

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

GEIS CONSTRUCTION, INC., et al.,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2014-T-0014
WARREN CONCRETE & SUPPLY CO.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2012 CV 1681.

Judgment: Reversed and remanded

Jeffrey T. Peters, and Timothy J. Weyls, Jr., Weyls Peters, LLC, 6505 Rockside Road, Suite #300, Cleveland, OH 44131 (For Plaintiff-Appellee).

Kevin P. Murphy and Matthew G. Vansuch, Harrington, Hoppe & Mitchell, LTD., 108 Main Street, S.W., Suite #500, P.O. Box 1510, Warren, OH 44481 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This accelerated-calendar appeal stems from a final order of the Trumbull County Court of Common Pleas, granting summary judgment in favor of appellee, Geis Construction, Inc., on two claims in the underlying action. Appellant, Warren Concrete & Supply Company, contends that it should have been allowed to proceed on its unjust enrichment claim because appellee’s evidentiary materials were insufficient to establish that appellee was entitled to retain \$46,764 to cover defective work. For the following

reasons, summary judgment was improper.

{¶2} Appellee is an Ohio corporation, engaged in the construction business. In July 2011, appellee entered into an agreement with Anderson & Dubose, Incorporated for the construction of a warehouse in Lordstown, Trumbull County, Ohio. Pursuant to the agreement, appellee was to act as the general contractor on the project.

{¶3} Appellee subcontracted with USA Concrete Specialists to do the concrete work for the warehouse. In turn, USA Concrete Specialists contracted with appellant to supply the concrete.

{¶4} The original contract between appellee and USA Concrete Specialists was for \$1,846,675. Due to changes in the project, the final amount appellee owed to USA Concrete Specialists was \$1,916,291.17. However, appellee only paid \$1,869,526.77 to USA Concrete Specialists. Appellee retained the remaining sum, \$46,764, allegedly to cover the costs of repairing defects in the concrete work.

{¶5} Pursuant to its separate contract with USA Concrete Specialists, appellant supplied \$292,854.02 in concrete for the project. In return, though, appellant was only paid approximately \$120,000. As a result, appellant took the requisite steps to impose a mechanic's lien on the Lordstown property.

{¶6} In July 2012, appellee submitted an application for the approval of a bond covering the amount of the mechanic's lien. After the trial court approved the bond and the lien was discharged, appellant filed its civil complaint against appellee, Anderson & Dubose, and USA Concrete Specialists. As to appellee, appellant's first claim alleged that it was entitled to recover \$177,032.04 under the posted bond. In its second claim, appellant asserted that both appellee and Anderson & Dubose were unjustly enriched in

using the concrete in the construction of the warehouse without paying adequate compensation.

{¶7} As part of its answer, appellee asserted a counterclaim against appellant for release of the bond. Appellee also raised three cross-claims against USA Concrete Specialists, sounding in breach of contract, breach of express warranty, and breach of implied warranty.

{¶8} After the action was pending for approximately one year, appellee moved the trial court for summary judgment regarding the two claims in appellant's complaint. As to the "bond" claim, appellee argued that the mechanic's lien must be declared void because appellant did not follow the correct procedure in filing it. As to the claim for unjust enrichment, appellee maintained that its retention of the concrete was not unjust because it had paid USA Concrete Specialists the full amount owed under their specific contract. In relation to the \$46,764 which appellee retained from the total sum owed, it attached evidentiary materials that provided an explanation of the repair costs the funds were intended to cover.

{¶9} In its response to the summary judgment motion, appellant challenged the assertion that appellee had "fully" paid USA Concrete Specialists for the concrete work. Specifically, appellant contended that a factual dispute still existed concerning whether the concrete work was defective, thereby warranting appellee's retention of the \$46,764. According to appellant, if the concrete work was not defective, it was entitled to recover the \$46,764 in light of the fact that it was not fully paid by USA Concrete Specialists.

{¶10} After appellee filed a reply brief, the trial court issued a final order granting summary judgment against appellant as to both of its pending claims against appellee.

