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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4302-09T4

P.E.M. CONSTRUCTION AND DEVELOPMENT CO., INC.,

Plaintiff-Appellant,

vs.

ENCAP GOLF HOLDINGS, LLC; CHEROKEE NORTHEAST, LLC; MEADOWLANDS DEVELOPMENT VENTURE I; and THE TOWNSHIP OF LYNDHURST,

Defendants,

and

NEW JERSEY MEADOWLANDS COMMISSION and NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Respondents.

Submitted: March 23, 2011 - Decided: August 30, 2011

Before Judges Cuff, Fisher, and Fasciale.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5392-07.

Shiriak & Timins, attorneys for appellant (Ben D. Shiriak, of counsel and on the briefs).

Lowenstein Sandler PC, attorneys for respondent New Jersey Meadowlands Commission

(Steven E. Brawer and Jonathan T. Guldin, of counsel and on the brief).

Paula T. Dow, Attorney General, attorney for respondent New Jersey Department of Environmental Protection (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mark Collier, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff P.E.M. Construction and Development Co., Inc. (PEM) worked on two projects in the Hackensack Meadowlands district and sought payment from an escrow account established by EnCap Golf Holdings, LLC (EnCap) and held by defendant New Jersey Meadowlands Commission (the Commission). This appeal presents two issues: whether the Bond Act, N.J.S.A. 2A:44-143 to -147, applied to the two projects undertaken by PEM, and whether the Commission was an undisclosed principal of EnCap, thereby allowing PEM to be paid from the EnCap escrow account. PEM appeals from an order granting summary judgment to defendants the Commission and the New Jersey Department of Environmental Protection (DEP).

PEM argues that the existence of genuine issues of material facts precluded entry of summary judgment. PEM also contends that the Commission was an undisclosed principal and had a statutory duty to protect it, and that it is entitled to payment from the escrow account. We hold that PEM is not able to draw

from the EnCap escrow account, and the Bond Act does not apply to the work performed by PEM. We, therefore, affirm.

The Commission was created to plan and implement the cohesive remediation and development of 21,000 acres of land known as the Meadowlands located in several contiguous municipalities in northern New Jersey. N.J.S.A. 13:17-6. In 1998, the Commission began the process of selecting developers for a project described as "one of the largest remediation, reclamation and development efforts ever undertaken in the State of New Jersey" (the Project). EnCap responded to the Commission's request, representing that it had "extensive experience and expertise in landfill-closure-to-golf-course development and that [it] had the private financial wherewithal to complete the project without public financing." Part of this private financial backing was attributed to investor Louis Gonda, "who was touted as one of the 400 richest men in the world." Investor William Gauger owned a 17.5% interest in EnCap.

EnCap and the Commission entered into a letter of intent on April 14, 2000, designating EnCap as the developer of the Project. On October 26, 2000, EnCap and the Commission entered into a "Landfill Closure and Development Agreement." This agreement provided for "replacement baseball fields and related

facilities (the [Replacement Recreational Facilities]) substantially the same or better in size, quality, capacity and general suitability as the municipal baseball fields located . . . in Lyndhurst . . . ." At that time, the Township of Lyndhurst (Lyndhurst) owned the property on which the ball fields were located.

On February 28, 2002, the Commission and Lyndhurst entered into an "Agreement for Exchange of Real Property." In this agreement, Lyndhurst agreed to exchange the ball field property for a 16.8 acre property the Commission owned (the Replacement Property). In partial consideration for the exchange, the Commission would "cause EnCap (at EnCap's sole cost and expense) to construct (or cause to be constructed) the Replacement Recreational Facilities . . . on the Replacement Property." The Replacement Recreational Facilities were to "consist of two (2) little league fields, a large baseball field, and a combination football field/soccer field." Lyndhurst was to convey the ball field property to the Commission upon execution of the agreement, and the Commission was to convey the Replacement Property upon completion of the Replacement Recreational Facilities.

