Unjust Enrichment Claims- A "Hail Mary" Play

By Henry L. Goldberg, Managing Partner & Subcontractors Trade Association Legal Counsel

Far too often, subcontractors prematurely commence work on a project without first obtaining an executed agreement. While this occurs more often than one not familiar with the informalities of the construction industry would assume, in hindsight it always is ill-advised. There is a legal strategy for obtaining what would be considered the "value" of your work.

An unpaid party without a written contract may commence an action alleging "unjust enrichment" of the defendant. This is a "quasi-contract" theory of recovery. It is an obligation the law creates in the absence of a written or oral agreement. The theory of unjust enrichment is derived from equitable principles to prevent injustice. The claim rests upon the notion that a party should not be allowed to enrich itself unjustly at the expense of another. Sound good? Let's see how it works in application.

The inquiry in an action for unjust enrichment is whether it is against "good conscience" to permit the defendant to retain what is sought to be recovered. A plaintiff must show that: (1) defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against "equity and good conscience" to permit the defendant to retain what is sought to be recovered.

In a recent case before a New York trial court, a plaintiff subcontractor commenced a lawsuit against defendants, general contractor and designer, for painting services performed. No contract was ever entered into between the parties. Instead, plaintiff alleged that it withdrew its claim for compensation because the general contractor promised that it would hire the subcontractor to perform work on a future project that was being organized by the defendant designer. Plaintiff was never hired for this future project.

Without a contractual claim for relief to rely upon, plaintiff sought quasi-contractual relief for "unjust enrichment," claiming that, in the interest of equity and good conscience, the defendants should be obligated to compensate plaintiff for the value of its work because defendants did not hire plaintiff as a subcontractor on the "future project" as promised. Therefore, the subcontractor alleged, there was a failure of consideration for the waiver of the subcontractor's charges for its painting work.

The general contractor moved the court to dismiss the action on the ground that the complaint failed to even state a cause of action. The contractor argued that there was no contract, written or oral, and all fees were waived in any event. The court denied the motion to dismiss and held that the subcontractor's claim against the general contractor sufficiently established a cause of action or claim for unjust enrichment.

Specifically, the court found that the plaintiff adequately alleged that: (a) the designer was enriched by having received a finished project, and the general contractor was further "enriched" by not having to send one of its own workers to paint or hire another subcontractor to do the work plaintiff performed; (b) plaintiff contributed its time and effort by performing services on the project; and (c) defendant failed to hire plaintiff as the subcontractor on the future project, in lieu of compensation, as promised. Therefore, plaintiff's unjust enrichment claim survived the motion to dismiss and the litigation continued. If the subcontractor can prove its damages at trial, it will be able to receive the "value" of its work performed for the benefit of the defendants.

Contractors and subcontractors must be cautioned, however, that it is not easy to win an unjust enrichment claim. Any and all work should await a signed contract. In order to recover under the theory of unjust enrichment, it is not enough to show that the defendant merely consented to the improvements or received a benefit from the plaintiff's activities. Plaintiff must show, with particularity, that performance was rendered for the defendant.

In another recent New York case, a contractor brought an action against the owner of a property for unjust enrichment with a very different result. This defendant was neither a signatory to a contract for the work performed, nor assumed an obligation to pay the plaintiff. At most, the defendant was found to be an incidental beneficiary of plaintiff's work. The court held that the mere fact that the defendant received some benefit from the plaintiff's activities is insufficient to recover on a theory of unjust enrichment. As in the case above, defendant moved the court to dismiss the plaintiff's cause of action for "unjust enrichment." In this situation, however, the court granted defendant's motion and the case was dismissed.

G&C Commentary

There are times when a subcontractor performs work without a contract being in place. (Note an unsigned written contract, as distinguished from no contract, presents other possibilities for a claimant, but that is for another article.) When an owner or general contractor receives the benefit of "non-contractual" work performed by a contractor or subcontractor and refuses to pay for it, the contractor or subcontractor might be able to successfully pursue a lawsuit for "unjust enrichment." Success is certainly not assured. However, as an alternative to a breach of contract action, this equitable theory could be the "Hail Mary" play which saves the game for a contractor or subcontractor unfortunate (or foolish) enough to have proceeded without a written contract being firmly in place.

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