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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1965-15T1

D&P CONSTRUCTION, INC.,

Plaintiff-Appellant,

v.

PHILLIPSBURG MALL, LLC,

Defendant-Respondent.

Submitted February 14, 2017 – Decided March 7, 2017

Before Judges Koblitz and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Warren County, Docket No. L-336-
14.

Benbrook & Benbrook, LLC, attorneys for
appellant (Allison T. Madden, of counsel;
Kevin P. Benbrook, on the brief).

Kaplin Stewart Meloff Reiter & Stein, PC,
attorneys for respondent (Joshua C. Quinter
and Karin Corbett, on the brief).

PER CURIAM

Plaintiff, D&P Construction, Inc., a snowplow contractor,
appeals from the Law Division's orders granting summary judgment
in favor of defendant, Phillipsburg Mall, LLC, and dismissing

plaintiff's complaint with prejudice.¹ Plaintiff performed snow-plowing services on defendant's property pursuant to a written agreement with defendant's maintenance contractor. When the maintenance contractor failed to pay its invoices, plaintiff filed suit against defendant only, alleging breach of contract and unjust enrichment. Judge John H. Pursel rejected plaintiff's contentions as a matter of law, finding no privity of contract to support a breach of contract claim and no reasonable "expect[ation of] remuneration from defendant" to support an unjust enrichment claim.

Plaintiff argues on appeal that the motion judge erred in granting summary judgment on the breach of contract claim by refusing to consider properly certified facts in its verified

¹ Plaintiff's notice of appeal states it is appealing only the December 1, 2015 order that dismissed its claim for unjust enrichment. Its case information statement alludes to the court's October 23 order, denying plaintiff's motion for reconsideration of the court's August 25 order, which granted defendant summary judgment on plaintiff's breach of contract claim. Plaintiff's appellate brief asks this court to review the August 25 order in addition to the December 1 order. Defendant objects. We could reject plaintiff's argument on the basis the October and August orders were not identified in the notice of appeal. See, e.g., Campagna ex rel. Greco v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div.) (refusing to consider order not listed in notice of appeal), certif. denied, 168 N.J. 294 (2001); Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div.) (issue raised in brief but not designated in notice of appeal not properly before court), aff'd o.b., 138 N.J. 41 (1994). We choose, however, to consider both orders for the purpose of completeness.

complaint that were sufficient to support liability on a theory of agency. Plaintiff also asserts the trial court erred when it granted summary judgment on its unjust enrichment claim by adding an element of "expected remuneration" into its analysis of that claim. We disagree with both contentions and affirm.

The material facts were generally undisputed, and when viewed in the light most favorable to plaintiff, can be summarized as follows. On December 10, 2013, Michael Fonesca, one of plaintiff's "partners," was approached by defendant's representatives, Adam Smith and, later, Mark Snediker, after plowing snow in a parking lot near defendant's property. Smith and Snediker requested immediate assistance in removing snow at defendant's property across the street. Fonesca agreed and arranged for plaintiff's snowplows to clear the snow as requested.

Thereafter, another principal of plaintiff, Michael Mancino, had an onsite meeting with Snediker to discuss future snow-removal services for defendant's premises for the 2013-2014 winter. Bill Mende, a representative of defendant's maintenance contractor, Alkyha Defense and Logistics Inc. (Alkyha), also attended the meeting. Snediker explained to Mancino that Alkyha was defendant's contractor responsible for snow removal services at defendant's properties. After the meeting, plaintiff and Alkyha entered into a written contract that required plaintiff to provide snow removal

services at defendant's property and bill Alkyha, who was solely responsible for payment. The agreement specified that plaintiff was prohibited from seeking payment from defendant, or even contacting defendant about any "billing dispute."

Plaintiff provided snow removal services pursuant to the contract at defendant's premises on sixteen occasions, and submitted invoices to Alkyha totaling \$149,502.50. Alkyha never paid the amount owed or disputed the invoices or its obligation to pay the outstanding amounts. After Alkyha's nonpayment, plaintiff terminated the contract with Alkyha and sent all the invoices to defendant, demanding payment for services rendered on its property. Defendant did not reply to plaintiff's demand.