On March 13, 2002, the Commission and EnCap entered into an Eminent Domain/Accelerated Acquisition Agreement. The

Commission and EnCap also entered into an "Amended and Restated Landfill Closure and Development Agreement" on March 10, 2003. This agreement stated that EnCap would construct the Replacement Recreation Facilities on the Replacement Property that would "replace certain municipal Recreational Facilities located on [the ball field property] in Lyndhurst . . . which will be rendered unusable by the Phase 1 Redevelopment Project." The amended agreement also required EnCap to obtain a performance security. On May 3, 2004, American Home Assurance Company issued Bond #ESD 731 5040 for this purpose. The bond served to secure EnCap's development obligations with respect to the Replacement Recreational Facilities.

On September 20, 2005, EnCap and the Commission entered into a "Second Amended and Restated Landfill Closure and Development Agreement," which also noted the continued inclusion of the Replacement Recreational Facilities "for use by the Township of Lyndhurst to replace the Existing Recreational Facilities, which will be rendered unusable by Phase 1 Redevelopment Project."

The Commission and Lyndhurst subsequently entered into an "Amended and Restated Agreement for Exchange of Real Property" on May 31, 2006, which set forth "additional work to be performed." Part of this additional work was the renovation of

the Prevost Building "an abandoned bus service station that Lyndhurst sought to convert into a recreational center, including classrooms and a gymnasium" located on the Replacement Property. The amended agreement stated: "While not required by the Original Agreement, the Township and EnCap have negotiated in good faith with adequate consideration and have agreed that, in addition to the [Replacement Recreational Facilities], EnCap will renovate and redesign" the Prevost Building. As Lyndhurst wished to complete this renovation by September 1, 2006, the Commission agreed to convey the Replacement Property to Lyndhurst immediately rather than after the completion of the Replacement Recreational Facilities.

EnCap was required to apply for all necessary zoning and construction permits from the Commission, and was to do so at its own risk. Without the knowledge of the Commission, on May 5, 2005, ESA Architects, on behalf of EnCap and Cherokee Northeast LLC (Cherokee),[1] issued instructions for bids regarding the renovation of the Prevost Building. On June 3, 2005, PEM submitted a bid for the renovation to Cherokee. On March 28, 2006, PEM and EnCap entered into a contract to renovate the Prevost Building for a sum of $1,417,500. PEM entered into

[1] Cherokee is a subdivision of Cherokee Investment Partners, which owned a private equity fund named Cherokee Investment Partners Fund II. This private equity fund owned 51% of EnCap.

several subcontracts for the renovation of the Prevost Building. The Commission had no knowledge of or involvement in these negotiations.

The Commission has the statutory duty to review proposed plans for the alteration of any structure in the Meadowlands. N.J.S.A. 13:17-12(a). Pursuant to its contract, PEM was required to secure all necessary work permits, which it submitted to EnCap and Cherokee. The Commission rejected some applications because they failed to identify Lyndhurst as the property owner. Once the Commission received the revised applications identifying Lyndhurst as the owner of the Replacement Property along with Lyndhurst's approval of the applications, it informed a Cherokee representative that it would "issue the permit as soon as [it] ha[s] determined that the application is in compliance with the provisions of all applicable regulations."

On June 9, 2006, the Commission issued Conditional Zoning Certificate CZC-03-681 to EnCap, identifying Lyndhurst as owner. This certificate noted that it was "NOT AN APPROVAL TO START CONSTRUCTION." On June 13, 2006, Lyndhurst issued a permit to PEM, identifying Lyndhurst as owner in fee, and authorizing the start of the renovation. Renovation of the physical structure commenced after receipt of the permit. As a result of several

change orders during the course of the renovation, the contract price increased to $1,839,784. EnCap paid PEM on a regular basis from June 2006 until May 2007.

On August 9, 2006, EnCap and the Commission entered into a "Third Amended and Restated Landfill Closure and Development Agreement" (the Third Amended Agreement). It contains the same provisions relevant to this appeal as the prior agreements, including a provision that nothing contained within it "shall be deemed or construed by the Parties hereto or by any third party to create the relationship of principal and agent, partnership, joint venture or any association between the EnCap and [the Commission], their relationship being solely as contracting parties under this Third Amended Agreement."

