IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KISS ELECTRIC, LLC,	:	
	:	C.A. No. K18C-12-014 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
CONBOY & MANNION CONTRACTING, INC., and MID-ATLANTIC ELECTRICAL SERVICE, INC.,	:	
	:	
Defendants.	:	

Submitted: July 12, 2019
Decided: October 9, 2019

ORDER

Defendants' Motions to Dismiss
Denied in Part; Granted in Part

W. Christopher Componovo, Esquire, Esquire of Kimmel & Silverman, P.C., Wilmington, Delaware; attorney for Plaintiff.

Ryan M. Ernst, Esquire of O'Kelly Ernst & Joyce, LLC, Wilmington, Delaware; attorney for Defendant Conboy & Mannion Contracting, Inc.

Dean A. Campbell, Esquire of the Law Office of Dean A. Campbell, P.A., Georgetown, Delaware; attorney for Mid-Atlantic Electrical Service, Inc.

WITHAM, R.J.

INTRODUCTION

Presently before the Court are Defendants Conboy and Mannion Contracting, Inc. (hereinafter "Defendant C&M") and Mid-Atlantic Electrical Service, Inc. (hereinafter "Defendant Mid-Atlantic) and their Motions to Dismiss Plaintiff Kiss Electric, LLC's (hereinafter "Plaintiff") breach of contract, unjust enrichment, and tortious inference claims[1] against both Defendants pursuant to Superior Court Rules of Civil Procedure Rule 12(b)(1).

After considering Defendants' motions, Plaintiff's responses, in opposition, and the record, the Court **GRANTS IN PART and DENIES IN PART** Defendants' Motions to Dismiss.

FACTUAL AND PROCEDURAL HISTORY

1. Plaintiff is an electrical installation company that maintains an office at 5921 Bistol-Emilie Road, Levittown, Pennsylvania 19057.

2. Defendant C&M is a New York based construction company, which maintains an office at 36 Phila Street, Sarasota Springs, New York 12866.

3. Defendant Mid-Atlantic Electrical Service is an electrical services company which maintains an office at 24556 Betts Pond Road, Millsboro, Delaware 19966.

4. The alleged acts and omissions claimed by Plaintiff occurred primarily in

[1] Plaintiff asserts only claims of breach of contract and, in the alternative, unjust enrichment against Defendant C&M. Plaintiff asserts breach of contract and tortuous inference claims against Defendant Mid-Atlantic. Plaintiff also asserts, in the alternative to the breach of contract claim, a claim of unjust enrichment against Defendant Mid-Atlantic if the Court finds that Mid-Atlantic did not breach its contract with Plaintiff.

Dover, Delaware.

5. On May 4, 2017, Defendant C&M hired Plaintiff to perform electrical services at Panera Bread, located at 545 N. DuPont Hwy in Dover, Delaware. Defendant C&M and Plaintiff entered into a contract that provided Plaintiff would be paid $157,500.00 by Defendant Conboy and Mannion for its services.[2]

6. The contract contained several provisions of note. First, it contained an integration clause that stated:

> ...writing constitute[d] the entire agreement of the parties and supercedes all prior negotiations, discussions, representations, understandings[,] or agreements with respect to the subject matter hereof and may not be specifically referring to this Agreement signed by all of the parties hereto."[3]

Second, it also contained a choice of law provision stating that the Contract and any amendments:

> [S]hall be governed by and construed in accordance with the law of the State of New York applicable to contracts made and to be performed entirely therein.[4]

Finally, the Contract contained a provision requiring arbitration. The Contract specifically states:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in Saratoga Springs, New York,

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[2] *See* Pl. Ex. A at § 2(A).

[3] *Id.* at § 10(a).

[4] Pl. Ex. A at § 10(g).

administered by the American Arbitration Association (hereinafter "AAA").[5] This specific arbitration clause further stated:

> Notice of demand shall be filed with the AAA within one hundred twenty (120) days after a dispute first arises.[6]

7. On May 8, 2017, Plaintiff hired Defendant Mid-Atlantic as a sub-contractor to perform electrical services at the Panera Bread.[7] Defendant C&M was allegedly aware that Plaintiff had hired Defendant Mid-Atlantic as a sub-contractor and expressed its acceptance of the arrangement at multiple times between May 2017 through August 2017.[8]

8. The agreement regarding the procedure for payment between the parties appears to be that Defendant C&M would pay Plaintiff and then in turn, Plaintiff would pay Defendant Mid-Atlantic.[9] From May 2017 to July 2017, Defendant C&M made timely installment payments to Plaintiff and Plaintiff made timely payments to Defendant Mid-Atlantic.