Regarding the “unjust enrichment” claim, the trial court concluded that appellant could not maintain such a claim when appellee made full payment its subcontractor, USA Concrete Specialists. On the same day the foregoing order was rendered, the trial court issued a separate order granting appellee summary judgment on the question of liability under its three cross-claims against USA Concrete Specialists. The court further stated that the three cross-claims would go forward on the issue of damages.

{¶11} Only the first of the foregoing two orders have been appealed to this court. Although other aspects of the underlying case still remain pending before the trial court, its summary judgment decision on appellant’s two claims against appellee constitutes a final appealable order because the trial court also made an express finding of “no just cause for delay” under Civ.R. 54(B). Appellant asserts a single assignment of error for review:

{¶12} “The trial court erred to the prejudice of appellant by granting summary judgment to appellee.”

{¶13} In maintaining that summary judgment should not have been granted on its unjust enrichment claim, appellant focuses upon the \$46,764 which appellee has not paid USA Concrete Specialists even though it was owed after changes were made to the original contract price. Essentially, appellant argues that appellee failed to present sufficient evidentiary materials with its summary judgment motion to show that the funds were retained to pay for the costs of repairing defective concrete work. Based upon this, appellant further argues that if the evidence subsequently demonstrates that the work was not defective and appellee merely retained the funds as profit, it would be entitled to recover those funds under its unjust enrichment claim.

{¶14} As a general proposition, unjust enrichment is an equitable remedy that is applicable when there is no express contract or implied contract, and is designed to stop a party from keeping money or benefits which, in all fairness, belongs to a second party. *Willoughby v. Willoughby*, 11th Dist. Trumbull No. 2012-T-0095, 2014-Ohio-743, ¶28. “Unjust enrichment occurs when: (1) a benefit is conferred by the plaintiff upon a defendant; (2) the defendant knows of the benefit; and (3) the defendant retains the benefit under circumstances where it would be unjust to do so without payment.” *Id.*

{¶15} The concept of unjust enrichment has been applied to situations involving a property owner, general contractor, and subcontractor:

{¶16} “Abstracted, the situation in the present case is this: a third-party contracted with one party to provide work and material, and that party in turn contracted with another party to provide some of the material. The second party provided the material but the first party did not pay all it owed. The second party then sued the third party, the one who benefitted from the provided material. In the construction context, ‘when a property owner has not paid his general contractor the full amount originally bargained for under the contract and either the improvements are complete or enough funds remain under the contract to compensate the subcontractor and to finish construction (* * *), the owner enjoys, at the subcontractor’s expense, an unfair windfall from whatever caused the general contractor to accept less than the agreed amount and breach its obligation to the subcontractor. The owner receives the benefits of the subcontractor’s performance, but avoids paying anyone for it. In this situation, a finding of unjust enrichment is warranted.’ *Booher [Carpet Sales, Inc v. Erickson (Oct. 2, 1998), Greene App. No. 98-CA-0007, 1998 Ohio App. LEXIS 4643].” Meridien*

Marketing Group, Inc. v. J&E Building Group, Inc., 2d Dist. Miami No. 2011-CA-02, 2011-Ohio-4872, ¶29.

{¶17} As appellant correctly notes, the foregoing logic, as applied to the property owner in the construction context, has been extended to a general contractor:

{¶18} “[A]n unpaid supplier or subcontractor not in privity of contract with a general contractor may pursue a theory of unjust enrichment against the general contractor the same as it could be pursued against a property owner. If the general contractor has paid its subcontractors in full, it has retained no benefit and cannot be held liable under a theory of unjust enrichment. If it has not paid for the materials that are the subject of the suit, then its net profits will be increased by the amount due for those materials and can be found liable for unjust enrichment.” *Steel Quest, Inc. v. City Mark Construction Services, Inc.*, 1st Dist. Hamilton No. C-960994, 1997 Ohio App. LEXIS 4769, *6-7 (Oct. 31, 1997).