In 2007, EnCap experienced a "liquidity crisis." Ultimately, the Commission terminated the Third Amended Agreement effective May 9, 2008. At the time, however, the Commission agreed to suspend the exercise of remedies under the Third Amended Agreement in exchange for the creation of a $5 million escrow account (the Escrow Account). The parties executed the first escrow agreement on November 28, 2007. EnCap continued to make a good faith effort to perform under the Third Amended Agreement and cure its defaults, and in exchange for an additional $1 million deposit into the Escrow Account, the

Commission agreed to further suspend the exercise of its remedies until May 9, 2008, in an Amended and Restated Escrow Agreement. PEM was not a party to the Amended and Restated Escrow Agreement and was not involved in the negotiations of it.

The January 14, 2008 Amended and Restated Escrow Agreement provides that it is "only for the exclusive benefit of the parties hereto [the Commission and EnCap] and [DEP] and is not intended to benefit, or confer any rights (express or implie[d]) to, any third person, other than [DEP]." Further, the amended agreement "shall in no manner provide, or be deemed to provide, EnCap with access to, or any rights with respect to, the moneys on deposit in the Escrow Account." The Commission is the escrow agent, and is granted the discretion to "withhold disbursement of funds from the Escrow Account . . . until [it] receives evidence to [its] satisfaction . . . that such action is in accordance with the terms and conditions set forth herein."

Section 3.2 of the agreement states that funds "shall be disbursed from the Escrow Account solely for payment of Approved Costs." "Approved Costs" include "Approved Designated Recreational Costs" defined as "any Designated Recreational Costs that are the subject of a Completed Requisition and have been approved in writing by [DEP] and [Lyndhurst] . . . in the sole reasonable discretion of each of [DEP] and [Lyndhurst]."

These Designated Recreational Costs are further defined as "reasonable and necessary costs incurred" for work under the Conditional Zoning Certificate CZC-03-681 for the Replacement Recreational Facilities. DEP is the "sole party authorized to submit requisitions under this Escrow Agreement."

On March 4, 2008, PEM demanded payment of approximately $260,000 for the work performed on the Prevost Building from the Escrow Account. The Attorney General's office advised PEM that the escrow account was "established solely to provide funds to address necessary environmental work and work required to complete the [R]eplacement [R]ecreational [F]acilities for the Township of Lyndhurst. Work previously completed is not covered by the escrow agreement." The letter also advised PEM that the work it did on the Prevost Building "is not included within the definition of 'replacement' recreational facilities" in the third amended agreement.

As a result of EnCap's "liquidity crisis," it entered into an agreement with the Meadowlands Development Venture I (MDVI), an entity controlled by the Trump Organization, whereby MDVI assumed some of EnCap's responsibilities. PEM learned MDVI would be accepting bids for work on the Replacement Recreational Facilities and submitted a proposal for the work on March 11, 2008, to the Trump Organization.

On March 17, 2008, PEM executed a rider with MDVI under which PEM would construct dugouts and a concession stand for the Replacement Recreational Facilities for an additional $450,000. The rider noted an unpaid balance of $238,299.25 on the Prevost Building renovation, and that PEM would receive $50,000 upon execution to be applied to that balance. In addition, once PEM completed the "punch list," EnCap would pay it $26,000. Upon completion of the dugouts and concession stand, PEM would receive the balance of $188,299.25. The rider further specified that within three days of beginning work on the dugouts/concession stand, EnCap would pay PEM $25,000 for that work.

PEM received a check from MDVI for $50,000 on March 17, 2008, and a second check for $25,000 on April 10, 2008.[2] On April 16, 2008, PEM submitted its first payment application for the dugout/concession stand work: EnCap issued a $150,000 check to PEM for the work on April 30, 2008. On May 9, 2008, EnCap filed a bankruptcy petition and MDVI refused to perform its obligations under the rider.

During the course of EnCap's bankruptcy proceeding, PEM applied for payment of $75,000 (Payment Application 11), from a

[2] Plaintiff contends this was for the punch list, whereas the Commission contends this was for the commencement of work on the dugouts/concession stand.

payment application submitted to EnCap on May 8, 2008. The Bankruptcy Court entered an order on August 7, 2008, authorizing payment to PEM of $63,000 from funds held in the escrow account. The order also reflected PEM's acknowledgement that "the Escrow Account, which is in the possession and control of the Commission, is not property of the Debtor's bankruptcy estate."

PEM also submitted Payment Application 12 to EnCap on June 19, 2008, for $10,000 for work performed on the dugouts/concession stand during the pendency of EnCap's bankruptcy filing. Neither EnCap nor MDVI approved this work; the work was performed at the request of Lyndhurst's mayor to repair wind-related damage. When PEM ceased work, the dugouts were approximately 90% complete and the concession stand was approximately 60% complete.

PEM filed a complaint against EnCap, Cherokee, and Lyndhurst on July 20, 2007. PEM filed a Notice of Tort Claim on September 18, 2007, with the Commission. An order dated March 31, 2008, dismissed the complaint against EnCap.

PEM added MDVI, as an additional defendant in an amended complaint filed on July 29, 2008. PEM filed a second amended complaint on September 10, 2008, and added the Commission. The court entered a default judgment against MDVI on October 28, 2008.

The $67,000 default judgment entered against MDVI included $12,000 for the balance of Payment Application 11, $10,000 for Payment Application 12, and $45,000 in lost profits. PEM levied on the escrow account but Judge Toskos discharged the levy, because the bank account upon which PEM levied was not property of the judgment debtor, MDVI.

In June 2009, PEM's owner applied to DEP for approval of the $67,000. PEM and Lyndhurst entered into a settlement agreement on July 1, 2009. Lyndhurst, as part of its $10,000 settlement with PEM, approved the $12,000 unpaid portion of Payment Application 11 on March 3, 2010. The court granted summary judgment in favor of Cherokee and dismissed all counts against it alleged in the second amended complaint.

DEP appeared as a defendant in PEM's Fourth Amended Complaint. PEM's Fourth Amended Complaint contains three counts relevant to the summary judgment proceeding. The Eighth Count asserts a tort claim against the Commission. PEM alleged the Commission was "under a statutory duty to protect [PEM] against loss by requiring appropriate performance guarantees and bonds from EnCap and [Cherokee]." As the Commission failed to obtain such guarantees, PEM alleges the Commission breached its duty and is liable for the full amount of the unpaid contract balance. Furthermore, this count alleges the Commission "failed

to notify [PEM] of the change in title." As such, the Commission "deprived [PEM] of the opportunity to require [Lyndhurst] to obtain appropriate performance guarantees and bonds before doing work on the project, and before agreeing to perform the change orders requested by [Lyndhurst's] Mayor."

The Twelfth Count asserts a "Constructive Lien Against [the Commission]." Thus, PEM, "having duly obtained a default judgment and writ of execution against defendant MDVI, has sought to levy against a certain escrow account held by defendant [the Commission] for the benefit of contractors, subcontractors and materialmen performing work at the ball fields, including the completion of dugouts and a concession stand." PEM alleged, it is an intended beneficiary of the escrow account, therefore, it is entitled to the creation of a constructive trust. The Thirteenth Count demands injunctive relief compelling DEP to pay PEM $67,000 plus interest from the escrow account for the work it performed on the Replacement Recreational Facilities.

The Commission, DEP, and PEM filed cross-motions for summary judgment. In his opinion, Judge Toskos broke down the tort claim into two parts: the Prevost Building renovation and the dugouts/concession stand. Addressing the Prevost Building, the motion judge first rejected PEM's contention that the

Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 to -86, imposed a duty on the Commission to obtain a performance guarantee because this statute was enacted for the benefit of the Commission, not a contractor. Then, he determined that the Bond Act did not apply to the renovations undertaken at the Prevost Building because the work had to be "under contract at the expense of the State or agent contracting on behalf of the State." The judge found "the Prevost Building Renovation was negotiated between Lyndhurst and EnCap for the benefit of Lyndhurst." The court further rejected PEM's contention that there was a principal/agent relationship between the Commission and EnCap because the Commission "had no involvement in the Prevost Building Renovations other than its statutory duty to review the plans to ensure its compliance with [Commission] regulations and the master plan." Thus, Judge Toskos held that there was no duty owed to PEM.

