contract included an integration clause, which provides the following:

ENTIRE AGREEMENT

This Agreement supersedes all previous agreements, oral or written, between Prudential Security and Client, and represents the entire

Agreement between the parties. No other agreements or representations, oral or written have been made by Prudential Security. This Agreement may not be altered, modified, or amended, except in a writing properly executed by an authorized representative of the party to be charged. In the event Client issues any work authorization, work order or purchase order to Prudential Security, Client agrees that only the terms and conditions of this Agreement shall be binding unless written modification, change or amendment is specifically agreed upon by Prudential Security in writing and signed by Prudential Security authorized representative. The provisions of this Agreement are severable and the invalidity and ineffectiveness of remaining parts or provisions of this Agreement (sic).

“Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.” *Barclae v Zarb*, 300 Mich App 455, 480; 834 NW2d 100 (2013). “When a contract contains ‘an explicit integration clause’ parol evidence is inadmissible to determine whether the contract was integrated.” *Barclae v Zarb*, 300 Mich App 455, 480; 834 NW2d 100 (2013).

Although a written contract may be modified orally if there is mutual assent, there must be clear and convincing evidence of affirmative conduct establishing a mutual agreement to waive the terms of the original contract. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 454–55; 733 NW2d 766 (2006); *Quality Products & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich 362, 373; 666 NW2d 251 (2003).

Here, there can be no establishment by clear and convincing evidence of a waiver of the original terms of the contract, which did not provide that the guards on duty would make rounds during their shifts. There is conflicting evidence from the parties of such an agreement. Noblin stated that on the “overnight shift Prudential guard on duty that guard was supposed to monitor the lot only from the guard shack, and was not supposed to leave the shack to make rounds, because of the danger that could present to the sole guard.” [Noblin Affidavit, Defendant’s Exhibit B]. On

the other hand, O'Hare stated that he expected rounds to be made. Coulter stated that "there wasn't agreement between Prudential and Jack Cooper for us to do the rounds. I implemented that on my own." [[Plaintiff's Exhibit D, p. 21, ln 16-20]. Clearly, there was no mutual assent to waive the original terms of the contract. Therefore, there can be no breach of contract on this basis and the integration clause controls. Moreover, Cooper does not address this argument. Thus, it has abandoned any argument against Prudential's contention. The failure to properly address the merits of an assertion constitutes abandonment of the issue. *Riemer v Johnson*, 311 Mich App 632, 653; 876 NW2d 279 (2015).

C. Untimely Notice

Prudential also argues that Cooper violated the "Notice of Claims" provision in two ways: (1) by failing to provide written notice to Prudential by certified mail of its claims within thirty days of Cooper's knowledge of the two thefts; and (2) by failing to institute the instant lawsuit within twelve months following the date Cooper became aware of the two thefts.

In response, Cooper asserts Prudential's argument regarding the "Notice of Claims" has no bearing on Prudential's independent cause of action of negligence which is based on tort liability. Cooper further contends that, when Prudential entered into the contract, Prudential had a duty to engage in non-negligent performance, and it breached that duty to Cooper.

As indicated above, Cooper's claim for negligence fails as a matter of law. Hence, the "Notice of Claims" section applies to the breach of contract claim. The section provides as follows:

Client shall give written notice to Prudential Security by certified mail of any claim or potential claim arising out of or relating to this Agreement within (30) thirty days following the date of Client's knowledge of the occurrence giving rise to such claim or potential claim. Such notice shall contain sufficient information as to the time, place, nature, and extent of such claim or potential claim as will enable Prudential Security to be properly advised and make a reasonable assessment thereof.

No action, suit or proceeding to recover any claim arising out of or relating to this Agreement shall be instituted or maintain (sic) against Prudential Security by Client or by anyone deriving its or their rights through Client unless written notice of such claim shall have been given by Client to Prudential Security in the manner and form set forth herein.

Unless specifically prohibited by law, no action, suit or proceeding to recover for any claim arising out of or relating to this Agreement shall be instituted or maintained by Client (or by anyone deriving its rights through Client) against Prudential Security unless said action, suit or proceeding shall have been instituted not later than twelve (12) months following the date Client became aware of the occurrence giving rise to such claim.

[Defendant's Exhibit A, p. 2].

Here, Cooper has provided no evidence that it gave written notice of its claim within 30 days from April 8, 2020, the day after the first theft when O'Hare became aware of the theft or from May 7, 2020, the day of the second theft. Even if Cooper can show it was not aware of the fact that the thefts were caused by Prudential's conduct, it nevertheless failed to both provide notice by certified mail and failed to institute the lawsuit within 12 months of Cooper's awareness of its claims. The instant lawsuit was filed on January 4, 2022, which was before it became aware of the fact that the guards may have fallen asleep while on their shifts. The suit was filed 19 months and 28 days after the second theft, but before discovery was conducted. The Court agrees that Cooper's claims were untimely pursuant to the parties' contract.

D. Unjust Enrichment

Finally, Prudential contends Cooper's unjust enrichment claim is meritless because the parties had an existing contract that governed the issue. Cooper argues, based on the Private Security Business and Security Alarm Act, MCL 338.1051, *et seq*, that it "is highly unethical to accept payment for security operations when you simply went to sleep and let theft occur on your security watch, it also forms as the basis for the unjust enrichment claim." Cooper also asserts that

“unethical to accept payment for security operations when you simply went to sleep and let theft occur on your security watch...,” which can form a basis for the unjust enrichment claim.

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). “However, a contract will be implied only if 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).

There is no dispute that an express contract exists covering the subject matter of the provision of security services for Cooper’s automobile lot. As specified in the contract, one guard was provided for the purpose of having a physical presence of security and to deter theft or other criminal behavior. Therefore, the claim of unjust enrichment fails as a matter of law.

IV. CONCLUSION

Cooper’s negligence claim fails as a matter of law. *Maiden, supra*; MCR 2.116(C)(10). Pursuant to the clear and unambiguous language of the contract, Prudential fulfilled its duty to provide one unarmed guard. There can be no breach of contract because the integration clause controls. In addition, Cooper’s claims were untimely pursuant to the “Notice of Claims” provision of the parties’ contract. The claim of unjust enrichment also fails as a matter of law because of the

existence of an express contract covering the same subject matter. *Maiden, supra*; MCR 2.116(C)(10). Accordingly, the Court grants Prudential's motion for summary disposition.

For the reasons stated in the foregoing Opinion,

IT IS ORDERED that the motion for summary disposition filed by Defendant Prudential Security, Inc. is hereby **GRANTED** in its entirety;

IT IS FURTHER ORDERED that the complaint filed by Plaintiff Jack Cooper CT Services, Inc. is hereby **DISMISSED**;

IT IS FURTHER ORDERED that this resolves the last pending claim and **CLOSES** the case.

IT IS SO ORDERED.

DATED: 3/1/2024

Circuit Judge



/s/ Annette J. Berry
March 1, 2024