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[5] *Id.* at § 10(h).

[6] *Id.*

[7] *See* Pl. Ex. B.

[8] Pl. Mot. at ¶ 12. *See also id.* at ¶ 13 (Plaintiff alleges Defendant C&M's acquiescence of this arrangement was clear in that Defendant C&M was physically present at the job site from May 2017 through August 2017 and observed Defendant Mid-Atlantic performing electrical installation.).

[9] Pl. Mot. at ¶ 14.

9. In August 2017 and for reasons unknown, Defendant C&M withheld payments to Plaintiff regarding the reminder of its outstanding balance. As a result, Plaintiff was not paid for expenses or payments made to Defendant Mid-Atlantic. Defendant Mid-Atlantic then asserted that Plaintiff was late in its payment.[10]

10. After not receiving payment from Plaintiff, Defendant Mid-Atlantic sought payment directly from Defendant C&M. Defendant C&M agreed to pay Defendant Mid-Atlantic.

11. On December 1, 2017, Plaintiff filed a mechanic's lien in this Court[11] against property located at 545 N. DuPont Hwy. in Dover.[12] On March 23, 2018, the mechanic's lien was discharged with consent of Plaintiff after Defendant C&M paid the bond to the Court. This Court currently still holds that bond.[13]

12. Plaintiff filed its current action, based in contract and tort, on December 13, 2018.

13. In response, two dismissal motions have been filed in this Court. First, Defendant C&M filed a Motion to Dismiss on March 27, 2019. Second, Defendant Mid-Atlantic followed with its own Motion to Dismiss on April 1, 2019.

14. The Court heard this matter at oral argument on July 12, 2019.

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[10] *Id.* at ¶¶ 16-17.

[11] Plaintiff's mechanic's lien was filed specifically in the Delaware Superior Court, Kent County.

[12] No. K17L-12-001.

[13] Pl. Mot. at ¶ 7.

PARTIES' CONTENTIONS

A. Defendants' Contentions Regarding Their Motions to Dismiss

15. The Defendants share many of the same arguments in their motions, but differ in some areas due to the allegations against each individually by Plaintiff.

i. Defendant C&M.

16. The crux of Defendant C&M's argument supporting their motion is that this Court lacks jurisdiction over Plaintiff's cause of action.[14] It specifically argues that the arbitration clause contained in the contract trumps any subject matter jurisdiction that this Court may have had otherwise.[15] Defendant C&M also asserts that Plaintiff's claim was filed well beyond the 120 days the Contract allows to file a notice of demand for arbitration.[16]

ii. Defendant Mid-Atlantic.

17. Defendant Mid-Atlantic appears to nearly mirror Defendant C&M's arguments asserting the Court's lack of subject matter jurisdiction in this case and the untimeliness of Plaintiff's filing.[17] Notably absent is any inference that New York law applies to its contract.

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[14] D. C&M Mot. at ¶ 8.

[15] *Id.* at ¶ 13.

[16] *Id.* at ¶ 17 (Defendant C&M also asserts that even if the Court were to toll the applicable statute of limitations to the date Plaintiff's mechanic lien action was resolved, Plaintiff still filed well beyond the 120 day requirement.

[17] D. Mid-Atlantic Mot. at ¶¶ 6, 12, 14-17.

B. Plaintiff's Contentions Regarding Defendants' Motions to Dismiss Based on Breach of Contract Theory

i. In regards to Defendant C&M.

18. Plaintiff's reply, in opposition, to Defendant C&M's motion asserts that this Court does in fact have subject matter jurisdiction, notwithstanding the arbitration provision contained in the Contract. Plaintiff makes four primary arguments in its response.

19. First, Plaintiff argues that Defendant C&M's participation in its mechanic's lien action effectively waived its right to enforce the arbitration clause.[18] Plaintiff specifically points to Defendant C&M's lack of argument regarding the arbitration clause during it's mechanic's lien litigation.[19]

20. Second, Plaintiff contends the dispute arose on August 27, 2017 which led to the mechanic's lien being filed in this Court on December 1, 2017, 96 days after the dispute arose.[20] Plaintiff contends that by filing the mechanic's lien within the 120 day period, it is timely filed. Regardless, Plaintiff asserts that the applicable statue of limitations regarding filing is tolled because of the mechanic's lien action.[21]

21. Third, Plaintiff argues that the arbitration provision of the Contract is

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[18] Pl. Reply to D. C&M Mot. at ¶ 10.