Addressing the dugouts/concession stand project, the judge noted that PEM's Notice of Tort Claim only gave notice of the claim for the Prevost Building renovation, and thus, PEM was unable to assert such a claim for the dugouts/concession stand work. Nonetheless, he held that even if PEM could assert such a tort claim, it would fail because he did not find the Commission "to have owed or breached a duty to PEM." He explained that

although the Commission properly required a performance bond from EnCap, "the performance bond has no effect on PEM because it was for the purpose of protecting the [Commission] only; and did not provide PEM with any rights." Moreover, the Bond Act was inapplicable because pursuant to the agreement, there was no agency relationship between EnCap and the Commission, the work was to be done at EnCap's expense, and PEM contracted for the dugouts/concession stand work by means of a rider between it and MDVI, acting as an agent of EnCap, not the Commission. Thus, the court granted summary judgment in favor of the Commission and dismissed the Eighth Count of the complaint.

Judge Toskos turned next to the Twelfth Count. He determined that because PEM was not a party to the escrow agreement, he had to decide whether PEM was an intended third-party beneficiary of the agreement, thus entitling it to payment from the escrow account of money obtained by the default judgment against MDVI. The motion judge noted that the designation of third-party beneficiary is determined by the intention of the contracting parties. Because the escrow agreement "specifically states that there are no intended third party beneficiaries of the Es[c]row Account,[] it is obvious that the contracting parties did not intend PEM to be a third party beneficiary." As such, he concluded that PEM was not

entitled to a constructive lien, and granted summary judgment in favor of the Commission.

Finally, Judge Toskos addressed the claim alleging DEP "is liable for compensatory damages for not approving the $67,000 payment out of the Escrow Account." He noted that the only intended third-party beneficiary of the escrow agreement was DEP. Although DEP is authorized to enforce certain provisions of that contract, "it does not create any contractual obligations upon [DEP] that would be owed to PEM, a non-party to the Escrow Agreement." The motion judge emphasized that the only people allowed to bring a cause of action based upon the provisions of a contract are intended third-party beneficiaries, and PEM is not in that category. He concluded by acknowledging that PEM may have relied on the existence of the escrow agreement when it agreed to enter into the rider with MDVI, but this reliance was unilateral and misguided. He thus dismissed this count of the complaint.

On appeal, this court applies the same standard in reviewing orders for summary judgment. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). The facts should be viewed in the light most favorable to the non-moving party. Brill, supra, 142 N.J. at 523.

PEM sets forth five facts that should have led the motion judge to deny defendants' summary judgment motions: (1) When did the Commission first learn about PEM; (2) Was the Prevost Building part of the Redevelopment Project; (3) Who owned the Prevost Building on March 22, 2006; (4) Did the Commission benefit from the Prevost Building Renovation; and (5) Were the Commission and EnCap principal and agent. The Commission and DEP respond that the material facts are undisputed and issues derived from those facts may be resolved by applying relatively straightforward principles of law. We agree, and in doing so, confine our discussion to the only two issues that warrant

discussion in this opinion: whether an agency relationship existed between the Commission and EnCap, and whether the Bond Act applied to the work performed by PEM. Both are issues of law.

"An agency relationship is created 'when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010) (quoting Restatement (Third) of Agency § 1.01 (2006)). Thus, an important factor in an agency relationship is the extent to which the principal is "controlling and directing the acts of the agent." Sears Mortg. Corp. v. Rose, 134 N.J. 326, 337 (1993). However, "direct control of principal over agent is not absolutely necessary; a court must examine the totality of the circumstances to determine whether an agency relationship existed even though the principal did not have direct control over the agent." Id. at 338. The Supreme Court has noted that even where an agreement purports to set out that an agency relationship is not created, "in particular transactions involving third persons the law will look at their conduct and not to their intent or their words as between themselves but to

their factual relation." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 374 (1960).

