STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

MODERN BUILDERS SUPPLY, INC.,
A Michigan corporation,

Plaintiff,

v

M&M CONTRACT BUILD, LLC,
CHRISTOPHER MANNING and
MARK WILLIAM MANNING, jointly
and severally,

Defendants/Third-Party Plaintiffs/
Counter Defendant,

v

T.H. MARSH CONSTRUCTION CO.,

Third-Party Defendant/Counter-Plaintiff.
_____/

No. 18-000339-CB-C30

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At a session of said Court held in Lansing, Ingham County, Michigan, on July 31, 2020

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This was a bench trial held on June 30 and July 1, 2020 that was taken under advisement to issue written findings of fact and conclusions of law. Trial was held on Plaintiff's First Amended Complaint against Defendant Christopher Manning only. A $10,000 judgment previously entered for T.H. Marsh Construction Co. against M&M Contract Build, LLC and Christopher Manning was dismissed as a Counter-Defendant. A $60,000 judgment entered in favor of Plaintiff and against M&M Contract Build, LLC only.

Plaintiff has voluntarily dismissed Mark William Manning, who had no involvement in the activities of the other Defendants.

Plaintiff's First Amended Complaint makes claims against Christopher Manning for breach of guaranty (Ct. II), common law conversion (Ct. IV), fraud (Ct. V), silent fraud (Ct. VI), and quantum meruit/unjust enrichment (Ct. VII). At the conclusion of trial, Plaintiff moved to amend the complaint to add a count for violation of the Builder's Trust Fund Act. Manning did not object to adding the count. The motion is hereby granted.

The Court has considered the testimony of all witnesses and has weighed their credibility. The Court has also considered all the exhibits admitted into evidence, the trial briefs, and the argument of counsel. The burden of proof by a preponderance of the evidence has been applied to Plaintiff. The Court makes the following findings of fact and conclusions of law.

Christopher Manning is the sole proprietor of M&M Contract Build, LLC. The company is no longer functioning but it is not dissolved. In May 2017, M&M was subcontracted by T.H. Marsh to complete roofing on the MediLodge of Grand Blanc. M&M obtained its roofing supplies for the MediLodge from Plaintiff. Supplies were obtained on credit pursuant to a Confidential Credit Account Application M&M made in October 2016. The credit application contained a separate personal guaranty signed by Manning (Plaintiff's Ex. 1).

Plaintiff was supposed to provide M&M with invoices and statements for purchased supplies. In fact, the credit application that M&M made in 2016 indicated that M&M was requesting electronic statements and invoices. There is no record of any invoices, statements or bills of lading ever provided to M&M contemporaneously with the delivery

of supplies for the MediLodge project. Instead, Plaintiff produced invoices with an approved date of February 12, 2018, which was five months after Manning stopped work on the project (Plaintiff's Ex. 4).

Although Manning now complains about the lack of invoicing, there is no evidence he ever complained back in 2017 when he was working on the MediLodge project and obtaining roofing supplies from Plaintiff. He maintains that he frequently requested documentation from Plaintiff's employee Steve Holmes and relied on Mr. Holmes' promises that the documents were forthcoming. Mr. Holmes is no longer employed by Plaintiff and he did not testify at trial.

Marsh terminated M&M from the project on September 21, 2017. Manning maintains that M&M was terminated because a specific flashing tape was needed and Plaintiff never supplied it. That claim is dubious, but the reason M&M was terminated is not pertinent to the issues to be decided here.

At some time after the MediLodge project was terminated, M&M was contracted to do roofing on a multi-unit apartment complex known as Burton Ridge. For this project, Manning acknowledges that he did receive invoices. The invoices that Plaintiff says are unpaid are contained in Plaintiff's Ex. 4 and designated by "Job: Burton Ridge." The total of unpaid invoices for Burton Ridge that Plaintiff claims is $13,539.78.

Plaintiff claims a total of $113,702.79 in unpaid invoices for both projects and proposes multiple alternate methods of calculating damages. Plaintiff also demands attorney fees. Manning claims that he owes nothing to Plaintiff because there is nothing due under the invoices and because his liability is limited under the personal guaranty section of the credit application.

The Court will first determine what is due under the invoices, then address the limits of the personal guaranty to determine the amount, if any, of Mannings' liability. The Court will then address Plaintiff's proposals for measuring damages for breach of the personal guaranty. As an additional component of damages, the Court will then address attorney fees. Finally, the remaining claims brought by Plaintiff will be addressed.

Determination of amounts due to Plaintiff

M&M began roofing the MediLodge at the end of May 2017. The project had three phases, two of which were known as the Ambassador Wing and the MSU Wing. According to Payment Applications prepared by M&M, each wing was budgeted to require $49,761.62 in material to be supplied by Plaintiff. M&M submitted pay applications to its general contractor Marsh several times, but only one was paid for $146,559.60. This was reflected by M&M's Partial Unconditional Waiver of its lien rights in the amount of $146,559.60 signed by Manning on behalf of M&M. This was the only payment that Marsh ever made to M&M for the project.

Plaintiff's former employee, Steve Holmes, signed two Partial Unconditional Waiver of Lien documents as it pertains to M&M's work on the MediLodge project (Plaintiff's Ex. 8). The first one verifies material was provided and installed on the Ambassador Wing and Plaintiff was paid in the amount of $49,500. The second one verifies material was provided and installed on the MSU Wing and Plaintiff was paid in the amount of $49,500.

In fact, M&M did issue checks to Plaintiff for $25,000 on August 30, 2017, $25,000 on September 20, 2017, and $49,000 on September 13, 2017. While those total what was reflected in the lien waivers, Manning voided two of the checks in his check register

(Plaintiff's Ex. 9). Manning testified that he did not stop payment on these checks – he only voided them. He gave them to Steve Holmes to hold pending Manning's receipt of draws two and three from Marsh. When the money never came from Marsh, the checks were not cashed. However, in his responses to Marsh's discovery, he said that he stopped payment on the checks (Plaintiff's Ex. 12). It is undisputed that the only check ever received and cashed by Plaintiff was one for $25,000 dated September 20, 2017.

Once M&M was terminated from the project, Manning requested that Plaintiff cease shipping all materials to the MediLodge site. Manning also requested that any materials that remained on site be returned to Plaintiff to be credited to his account (Defendant Ex. 2). Manning testified that he also had materials stored in his pole barn and in his trailer. The trailer remained on the MediLodge site. The materials in the trailer he ultimately got back and someone in Plaintiff's employ picked up the items from Manning's pole barn and trailer, which together totaled $13,500 (Defendant's Ex. 9). Plaintiff does not strongly disagree that Manning may be entitled to a credit of $13,500 for returned material. The Court concludes that Manning is entitled to the $13,500 credit.

Manning also claims that a large amount of material charged to him remained on site at the MediLodge project. Defendant's Ex. 3 illustrates the conflict that arose regarding material left on site. Speaking of materials left in M&M's *trailer*, Manning informed Marsh that unless Marsh was going to pay for it, it would all be returned to Plaintiff for credit. Likewise, Plaintiff wrote that since M&M had been billed for the material, it belongs to M&M unless Marsh wanted to pay for it. Marsh weighed in by pointing out that the sworn statements and pay applications would mandate keeping it on site -- the implication being that M&M claiming in its pay applications to have received

and paid for the materials and Marsh having paid M&M for them, they rightly belong with the project. Manning testified at trial that he assumed either Plaintiff picked up the material or Marsh took it over and paid for it.

In his responses to Interrogatory and Request for Production No. 20 and 21, Manning points to the above emails to support his claim that Marsh agreed to take over and pay for the materials on site (Plaintiff's Ex. 2).

The emails do not support that Marsh agreed to pay for materials left on site at the MediLodge project. Even if Marsh had so agreed, Manning's complaint should be taken to Marsh – it does not relieve him from paying for materials supplied by Plaintiff that M&M ordered and agreed to pay for.

The Court is not even satisfied that materials were left on site. The emails refer to materials in Manning's *trailer*. Manning testified that ultimately the materials in the trailer were returned to him and he returned them to Plaintiff. Those materials are the source of the $13,500 credit. There is no evidence that other materials were left on site. The testimony was that the site had limited space for storage of materials. If there were any other materials left on site, Manning should not have assumed that someone picked them up or that Marsh paid for them. Manning ordered the materials on credit and if he wanted credit for them he was the one to return them.

Manning also maintains that Plaintiff stored a large amount of supplies at its own warehouse that were charged to M&M. Manning said that he drove by Plaintiff's warehouse and saw about 3,000 pieces of insulation. Manning testified that Plaintiff said he had received all material, but Manning maintained that this could not be true because

there would have been no place for him to store it. Manning also introduced an email from Plaintiff's former employee Steve Holmes to Marsh dated November 14, 2017:

> We have an unreal amount of ISO [roofing insulation] left at my warehouse for this project, 3000 pcs + would be a pretty close estimate. I know that the majority of it is 2" flat ISO.
>
> I can get a count on the 2" flat from my Lansing team and have that to you by tomorrow morning.
>
> The invoices I have provided you are only for the material that was requested to be delivered by the original installer.
>
> Last I was aware, the center portion was on hold and had not even had the ballast removed from the roof. We would not have delivered any material for the center portion until it was close to being ready for install, or until the contractor requested it to be shipped.
>
> Has the new contractor resumed work on the facility yet? If so, he has not reached out to me or any member of the MBS team. I'm also getting zero support or information on this project from GenFlex. I'm starting to get the feeling that I will be left holding the bill on all of this and it is becoming concerning. Any info you can share with me on the status or direction the project is going would be very helpful.
>
> Thank you.
>
> Steve Holmes

The Court cannot conclude that there was a large amount of material that is being charged to M&M that remained with Plaintiff in its warehouse. The email from Holmes *does* support that there was insulation for the project at the warehouse, but it does *not* say that M&M was invoiced for this material that had not yet been delivered. To the contrary, Holmes says that the invoices he provided were only for material that M&M had requested be delivered. Furthermore, the invoices in Plaintiff's Ex. 4 account for nowhere near the 3,000+ pieces that Holmes mentions in his email so it appears to be impossible for Plaintiff to be billing M&M in Ex. 4 for the 3,000+ pieces of insulation in the warehouse.

The Court has to reject Manning's contention that he is being charged for material he did not use.

Manning maintains that he owes nothing for Burton Ridge. He produced Defendant's Ex. 10 on the second day of trial and explained that it shows payments to Plaintiff for the Burton Ridge project on three separate dates for a total payment of $22,961.52. According to Manning's record, these payments were M&M check nos. 17930, 17902, and 17885. Furthermore, Manning testified, Plaintiff only supplied three buildings of the seven Burton Ridge buildings and it was not possible that the amount already paid plus the amount of claimed unpaid invoices could reflect the amount of shingles needed to complete three buildings. Thus, he was paid in full.

Manning's argument fell apart when Manning re-called Timothy Dever during Manning's case in chief. Dever was able to trace each of the three check payments Manning made to different invoices than those contained in Plaintiff's Ex. 4 for Burton Ridge. Furthermore, the Court notes that the unpaid invoices reflect roofing supplies in addition to shingles. That casts extreme doubt on Manning's argument that the amount of money being billed was far beyond what would be needed for shingles. Finally, Manning's claim that he only used Plaintiff to supply three of the buildings and used another supplier, who was a friend, for the others fell flat when Manning refused at trial to provide the name of the friend.

The Court concludes that the MediLodge invoices are an accurate accounting of what M&M ordered and used for the project, minus the returned materials. There simply is no credible evidence otherwise. Furthermore, the Burton Ridge invoices were prepared contemporaneously with delivery and Manning acknowledged receipt. His explanation

now, without any prior complaint, as to why they are inaccurate was simply not borne out by the testimony or the content of the invoices.

The Court finds that Plaintiff's invoices for MediLodge accurately reflect materials supplied for $125,163.01. M&M made one payment of $25,000 and returned materials amounting to $13,500 for a balance owing of $86,663.01. Further, the invoices for Burton Ridge accurately reflect a balance due of $13,539.78. The total outstanding amount due to Plaintiff is $100,202.79.

Manning's liability under the personal guaranty

Paragraph 13 of the Terms and Conditions of Credit in the Confidential Credit Account Application provides that the law of the State of Ohio will govern all disputes concerning its terms. Manning argues that *City Wide Supply, Inc* v *Professional Air, Inc*, 10th Dist. Franklin No. 99AP-1152, 2000 WL 943250 (July 11, 2000)[1] applies and requires a limitation on Manning's personal guaranty to some amount not specified by Manning, although Manning has maintained throughout the trial that he owes nothing.

Manning executed the credit application. Even though he testified that some of the information on the application was filled in by him and some was not, he never claimed that any part of the application was blank when he signed it on October 12, 2016. Although there appeared to Manning to be something written in front of his signature, he acknowledged that his signature is on the Guaranty section of the application. The face of the application says "credit limit requested $15,000." Manning testified that he did not

[1] It would appear that Ohio Court of Appeals opinions whether published or unpublished are not binding precedent. "All opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published." S Ct R Rep Op 3.4. The previous version of the rule provided that unpublished opinions shall be considered persuasive authority only to a court in the judicial district in which the opinion was rendered. All Ohio cases cited herein are unpublished and are not binding precedent.

fill in this amount. At the bottom of the page, it says "Dollar amount of your anticipated monthly requirements for the following products: Roofing Shingles: $30,000 Commercial Roofing: $30,000." At the bottom of page two, it indicates that on October 13, 2016, the day after Manning signed, Plaintiff authorized a $5,000 credit limit.

City Wide Supply involved an application for credit that was initially approved for $4,000. The personal guaranty section of the application read "I personally guarantee payment of all City Wide Supply, Inc. invoices." Six years after signing the guaranty, the individual defendant sold his interest in the company and became an employee. Two years after that, the lawsuit was filed seeking to have him held liable for a $25,297.21 debt of the company. The trial court found the individual defendant personally liable for the entire amount of the company's debt. The Court of Appeals reversed and found as follows:

> Since the personal guarantee was sought from Jackson in relation to a credit application of $4,000 to $4,500, for which $4,000 was approved, it is a reasonable construction of the guarantee that Jackson's personal liability was to be limited to $4,000.

The *City Wide* Court distinguished another case, *Hughes Supply, Inc* v *Stage 1 Mechanical, Inc*, 2nd Dist. Darke No. 1416, 1997 WL 282346 (May 30, 1997), by noting that in *Hughes Supply* the guarantee of payment specifically provided that it covered all indebtedness, including all renewals, extensions and modifications. Furthermore, the credit application had no provision for a credit limit.

Another case, *Amerisourcebergen Drug Corp* v *Hallmark Pharmacies, Inc*, 10th Dist. Franklin No. 05AP-1250, 2006 WL 1495073 (June 1, 2006), distinguished *City Wide Supply*. In *Amerisourcebergen*, the Vice-President of the defendant Hallmark signed a personal guaranty as part of a corporate credit application that stated "The undersigned,

for valuable consideration received, hereby personally and unconditionally guarantees each and every obligation to [plaintiff] by this applicant until fully paid."

The *Amerisourcebergen* Court found *City Wide Supply* to be inapposite because the guarantor in *City Wide* clearly sought a specific amount of credit, and a credit line of that specific amount was later granted. The Court held:

> *The present case is not one in which a guarantor has agreed to become liable for the debt of another up to a specified maximum credit limit and the creditor later, without the guarantor's knowledge*, extends additional credit to the debtor without obtaining further written assurance of payment from the guarantor. Appellant signed an unconditional, unequivocal, unlimited personal guaranty respecting all debts incurred by Hallmark through extension of credit by appellee. The monthly purchase estimate was just what it purported to be-an estimate-and cannot arguably represent the maximum amount that the parties understood was being personally guaranteed, as was the case in *City Wide.* As such, we find no error in the trial court's refusal to limit appellant's liability to the amount of the monthly purchases estimate of $5,000. (Emphasis added.) *Amerisourcebergen* at ¶ 19.

The credit application here does have a credit limit, but it also has a provision that is more like the one in *Hughes Supply*. Paragraph 3 of the Guaranty provides:

> This is a continuing guaranty and, until revoked or otherwise modified, shall cover the future indebtedness of the debtor as contemplated herein, including indebtedness arising under successive transactions that shall either continue the indebtedness or from time to time renew it after it has been satisfied.

The language of the Guaranty here is far more specific and expansive than the language in *City Wide Supply*. Here, the language covers all future indebtedness. This case is more analogous to *Hughes Supply* rather than *City Wide Supply*.

Furthermore, the credit limit that was applied in *City Wide Supply* was set at $4,000. The same cannot be said of the credit limit here. On page one of the application, the credit limit requested is $15,000. At the bottom of that page, the dollar amount of the

monthly requirement for roofing shingles and commercial roofing combined is $60,000. But on page two, the approved credit limit is $5,000. The clarity of the *City Wide* guaranty is not present in this guaranty. The Court does not, however, find the guaranty to be ambiguous. The guaranty here unambiguously covered all future indebtedness including successive transactions and is not limited by the limit requested, the estimated monthly requirement, or the amount approved by Plaintiff.

Not only is the language of the guaranty different than in *City Wide Supply*, but the circumstances differ as well. Manning himself incurred additional indebtedness for which he was extended credit. Manning knowingly, as the sole owner of M&M, obtained credit from Plaintiff in excess of any credit limit imposed when he signed the personal guaranty.[2] If the Ohio Court of Appeals had not limited the impact of the personal guaranty in *City Wide Supply*, the owner-turned-employee would have been liable for debts far beyond his knowledge and consent. That is not true here.

The *Amerisourcebergen* Court found the element of knowledge to be pertinent where the guarantor remained the Vice-President of the company incurring the debt and thus knew of her personal obligation. This case, like *Amerisourcebergen*, is not one in which Manning agreed to become liable for the debt of another up to a specified limit and Plaintiff later, without Manning's knowledge, extended additional credit to the debtor.

Moreover, this guaranty gives Manning the chance to avoid any circumstance where he could unknowingly be held liable for debts beyond what he agreed to because

[2] Although Manning claims without support that his payment never allowed the debt to exceed the credit limit, that claim is not plausible. The only payment he made was $25,000 and the Plaintiff's approved credit limit was $5,000. The very fact that Manning made a $25,000 payment disproves his claim.

he could have renounced, revoked or modified it pursuant to paragraph 4. Manning admits that he never renounced, revoked or modified his personal guaranty. In fact, he continued to use his line of credit/personal guaranty as he continued to obtain materials for Burton Ridge even after the MediLodge project was terminated.

For all the above reasons, the Court concludes that Manning is personally liable for all of M&M's indebtedness to Plaintiff.

Damages

Plaintiff proposes several different alternatives for calculating damages. Two of those alternatives are based on the pay applications and lien waivers that offer support for the amount of materials supplied by Plaintiff. However, Plaintiff has repeatedly asserted that all this documentation was false. And it was. Even Manning has admitted their falsity. For example, he made payment applications to Marsh falsely stating he had paid certain amounts to Plaintiff only for purposes of obtaining payment from Marsh. When payment from Marsh did not occur, he either stopped payment on or voided two of the three checks from M&M to Plaintiff.

The Court has no confidence that just because Manning wrote checks and then voided checks in the amount of $74,000 that the sum is an accurate measure of supplies received from Plaintiff. The same can be said of the lien waivers. To properly and justly calculate damages, the Court would prefer to rely on true evidence.

Another method Plaintiff proposes is to, at a minimum, enter judgment against Manning for the same $60,000 amount as the judgment entered against M&M. While this holds logical appeal – Manning personally guaranteed M&M's debts to Plaintiff and Plaintiff obtained a judgment in that amount – this too is problematic. The $60,000

judgment was entered following acceptance of case evaluation. While case evaluation was useful in this instance, it is not necessarily a true measure of damages. Furthermore, the Court is satisfied that Manning is entitled to a $13,500 credit and there is no way to determine whether the case evaluation award took that into account.