Plaintiff filed a complaint against defendant only, asserting claims for breach of contract and unjust enrichment.² In July 2015, defendant moved for partial summary judgment with respect to plaintiff's breach of contract claim, asserting that admissions in plaintiff's pleadings acknowledged there was no contractual privity between the parties. Plaintiff opposed the motion, relying on the contents of its verified complaint and arguing that

² Danielle Mancino, who stated she was an "Officer and Owner of . . . Plaintiff," verified the allegations of the complaint. Ms. Mancino did not attend or participate in any of the meetings between plaintiff, Alkyha, and defendant, as alleged in the complaint.

defendant held Alkyha out as its agent and Alkyha acted with apparent authority to bind defendant to the contract between plaintiff and Alkyha. Defendant responded by contending that an agent cannot act with apparent authority where there is a contract "between the contractor and the subcontractor[,] and the relationship between the owner and the contractor is clearly defined by a separate contract."

Judge Pursel rejected plaintiff's argument and entered an order on August 25, 2015, granting defendant's motion for partial summary judgment. In his accompanying written statement of reasons, the judge explained, "It is undisputed that no contract exists between the parties" and "[p]laintiff has furnished no probative evidence of an agency relationship between the defendant and Alkyha that would give rise to liability in contract." Judge Pursel rejected plaintiff's reliance upon its verified complaint as to what the parties represented to each other at their meetings because it was verified by Danielle Mancino "who [was] not alleged to have been a party to the dealings between plaintiff and defendant." The judge concluded, "no genuine issues of material fact remain" because "[p]laintiff . . . failed to present any probative evidence of the alleged dealings between itself and defendant."

Plaintiff filed a motion for reconsideration arguing, "Defendant held Alkyha out as its agent and is responsible for the contractual commitments it made to" plaintiff and that the facts alleged in its verified complaint have been unopposed by defendant. Defendant opposed this motion. On October 23, 2015, Judge Pursel denied plaintiff's motion for reconsideration. In his written statement of reasons, the judge acknowledged that "[t]he presence or absence of a contractual relationship is not in itself indicative of agency." The judge re-asserted that Danielle Mancino could not provide any evidence because "she is not alleged to have been a party to dealings between Plaintiff and Defendant" and, therefore, she could not provide evidence of the alleged agency relationship. He explained, "Plaintiff offer[ed] no new information or evidence that was not available to the [c]ourt at the time it made its decision." The judge concluded that he was "not persuaded [his original] decision was based upon a palpably incorrect or irrational basis or failure to appreciate the significance of probative, competent evidence."

After the judge granted defendant's motion for partial summary judgment, but before he decided the reconsideration motion, Fonseca testified at a deposition. Fonseca acknowledged plaintiff's contract was with Alkyha, admitted he communicated almost exclusively with Alkyha, and rarely spoke with defendant's

representatives. He also admitted he never talked to defendant's principals about payment until after Alkyha refused to remit payment. According to Fonseca, Mende hired plaintiff, and Mende provided direction throughout the snow removal project. Fonseca acknowledged that defendant paid Alkyha several of the installment payments on the contract between defendant and Alkyha.

After Fonesca's deposition, defendant filed another motion for summary judgment, seeking the dismissal of plaintiff's remaining unjust enrichment claim. Defendant argued that where a remedy at law exists – in the form of a breach of contract claim against Alkyha – the equitable claim of unjust enrichment cannot be pursued. Plaintiff opposed the motion advancing a quasi-contract theory and arguing that defendant was unjustly enriched by receiving the benefit of plaintiff's services. Plaintiff filed the certification of Michael Mancino in which he stated that Snediker explained to him "the terms and rates for [plaintiff's] services would be established through a contract with [plaintiff's] designated contractor, [Alkyha]." He then met with Mende at plaintiff's facilities and signed an agreement to perform the snowplowing services with Alkyha. Defendant responded, asserting there was no "evidence that [p]laintiff expected compensation from . . . defendant at the time [p]laintiff conferred the benefit"