Generally, "when a principal, by any such acts or conduct, knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances . . . ." Atl. Guar. & Title Ins. Co. v. McDevitt, 105 N.J. Eq. 570, 571-72 (Ch. 1930). However, equitable estoppel "is rarely invoked against a government entity, although it will be applied in 'appropriate circumstances unless the application would prejudice essential governmental functions.'" Sellers v. Bd. of Trs. of Police & Firemen's Ret. Sys., 399 N.J. Super. 51, 58 (App. Div. 2008) (quoting Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000)). That is, "[p]rinciples of equitable estoppel may be applied to a government entity to 'avoid wrong or injury ensuing from reasonable reliance upon such conduct.'" Ibid. (quoting Skulski v. Nolan, 68 N.J. 179, 198 (1975)). Nonetheless, equitable estoppel can be used against a governmental entity "only in very compelling circumstances, where the interests of justice, morality and common fairness dictate that course."

Maltese v. Twp. of N. Brunswick, 353 N.J. Super. 226, 244-45 (App. Div. 2002).

PEM attempts to transform a straightforward contractual agreement into an agency relationship. In fact, its agency argument is founded on a recitation of the different agreements between EnCap and the Commission. These agreements specifically detail the tasks to be undertaken by EnCap, but do not demonstrate that the Commission controlled EnCap as a principal would control an agent.

It is also undisputed that the Commission had no knowledge of the bidding process for the renovation work or the contract negotiations between EnCap and PEM. Furthermore, the Commission had no involvement or knowledge of the negotiation, preparation, or execution of change orders. No Commission representative attended meetings regarding the project or ever communicated with PEM regarding the project. Although the Commission had a statutory duty to review proposed plans for any development in the Meadowlands, this fact does not lead to the conclusion that the Commission controlled EnCap's actions.

The absence of an agency relationship between the Commission and EnCap precludes liability as an undisclosed principal. This also precludes PEM's agency by estoppel

argument. Atl. Guar. & Title Ins. Co., supra, 105 N.J. Eq. at 572.

PEM also argues that the Bond Act compelled the Commission to require EnCap to obtain a payment bond for PEM's protection. The Commission argues the Bond Act is inapplicable because the Prevost Building Renovation was not a public building constructed under contract, at the expense of the State.

N.J.S.A. 2A:44-143(a)(1) provides:

> When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any contracting unit, . . . the board, officer or agent contracting on behalf of the State, contracting unit or school district, shall require delivery of the payment and performance bond . . . . (emphasis added).

Terms of art used in statutes "shall be construed in accordance with [their] technical or special and accepted meaning." N.J.S.A. 1:1-1. Thus, the common law principles determining whether an agency relationship exists are controlling under the Bond Act. Having determined that an agency relationship did not exist between the Commission and Encap, the Bond Act does not apply. Moreover, it is undisputed that the renovation was to be done at EnCap's expense, not at the expense of the Commission.

PEM further argues that the Commission, as a governmental entity, has a duty to protect its subcontractors. PEM concludes that the Commission breached this duty by "failing to tell [PEM] that it was not the owner, by not requiring a bond from EnCap for the Prevost Building, and by not telling [PEM] that it would not be protected." The nature of the relationship among PEM, EnCap, and the Commission was clear. EnCap, not the Commission, was the contracting party. PEM was not a government sub-contractor.

PEM also argues it was an intended beneficiary of the escrow account and should be paid from it. The Commission disagrees.

In determining whether there is a third-party beneficiary to a contract, "[t]he contractual intent to recognize a right to performance in the third person is the key. If that intent does not exist, then the third person is only an incidental beneficiary, having no contractual standing." Broadway Maint. Corp. v. Rutgers, State Univ., 90 N.J. 253, 259 (1982). Moreover, "[t]he parties of course may expressly negate any legally enforceable right in a third party. Likewise they may expressly provide for that right." Id. at 260.

The Amended and Restated Escrow Agreement here is clear. The only intended third-party beneficiary is DEP. The agreement

states that it is "only for the exclusive benefit of the parties hereto [the Commission and EnCap] and [DEP] and is not intended to benefit, or confer any rights (express or implie[d]) to, any third person, other than [DEP]."

Moreover, even if PEM had any right to enforce the terms of the agreement, it would not be entitled to the funds. Indeed, even PEM points out in its brief:

> An escrow agreement imports a legal obligation on the part of the depositary to retain the money or documents until the performance of a condition or the happening of an event, at which time the money or documents are to be delivered in accordance with the terms of the agreement.
>
> [Colegrove v. Behrle, 63 N.J. Super. 356, 365 (App. Div. 1960).]

Thus, the legal obligation to disburse payment only arises upon "the performance of a condition or the happening of an event . . . ." Ibid.

Here, the $67,000 payment that PEM sought from the Escrow Account is not eligible for payment from the account because the plain terms and conditions of the Amended and Restated Escrow Agreement were not satisfied. Judge Toskos also found that PEM had not complied with Section 3.2 of this escrow agreement. The judge explained: "For the $12,000 and $10,000 portions of the $67,000 claim, PEM did not receive the necessary approvals from Lyndhurst. For the remaining $45,000 of the $67,000 claim

sought for 'lost profits,' this remedy is not within the scope of allowable costs recoverable under the Escrow Agreement."

Section 3.2 of the Amended and Restated Escrow Agreement states that only approved costs are to be disbursed from the account, including "any Designated Recreational Costs that are the subject of a Completed Requisition and have been approved in writing by [DEP] and [Lyndhurst] . . . in the sole reasonable discretion of each of [DEP] and [Lyndhurst]." These Designated Recreational Costs are further defined as "reasonable and necessary costs incurred" for work under the Conditional Zoning Certificate CZC-03-681 for the Replacement Recreational Facilities.

There is no evidence that a Lyndhurst official approved the $10,000 or $45,000 payment requests. Furthermore, the escrow agreement does not provide for the payment of lost profits because it is not a Designated Recreational Cost. Finally, as for the $12,000 claim that Lyndhurst approved via its settlement with PEM, Lyndhurst did not sign off on this claim at the time the requisition was submitted. Moreover, Lyndhurst had no authority or right to utilize the escrow account to settle the claims between PEM and Lyndhurst.

In the alternative, PEM contends an equitable lien or constructive trust should be imposed on the escrow account. The

Commission responds that the relief sought is a remedy but PEM has not demonstrated it is entitled to relief. Generally, courts "employ a two-prong test when determining whether a constructive trust is warranted in a given case." Flanigan v. Munson, 175 N.J. 597, 608 (2003). In the first instance, "a court must find that a party has committed 'a wrongful act.'" Ibid. (quoting D'Ippolito v. Castoro, 51 N.J. 584, 589 (1968)). The act does not need to be fraudulent in order for the court to impose a constructive trust. Ibid. Secondly, "the wrongful act must result in a transfer or diversion of property that unjustly enriches the recipient." Ibid. Similarly, an equitable lien is a remedy that can be imposed where there has been unjust enrichment. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 548 (1994).

A constructive trust and an equitable lien should only be allowed where a plaintiff can show it is entitled to a remedy. Here, PEM has not shown such an entitlement.

Finally, PEM argues that the trial judge ignored the requirement of N.J.S.A. 2A:17-29.[3] The trial judge discharged the levy in an order dated June 26, 2009. PEM, however, has advanced an argument to an order from which it has not appealed.

[3] This statute provides that a jury trial is required when someone other than the execution defendant makes a claim to property following a levy.

Throughout its notice of appeal, case information statement, and all amendments thereto, PEM stated that it was only appealing the April 9, 2010 summary judgment motions. The June 26, 2009 order is never mentioned.

Rule 2:5-1(f)(3)(A) provides that the Notice of Appeal "shall designate the judgment, decision, action or rule, or part thereof appealed from . . . ." (emphasis added). The Comments to this Rule note that "[w]hile the rule does not in terms so provide, it is clear that it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review." Pressler & Verniero, Current N.J. Court Rules, comment 6.1 on R. 2:5-1 (2011). Indeed, this court has stated: "On appeal, plaintiffs did not indicate in either their notice of appeal or in their amended notice of appeal that they were appealing from the order of March 4, 1999, that denied their cross-motion. . . . This issue is not properly before us for review." Campagna v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div.), certif. denied, 168 N.J. 294 (2001). The June 26, 2009 order is not subject to this appeal.

Affirmed.