The Court concludes that the best measure of damages in this case is to use the unpaid invoices in Plaintiff's Ex. 4. As the Court has found above, the total amount due, and the amount that Manning is personally liable for, is $100,202.79.

Attorney fees

Paragraph 7 of the credit application provides:

> In the event it should become necessary to commence any type of legal action or proceedings to collect monies due Seller from the Buyer, Buyer agrees [to] pay all expenses related to any such legal action including but not limited to court costs and attorney's fees.

Plaintiff produced Ex. 13 at trial, which was admitted without objection. Ex. 13 consists of detailed billing statements for Plaintiff's counsel. The hourly rate is $350 and the hours billed start on March 14, 2018 with the inception of this case and continue to June 26, 2020. Mr. Dever testified that the attorney fees in this case total $83,717.

Manning has raised no objection to the hourly rate or the number of hours billed. The credit application requires payment of attorney fees and the personal guaranty covers all indebtedness of M&M. Therefore, Manning is personally liable for Plaintiff's attorney fees in the amount of $83,717.00.

Liability for conversion, fraud, quantum meruit, and Builders Trust Fund

Plaintiff's claim for conversion, according to the First Amended Complaint, is based on Manning allegedly converting the money paid by Marsh. It is alleged that those funds

rightfully belonged to Plaintiff. At trial, Plaintiff asserted that its conversion claim was based on Manning's receipt of materials that he wrote checks for and then stopped payment on the checks. Common law conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. *Aroma Wines & Equip, Inc* v *Columbian Distribution Services, Inc*, 497 Mich 337, 871 NW2d 136 (2015). Plaintiff fails to explain how either of its theories constitutes conversion.

Plaintiff's claim for fraud, according to the First Amended Complaint, is based on representations Manning made that roofing materials would be installed at the MediLodge project and construction proceeds would be paid to Plaintiff and that those representations were false when made. Silent fraud is alleged based on Manning not disclosing that he was not going to pay Plaintiff for roofing materials. At trial, Plaintiff argued that fraud was shown based on the false lien waivers.

Fraud requires some kind of reliance or action by the party defrauded. If Manning defrauded anyone with false lien waivers, it would not be Plaintiff. There is no evidence that the false lien waivers induced Plaintiff to do anything. Furthermore, both fraud and silent fraud would require that Manning knew or intended at the time that he made representations or failed to disclose information that he would not fulfill his commitment to Plaintiff. There is no such evidence in this case.

Plaintiff moved at the end of trial to add a claim for violation of the Builders Trust Fund based on Manning's admitted payment of a cell phone bill with funds received from Marsh. The Builder's Trust Fund Act (MCL 570.151) requires that funds paid for a specific project be used for that project. A subcontractor may not retain or use funds from a

particular project until all laborers, subcontractors, and materialmen who worked on the project have been paid. *People* v *Brown*, 239 Mich App 735, 610 NW2d 234 (2000). The Builders Trust Fund does not require a subcontractor to pay others in any particular order. There is no evidence that payment of a cell phone bill was unrelated to this project. Manning could have paid any expenses related to the project in any order as long as he did not retain or use any funds for any other project or purpose without first paying Plaintiff. There is no demonstrated violation of the Builders Trust Fund here.

The *quantum meruit* claim is unnecessary when an express contract exists as it does here.

Conclusion

For all the reasons stated above, the Court finds that Plaintiff is entitled to judgment in the amount of $100,202.79 for unpaid invoices, $83,717.00 for attorney fees, plus any interest and costs to which Plaintiff may be entitled.

IT IS HEREBY ORDERED that Plaintiff shall submit a judgment in the appropriate amount within 21 days of the date of this order.

/S/

_____

Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes

addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on July 31, 2020.

/S/

_____

Michael Lewycky
Law Clerk/Court Officer