[19] *Id.* at ¶¶ 12-13.

[20] *Id.* at ¶¶ 15, 17. See also *id.* at ¶ 16 (Plaintiff asserts that the mechanic's lien issue is still pending resolution since the Court still holds the bond collected from Defendant C&M.).

[21] *Id.* at ¶ 17.

unenforceable as a matter of law.[22] Plaintiff asserts that because the contract's 120 day limitation shortens the Delaware statute of limitations by nearly 90%, the limitation is insufficient and unenforceable under Delaware law.[23] Additionally, Plaintiff contends that the arbitration clause would have precluded Plaintiff from filing and enforcing a mechanic's lien in the only matter that Delaware law allows, adding support for why the provision is unenforceable.[24]

ii. In regards to Defendant Mid-Atlantic.

22. Plaintiff's arguments in response to Defendant Mid-Atlantic's motion appear similar to its arguments previously made in response to Defendant C&M's motion in regards to breach of contract.[25] Plaintiff does provide additional amplification of its arguments, however, due to the particular facts in regard to the arbitration provision's unenforceability.

23. In short, Plaintiff further argues that the arbitration clause is invalid due to being unconscionable. First, Plaintiff contends that the provision reduces its time to seek redress under Delaware's statute of limitations for filing tortious interference

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[22] Pl. Reply to D. C&M Mot. at pg. 4.

[23] *Id.* at ¶¶ 20-22.

[24] *Id.* at ¶ 27.

[25] Plaintiff's argument regarding tortious inference mimics its argument regarding unjust enrichment. However, since it appears Defendant Mid-Atlantic did not have any involvement in the mechanic's lien action, Plaintiff has not argued waiver of the arbitration cause.

claims by 80%.[26] Second, Plaintiff argues that the arbitration clause is "especially absurd"and asserts that a clause that would make the entities, located in Levittown, PA and Millsboro, DE respectively, arbitrate in New York can not be enforced by a Delaware court.[27]

C. Plaintiff's Contentions Regarding Defendants' Motions to Dismiss Based on Unjust Enrichment Theory

i. In regards to Defendant C&M.

24. Plaintiff argues that even if the Court finds the arbitration clause is enforceable against it, the unjust enrichment claim against Defendant C&M must survive because that claim is not grounded in the underlying contract.[28]

ii. In regards to Defendant Mid-Atlantic.

25. Plaintiff provides the same argument, based on unjust enrichment, that it offered against Defendant C&M.[29]

D. Plaintiff's Contentions Regarding Defendant Mid-Atlantic's Motion to Dismiss Based on Tortious Interference

26. Plaintiff argues that even if the Court finds the arbitration clause is enforceable against it, the tortious interference claim against Defendant Mid-Atlantic

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[26] Pl. Reply to D. Mid-Atlantic Mot. at ¶¶ 19-20 (Plaintiff also includes the previously mentioned time reduction the contract provides for filing a breach of contract claim in Delaware.).

[27] Pl. Reply to D. Mid-Atlantic Mot. at ¶ 27.

[28] Pl. Reply to D. C&M at ¶ 29.

[29] Pl. Reply to D. Mid-Atlantic Mot. at ¶¶ 29, 30-31.

must survive because the claim is not grounded in the contract.[30]

STANDARD OF REVIEW

27. On a motion to dismiss pursuant to Rule 12(b)(1), the Court is mandated to dismiss an action for lack of subject matter jurisdiction if it appears from the record that the Court does not have jurisdiction over the claim.[31] Notably, "[t]he burden of establishing the Court's subject matter jurisdiction rests with the party seeking the Court's intervention."[32] Thus, to prevail on a Rule 12(b)(1) motion, a movant need only show that the Court lacks jurisdiction.[33]

DISCUSSION

A. New York Law Does Not Apply Based on Contracts' Plain Language

28. As a preliminary matter, the Court finds that New York law does not apply because the Contract itself does not meet the plain language of the Contract that

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[30] *Id.*.

[31] *Airbase Carpet Mart, Inc. v. AYA Associates, Inc.*, 2015 WL 9302894, at *2 (Del. Super. Dec. 15, 2015) (citing Super. Ct. Civ. R. 12(b)(1)).

[32] *Id.* (citing *Ropp v. King*, 2007 WL 2198771, at *2 (Del. Ch. July 25, 2007) (citing *Scattered Corp. v. Chicago Stock Exch.*, 671 A.2d 874, 877 (Del. Ch.1994), *aff'd*, 633 A.2d 372 (1993)); *see also Appriva Shareholder Litigation Co., LLC v. EV3, Inc.*, 937 A.2d 1275 (Del.2007) (stating that, "[u]nlike the standards employed in Rule 12(b)(6) analysis, the guidelines for the Court's review of [a] 12(b)(1) motion are far more demanding on the non-movant. The burden is on the Plaintiffs to prove jurisdiction exists. Further, the Court need not accept Plaintiff's factual allegations as true and is free to consider facts not alleged in the complaint." (quoting *Phillips v. County of Bucks*, C.A. No. 98–6415, 1999 WL 600541, at *1 (E.D.Pa. Aug. 9, 1999) (citations omitted))).

[33] *Id.* (citing Super. Ct. Civ. R. 12(b)(1)).

would invoke the application of New York law. Here, both Contracts contain the following provision:

> This agreement and all amendments thereof shall be governed by and construed in accordance with the law of the State of New York applicable to contracts *made and to be performed entirely therein*.[34]

29. In this case, Defendant C&M appear to partially imply that their Contract with Plaintiff is governed by New York Law.[35] However, after applying the plain language of both contracts to the facts of the complaint, this does not appear to be the case. First, it is unclear where the contract was made. While it could be inferred that the Contract between Plaintiff and Defendant C&M was made in New York, based on Defendant C&M's business being located in New York, there is presently no way for the Court to know that for sure because the Contract's plain language is silent as to where the contract was actually entered into.[36]

30. However, assuming arguendo that the Contract was entered into in New York, there is still an issue for Defendant C&M. The provision clearly states New

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[34] Pl. Ex. A at § 10(h); Pl. Ex. B at § 9(g) (emphasis added).

[35] *See* D. C&M Mot. at ¶ 5. Notably, Defendant Mid-Atlantic does not make the same argument, despite the fact that the clause is contained in its contract with Plaintiff verbatim.

[36] Additionally, the Court notes that while Defendant Mid-Atlantic did not imply New York law applies, if it had, it is unlikely that the contract between Plaintiff and Defendant Mid-Atlantic would have been entered into in New York, when neither entity has any apparent ties to the State of New York.

York law is applicable to contracts "made *and* to be performed entirely therein."[37] Here, the contracts both clearly state that the work would be performed in Dover, Delaware, not anywhere in the State of New York.

31. Thus, because the plain language of the clause is not present under the facts of this case, it appears that New York law does not apply in this case, despite Defendant C&M's inference to the contrary.

B. The Arbitration Clause Appears to be Waived by Defendant C&M

32. Where it is reasonable to construe a contract as requiring arbitration, courts will do so in view of the public policy encouraging arbitration.[38] Pursuant to Section 5701, Title 10 of the Delaware Code, a written agreement to submit to arbitration any controversy that arises or exists after the effective date of the contract is valid, enforceable, and irrevocable.[39] However, Delaware law provides that the right to

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[37] *See* Supra n.32 (emphasis added).

[38] *Pettinaro Const. Co., Inc. v. Harry C. Partridge, Jr., & Sons, Inc.*, 408 A.2d 957, 962 (Del. Ch. 1979) (citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-84 (1959)); *see also SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998).

[39] *See* 10 *Del. C. §* 5701 (A written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the controversy, and confers jurisdiction on the Chancery Court of the State to enforce it and to enter judgment on an award. In determining any matter arising under this chapter, the Court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives, except as otherwise provided in § 5725 of this title.).

compel arbitration can be waived, if a party "actively participated in a lawsuit or taken other action inconsistent with the right to arbitration."[40]

33. In this case, not only did Defendant C&M participate in the mechanic's lien action as an interested party, it also paid a bond to the Court with the understanding that the Court would hold the bond until the underlying dispute was resolved. Notably absent from its arguments in that action was any mention to the contract's arbitration clause, nor were there any attempts made by Defendant C&M to enforce that provision. Rather, Defendant C&M appeared to acquiesce to the Court determining the merits of Plaintiff's claims when it paid the bond to the Court.[41]

34. Furthermore, because the Court finds Defendant C&M has waived the arbitration clause, it appears to have also waived the time requirement per the arbitration clause in the contract. As a result, the statute of limitations for which Plaintiff can bring a contract claim against Defendant C&M is three years.[42] Thus, since Plaintiff claims the dispute arose on August 27, 2017, and its complaint was filed on December 13, 2018, its filing is well within the statute of limitations.[43]

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[40] *SBC Interactive, Inc.*, 714 A.2d at 762 (citing *Falcon Steel Co. v. Weber Eng'g Co.*, 517 A.2d 281, 288 (1986)).

[41] *See* Pl. Ex. D.

[42] See 10 *Del. C. §* 8106.

[43] Plaintiff has made much ado about how its action was tolled by the mechanic's lien, in part because it had no other choice but to file the mechanic's lien in order to seek a lien for unpaid services. *See* Pl. Reply to D. C&M at ¶ 25; Pl. Reply to D. Mid-Atlantic at ¶ 25. However, because the Court finds the arbitration clause waived by Defendant C&M, this argument is moot. The

35. Thus, the Court finds that the arbitration clause has been waived by Defendant C&M, and its motion to dismiss based on these grounds must be denied.

C. The Arbitration Clause and Time Requirements Are Invalid in Regard to Defendant Mid-Atlantic Due to Unreasonableness of the Provision

36. Delaware has adopted the Uniform Arbitration Act, making an arbitration provision valid and binding. 11 *Del. C.* § 5701 provides in pertinent part:

> A written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the controversy, and confers jurisdiction on the Chancery Court of the State to enforce it and to enter judgment on an award. In determining any matter arising under this chapter, the Court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.[44]

37. Pursuant to section 5701, Delaware courts typically lack subject matter jurisdiction to resolve disputes when the parties have contractually agreed to arbitrate. Additionally, there is a strong presumption in Delaware that favors arbitration, which is generally interpreted broadly by the Courts. Courts in Delaware normally resolve

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argument is moot in regard to Defendant Mid-Atlantic as well due to the timely filing of Plaintiff's complaint.

[44] 11 *Del. C.* § 5701.

doubt of the arbitration clause in favor of arbitration.[45] Courts generally look to the contract to determine the scope of issues that are subject to arbitration.[46]

38. Here, at first glance, the law, in conjunction with the integration clause, would support Defendant Mid-Atlantic's claim that the Court should honor the arbitration clause. It is well-settled under Delaware and federal law that parties may validly contract to limit the time period for filing a federal cause of action.[47] However, there is a difference between the general proposition stated above and its application to the facts of a particular case.

39. In short, parties to a contract do not have unbridled discretion to shorten the statute of limitations.[48] Delaware courts follow the general principle that a contractual limitation of actions periods are valid only if they are "reasonable."[49]

40. In *Bonanza Restaurant Co. v. Wink*,[50] this Court found that a two year period provided by a franchise agreement for filing breach of contract claims, was

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[45] *Elia v. Hertrich Family of Auto. Dealerships*, 2013 WL 6606054, at *2 (Del. Super. Dec. 13, 2013) aff'd, 103 A.2d 514 (Del. 2014); *see also Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002).

[46] *Parfi Holding AB*, 817 A.2d at 155.

[47] *Johnson v. Daimler Chrysler Corp.*, 2003 WL 1089394, at *3 (D. De. Mar. 6, 2003).

[48] *See ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, 2015 WL 9060982, at *11 (Del. Ch. Dec. 16, 2015) (citing *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386 (Del. Super. 1978)).

[49] *Id.*

[50] *Bonanza Restaurant Co. v. Wink*, 2012 WL 1415512, at *1 (Del. Super. Apr. 17, 2012).

reasonable, despite the three year statute of limitations provided by section 8106. The Wink court stated:

> [T]he two-year provision ... is reasonable because it expedites litigation without infringing on the parties' rights.[51]

41. Again, in *Aircraft Service International, Inc. v. TBI Overseas Holdings, Inc.*,[52] that 18–month and two-year provisions were reasonable and enforceable in a contractual dispute for amongst other things, breach of contract.[53]

42. In this case, as previously stated above, the contract between Plaintiff and Defendant Mid-Atlantic contained an integration clause. However, the limitation of 120 days to seek redress does reduce the ability to file a breach of contract claim by nearly 90%. The Court finds that this is unreasonable and as a result finds the arbitration clause, including the time requirement, invalid.

43. Thus, the Court also denies Defendant Mid-Atlantic's motion to dismiss with respect to Plaintiff's breach of contract claim.

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[51] *Id.* (However, the Court also invalidated an exception to the agreement that did not establish a limitations period.); cf. *ESG Capital Partners II, LP*, 2015 WL 9060982, at *11, where Plaintiff cites as an example of where the Chancery Court found a shorted period unreasonable. Rather, the Court stated "it is possible that a ten-day limitations period could be unreasonable." *See id.* The Court did not make a formal determination because the record was not fully developed at that stage of the litigation.

[52] 2014 WL 4101660, at *3 (Del. Super. Aug. 5, 2014).

[53] *Id.*

D. Plaintiff's Claims for Unjust Enrichment Are Dismissed

44. Assuming arguendo, the Court had found the arbitration clause did apply, meaning that Defendants' motions would be granted on the breach of contract issue, the Court must find that Plaintiff's claims of unjust enrichment are dismissed against Defendants.

45. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[54] A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim. In other words, if "the contract is the measure of [Plaintiff's] right, there can be no recovery under an unjust enrichment theory independent of it."[55] Thus, "[w]hen the complaint alleges an express, enforceable contract that controls the parties' relationship ... a claim for unjust enrichment will be dismissed."[56]

46. Here, the unjust enrichment claims are equitable claims not based in contract. Plaintiff alleges the existence of, and brings claims for the breach of, contracts between it and Defendants C&M and Mid-Atlantic. Plaintiff contends that

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[54] *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 891 (Del. Ch. 2009) (citing *Schock v. Nash*, 732 A.2d 217, 232 (Del.1999) (quoting *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)).

[55] *Id.* (citing *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979)).

[56] *Kuroda*, 971 A.2d at 891 (internal citations omitted).

it is owed money pursuant to the terms of a contract with Defendant C&M, and that Defendant C&M has failed to pay it in violation of their contractual obligations. Plaintiff also contends that Defendant Mid-Atlantic has violated its contract with Plaintiff by seeking and receiving compensation directly from Defendant C&M. In counts II and IV of the Complaint, Plaintiff alleges that Defendants were unjustly enriched by (1) "utiliz[ing] the materials provided and paid for by [Plaintiff]"[57] and (2) "compensated by [Defendant C&M] in lieu of [Plaintiff] with monies that were due and owing [Plaintiff]."[58] It is thus clear from the face of the complaint, despite Plaintiff's assertions to the contrary, that Plaintiff's relationship with Defendants is governed by an express contract.

D. Plaintiff's Claim for Tortious Interference Can Survive

47. Finally, Plaintiff's claim of tortious interference against Defendant Mid-Atlantic can survive. In order to sustain a claim for tortious interference with a contract, there must be (1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury.[59] In order to recover, Plaintiff must show that Defendant Mid-Atlantic's interference with a contract was both intentional

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[57] Pl. Complaint at ¶ 28.

[58] *Id.* at ¶ 39.

[59] *Lyons Insurance Agency, Inc. v. Kirtley*, 2019 WL 1244605, at *3 (Del. Super. Mar. 18, 2019) (citing *Triton Const. Co., Inc. v. Eastern Shore Elec. Services, Inc.*, 2009 WL 1387115, at *17 (Del. Ch. 2009) (internal quotations omitted)).

and improper.[60]

48. In this case, because the Court finds that the arbitration clause is invalid, the Court will allow the tortious interference claim to continue because Plaintiff filed its Complaint within the statute of limitations.[61]

CONCLUSION

49. For the above mentioned reasons the Court GRANTS IN PART and DENIES IN PART, Defendants' motions. Specifically:

(1) Defendants' Motions to Dismiss are **DENIED** as to Plaintiff's Breach of Contract Claims against Defendants C&M and Mid-Atlantic and **DENIED** as to Plaintiff's Tortious Interference claim against Defendant Mid-Atlantic; and

(2) Defendant Mid-Atlantic's Motion to Dismiss is **GRANTED** as it pertains to Plaintiff's claim of Unjust Enrichment.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[60] Restatement (Second) of Torts § 766.

[61] *See* Supra n.43.