Judge Pursel granted defendant's motion, explaining in a written statement of reasons, that "[p]laintiff . . . presented no evidence that it expected remuneration from defendant, as all evidence suggests plaintiff knew its contract was with Alkyha, and only sought payment from defendant when payment from Alkyha was not forthcoming." The judge noted, "plaintiff had an express contract with Alkyha and plaintiff's legal remedy is found in a breach of contract action against Alkyha." Citing Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 110 (App. Div. 1966), the judge explained, "plaintiff is not entitled to employ the legal fiction of quasi-contract to 'substitute one promisor or debtor for another.'" Judge Pursel also stated that the equitable remedy of unjust enrichment "cannot be imposed when there remains a legal remedy to be pursued." Accordingly, he concluded, "that there are no issues of fact having any bearing on plaintiff's claim for unjust enrichment and defendant is entitled to judgment as a matter of law."

Judge Pursel entered the court's order on December 1, 2015. This appeal followed.

We review the grant of summary judgment by applying the "same standard as the motion judge." Globe Motor Co. v. Igdaley, 225 N.J. 469, 479 (2016) (quoting Bhaqat v. Bhaqat, 217 N.J. 22, 38 (2014)).

That standard mandates that summary judgment be granted "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."

[Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).]

"When no issue of fact exists, and only a question of law remains, [we] afford[] no special deference to the legal determinations of the trial court." Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Turning to plaintiff's arguments, it first contends Judge Pursel erred in granting partial summary judgment on its breach of contract claim because he refused to consider facts in plaintiff's complaint that supported an agency theory of liability. Plaintiff argues that Alkyha was acting with apparent authority on behalf of defendant when it entered into a contract with plaintiff, and that plaintiff sufficiently pled these facts in its complaint. Plaintiff also contends the judge erred in making the factual finding that defendant contracted with Alkyha for snow removal services because an entity other than defendant had a contract with Alkyha.

Plaintiff also challenges the motion judge's granting of defendant's motion for summary judgment on its claim for unjust enrichment. According to plaintiff, it "conveyed a substantial benefit upon [d]efendant . . . for which it has received not a penny." Relying upon Callano, supra, 91 N.J. Super. at 108, for the proposition that "a person shall not be allowed to enrich himself unjustly at the expense of another," plaintiff argues courts "allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust." It also argues the motion judge "improperly added an element of 'expected remuneration'" to the analysis of its unjust enrichment claim because it contradicts Michael Mancino's certification that stated plaintiff expected it would be paid for its services by defendant through Alkyha. In explaining defendant's property is a large shopping mall, plaintiff contends, "it is obvious that neither . . . [d]efendant nor any contractor would expect a service to be provided at the property without proper compensation." Moreover, plaintiff states it is "mere common sense that when . . . [p]laintiff was not paid for its snow removal services from Alkyha, . . . [p]laintiff would look to . . . [d]efendant as the owner of the property to pay for the services that directly benefited the property and its commercial operation."

We find plaintiff's arguments to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by Judge Pursel in his thoughtful statements of reasons accompanying the orders granting defendant summary judgment. We add only the following brief comment.

Contrary to plaintiff's assertions, Judge Pursel properly considered whether there was any evidence that plaintiff expected remuneration for defendant. To prove a claim for unjust enrichment, a party must demonstrate that the opposing party "received a benefit and that retention of that benefit without payment would be unjust." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007) (quoting VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994)). "That quasi-contract doctrine also 'requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.'" Ibid. (quoting VRG Corp., supra, 135 N.J. at 554) (emphasis added). Plaintiff's contract with Alkyha and Fonesca's testimony support the finding that plaintiff had no expectation of remuneration from defendant when it rendered its services.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION