IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAMES J. GORY MECHANICAL CONTRACTING, INC,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 6999-VCG*
BPG RESIDENTIAL PARTNERS V, LLC, and THE BUCCINI/POLLIN GROUP, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: December 20, 2011
Date Decided: December 30, 2011

Peter B. Ladig, David J. Soldo, and Corinne E. Amato, of MORRIS JAMES LLP, Wilmington, Delaware; OF COUNSEL: Bruce L. Philips and Patrick A. Costello, of VENZIE, PHILLIPS & WARSHAWER, P.C., Philadelphia, PA, Attorneys for Plaintiff.

Jeffrey M. Weiner, Wilmington, Delaware, Attorney for Defendant.

GLASSCOCK, Vice Chancellor

I. BACKGROUND

Before me is the Defendants' Motion for Judgment on the Pleadings. Because no answer has been filed, the Motion is premature. In the interest of judicial economy, I will consider the Motion as seeking dismissal under Court of Chancery Rule 12(b)(6).[1] Consistent with the well-known standard for such a motion, I accept as true all well-pled factual allegations in the Plaintiff's Verified Complaint, and I draw all reasonable inferences in the Plaintiff's favor.[2] The Plaintiff, James J. Gory Mechanical Contracting, Inc., a construction company incorporated in Pennsylvania, has sued for breach of contract, alleging it is owed $290,444.38, plus interest, costs, and attorneys' fees, on a construction contract with Defendant BPG Residential Partners V, LLC ("BPG RPV" or the "Defendant"),[3] for which the Plaintiff purportedly has fully performed.

The Defendant hired Gilbane Building Company ("Gilbane") to serve

---

[1] Because the Defendants' Motion does not rely on evidence outside of the exhibits attached to the Complaint and the standard of review for a motion for judgment on the pleadings under Rule 12(c) requires the court to view the facts pleaded and the reasonable inferences from those facts in the light most favorable to the non-moving party, the slight difference between the standard of review on a Rule 12(b)(6) motion and a Rule 12(c) motion is immaterial here.

[2] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011).

[3] The Plaintiff also seeks to hold Defendant The Buccini/Pollin Group, Inc. ("BPG Inc."), the parent company of BPG RPV, liable for the contract by piercing the corporate veil. The Defendants' Motion seeks dismissal on other grounds, and thus I do not need to address this issue here. For clarity, I refer to BPG RPV as the "Defendant," and I do not in this Memorandum Opinion address BPG Inc.'s potential liability as the "alter ego" of BPG RPV.

as construction manager for the construction of a condominium tower at the project site the Defendant owns known as Christina Landing Condo Tower (also known as the "River Lofts" project) in Wilmington, Delaware. GBC Christina Landing, LLC ("GBC"), is an affiliate or subsidiary of Gilbane created to oversee locally the construction of the condominiums, and it is the company with which the Plaintiff originally contracted.

Per another agreement not at issue here, GBC, upon the receipt of invoices from the Plaintiff, was to submit payment applications to the Defendant, who owns the project site. The Defendant would then pay GBC, who would then pay the Plaintiff. The Plaintiff last furnished labor and materials to the construction project on May 23, 2008, and, based on the Plaintiff's reasonable assumptions regarding the payment agreement between the Defendant and GBC, payment on the Plaintiff's final invoices was due on or about July 1, 2008. Although GBC made several payments to the Plaintiff toward the original contract price of $3,769,903.00, it failed to make payments on the Plaintiff's final invoices, allegedly because the Defendant failed to make payments on the applications submitted by GBC regarding the work done by the Plaintiff.

The Defendant and GBC then, with the Plaintiff's written consent, entered into an Assignment and Assumption Agreement, whereby the

Defendant agreed to perform GBC's payment obligations in full. The Defendant has nonetheless failed to make full payment of the remaining balance of the contract, $290,444.38.

In its Motion, the Defendant has not disputed the amount owed. Rather, the Defendant contends that the parties entered into a superseding agreement that made the Defendant's payment obligation contingent on the sale of certain condominiums. The Defendant asserts that in the process of negotiating a payment schedule for the amount it owes, it entered into a legally-binding contract with the Plaintiff which satisfied the requirements for contract formation and superseded the previous agreement between the parties upon which the Plaintiff predicates liability. This alleged agreement began with a memorandum sent on November 29, 2010, from the Defendant to the Plaintiff (the "Payment Memo"):

> Jim, pursuant to our conversation this month, please find below the payment scheduled for [BPG RPV] and your firm.
>
> March 15, 2011 – $25,000.00
> Commencing April 1, 2011 until April 1, 2012 – $2,000.00 per month
> October 15, 2011 – $25,000.00
> Final Payment – April 15, 2012
>
> *Maintaining the above payment schedule will require [BPG RPV] to sell a minimum number of condominiums over the*

above payment period.[4]

The last clause, argues the Defendant, conditions the Defendant's payment obligation on its selling an unspecified "minimum number of condominiums." The Plaintiff, after contacting the Defendant to ask if the payments could begin earlier and receiving a negative response, then wrote "Accepted" on the Payment Memo, signed it, and returned it by email to the Defendant.

The issue on the Motion before me is whether the Payment Memo constituted a valid contract and thus superseded any previous payment obligations owed to the Plaintiff by the Defendant. The Defendant contends that the Plaintiff, in writing "Accepted" on and signing the Payment Memo, accepted the Defendant's offer and that a valid contract was therefore formed that superseded the previous contract. The Plaintiff argues that the Payment Memo was not a valid contract because, under the pre-existing duty rule, the Defendant provided no consideration for the Plaintiff's forbearance and because, even if a contract was created, the "minimum number of condominiums" term is not sufficiently specific and therefore is unenforceable. For purposes of this Motion to Dismiss, I find the Payment Memo unenforceable.

[4] Compl. Ex. 14 (emphasis added).

II. STANDARD OF REVIEW

In considering a defendant's motion to dismiss, this Court accepts as true all well-pled factual allegations in the plaintiff's complaint and draws in the plaintiff's favor all reasonable inferences to be made from those alleged facts.[5] Based on the alleged facts, if the plaintiff could recover under any reasonably conceivable set of circumstances, the defendant's motion will be denied.[6]

III. ANALYSIS

It is the blackest of black-letter law that an enforceable contract requires an offer, acceptance, and consideration.[7] Here, the Plaintiff challenges the Defendant's alleged contract only for lack of consideration. Consideration is "a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request."[8] A commitment to honor a pre-existing obligation works neither benefit nor detriment; therefore, "[a] promise to fulfill a pre-existing duty, such as a promise to pay a debt owed, cannot support a binding contract" because consideration for the promise is lacking.[9]

---

[5] *Cent. Mortgage*, 27 A.3d at 536.
[6] *Id.*
[7] *Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings Inc.*, 2010 WL 5276991, at *6 (Del. Ch. Dec. 17, 2010).
[8] *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1232 (Del. Ch. 2000).
[9] *First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co.*, 2005 WL 2173993, at *9

The application of the pre-existing duty rule here is clear. Assuming the Plaintiff's allegations to be true, as I must on a motion to dismiss, the Plaintiff has fully performed its contractual obligation, and the Defendant therefore owes the balance of the contract price, $290,444.38. The Defendant cannot use its pre-existing duty to pay the Plaintiff for its work as consideration for the Plaintiff's agreement to accept installment payments (contingent, in the Defendant's view, on a minimum number of condominium sales) rather than seek full and immediate payment, which payment is long past due.

The Defendant alleges that the pre-existing duty rule does not apply because sufficient consideration was furnished to sustain the Payment Memo as a valid contract. The Defendant points out that the Plaintiff had a contractual claim against BPG RPV upon which it could have filed a civil action to collect the amount owed. The Defendant argues that in electing to forgo this civil action and instead negotiating a payment schedule contingent on the sale of a minimum number of condominiums, the Plaintiff gave up a legal right to sue, which is sufficient new consideration to render the Payment Memo an enforceable contract.

(Del. Ch. Sept. 6, 2005); *see also Continental Ins. Co.*, 750 A.2d at 1232 ("A party cannot rely on a pre-existing duty as his legal detriment in an attempt to formulate a contract.").

This argument is focused on the wrong party. What is the consideration given by the Defendant in return for the Plaintiff's promise? The Plaintiff agreed to accept installment payments over a one-year period for an amount that was already due in full, and the Plaintiff also implicitly promised not to sue the Defendant provided that the Defendant kept up on the installment payments. The Defendant, on the other hand, *promised only to pay a debt which it already had a legal obligation to pay*. To be clear, that is a pre-existing duty and is not sufficient consideration to support a contract under Delaware law. The Payment Memo is therefore not an enforceable contract, and the Defendant's Motion fails on that ground.

The Defendant also argues that the Plaintiff, by signing the Payment Memo, expressly waived its right to demand any funds owed under the original contract and that such a waiver does not require consideration. According to the Defendant, the Plaintiff knew or should have known it had a right to demand payment of a balance owed under the original agreement, and by signing the agreement it expressly waived that right in favor of the terms of the Payment Memo. "[W]aivers of contractual rights are not lightly found. Under Delaware law, a waiver is 'the voluntary and intentional relinquishment of a known right . . . and implies knowledge of all material

facts, and intent to waive.'"[10] A waiver "must be unequivocal."[11] Simply put, the language of the Payment Memo is an insufficiently unequivocal expression by the Plaintiff of its intent to waive its right to payment to support the dismissal of this action.

The Plaintiff argues, in the alternative, that even assuming sufficient consideration were present to support the enforceability of the Payment Memo as a contract, that document is otherwise unenforceable as interpreted by the Defendant. The Defendant argues that the language providing that its *ability* to pay is contingent upon the sale of a "minimum" number of condominium units is in fact a contingency clause which releases the Defendant from payment obligations *unless* it sells a "minimum" number of units. Assuming that the agreement contemplates only contingent payment obligations, the Plaintiff argues, that contingency provision is unenforceable. To be enforceable, a contract must contain "terms . . . [that] are sufficiently definite" to demonstrate the intent of the parties.[12]

Since I have found that the Payment Memo fails as a contract for lack of consideration, I need not decide this issue here. It is apparent, however,

---

[10] *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2010 WL 2368637, at *4 (Del. Ch. June 14, 2010) (quoting *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982)).
[11] *Wimbledon*, 2010 WL 2368637, at *4 (quoting *DiRienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944, at *4 (Del. Ch. Dec. 8, 2009)).
[12] *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

that even if consideration were present, the purported contingency in the Payment Memo would be unenforceable as written. The term in question here—the "minimum number of condominium[ ]" sales necessary to trigger a payment obligation—lacks the requisite specificity because it would be impossible to determine when, if ever, the Defendant's payment obligation would be triggered. Does "minimum" mean one condominium or ten? Is it a fluid amount? Or does it mean whatever the Defendant decides it means?[13] The contingency is material to the obligations of the parties under the alleged contract, and without more specificity, it is unenforceable.[14] At best, the contingency term is ambiguous, precluding dismissal.[15]

Based upon the allegations of the Complaint, I find that the Payment Memo was not a valid contract as a matter of law. The Defendant thus is not entitled to a dismissal or judgment on the pleadings. For the reasons above, the Defendants' Motion is DENIED.

IT IS SO ORDERED.

---

[13] The Defendants' motion papers suggest that between one and three units have been sold during the relevant period, a number insufficient to trigger its payment obligation, according to the Defendants.

[14] *See id.*

[15] I need not determine whether the contingency is severable from the remaining terms. The Defendant has already missed a number of its proposed installment payment deadlines, and thus the outcome is the same whether the Payment Memo is enforceable without the contingency or void in its entirety.