{¶19} Appellee does not contest the general applicability of the foregoing logic to the factual scenario in this case. Instead, appellee submits that its evidentiary materials were sufficient to prove that, although it did not pay USA Concrete Specialists the full amount owed for the work performed, it has not kept those funds as net profits from the project. In support, appellee cites the second exhibit attached to its summary judgment motion. This exhibit consists of a copy of a document entitled: “Contractor’s Affidavit of Payment of Debts and Claims.” In the document, appellee’s representative averred that all obligations pertaining to the materials and work on the “warehouse” project had been satisfied. The document also averred that there was one exception to the full payment, and this was explained in a separate statement accompanying the affidavit:

{¶20} “Contractor has paid for all materials, equipment, work, labor and services provided by its subcontractor, USA Concrete Specialists, Inc., that was required to pay pursuant to the terms of its contract dated August 3, 2011 (the “USA Concrete Contract”), as amended by all approved change orders [and] other modifications made pursuant to the terms of said USA Concrete Contract as of the date of this Affidavit. Pursuant to the terms of the USA Concrete Contract, including but not limited to Articles 18 and 20, Affiant was permitted to withhold certain sums for incomplete and defective work, as well as Affiant’s costs in enforcing the USA Concrete Contract.

{¶21} “As of this date, Affiant has withheld \$46,764 from the USA Concrete Contract. Of that sum, \$5,050.00 has been used to pay a third party to repair defects in the work (which amount includes the 25% markup, architect/engineer’s fess, and other expenses). Of the remaining balance, USA Concrete Specialists, Inc. is also responsible to Affiant for Affiant’s costs in enforcing the terms of the USA Concrete Contract and completing the work, which amounts may also be offset against any amounts owed. As of this date, the costs incurred by Affiant and additional liability for warranting the work exceed the remaining balance of funds held under the USA Concrete Contract. * * *”

{¶22} As an initial point, the record indicates that the copy of the “Contractor’s Affidavit” was not accompanied by a separate affidavit in which a person with sufficient knowledge verified the authenticity of the copy. For purposes of summary judgment, if an evidentiary item does not fall within the list of permissible documents set forth in Civ.R. 56(E), it cannot be considered in the analysis unless it is accompanied by a properly-framed affidavit. See *State ex rel. Lemons v. Kontos*, 11th Dist. Trumbull No.

2010-T-0101, 2011-Ohio-653, ¶9. But, in its response to the summary judgment motion, appellant did not raise any object to the lack of an accompanying affidavit. Hence, appellant waived the “affidavit” requirement. *Id.* Furthermore, since there was no other obvious reason to question the authenticity of the document, the trial court could properly consider it in making its final ruling.

{¶23} In relation to the substance of the statement attached to the “Contractor’s Affidavit,” appellant is correct that the statement does not provide any explanation as to the nature of the alleged defect in the concrete work. Under the foregoing case law, the underlying purpose of an unjust enrichment claim in the construction context is to stop the general contractor from gaining a windfall as a result of not having to pay the entire amount owed to the subcontractor. Hence, in order for appellant to recover the entire \$46,764, it will be required to demonstrate that there was no defect in the concrete work that warranted the retention of the funds. In turn, in order for appellee to prevail on its summary judgment motion, it would be necessary to present sufficient evidence to show an actual defect in the concrete work.

{¶24} The statement in the Contractor’s Affidavit only has a conclusory assertion that the concrete work performed by USA Concrete Specialist had a defect. There is no explanation regarding the exact nature of the defect and why it needed to be repaired. Therefore, the statement is not sufficient for appellee to carry its initial burden as to the “defect” issue.

{¶25} Furthermore, although the statement attached to the Contractor’s Affidavit expressly states that \$5,050 of the \$46,764 was spent to repair the defect, there is only a conclusory statement as to how the remaining funds were spent. The statement only

provides that the remaining funds were used to cover the costs of enforcing the contract against USA Specialists. In order to show for summary judgment purposes that it has not retained any of the remaining funds for its benefit, appellee must provide a detailed explanation of specific costs covered. Thus, even if an actual defect had been shown, the statement is not sufficient to demonstrate that appellee has used all of the retained funds on costs associated with the defect.

{¶26} As a separate basis for upholding the summary judgment ruling, appellee submits that appellant cannot prevail on its unjust enrichment claim because it did not satisfy all of the requirements for a mechanic's lien. However, the merits of an unjust enrichment claim is not dependent upon the propriety of the lien: "a subcontractor may pursue a claim of unjust enrichment against a property owner even if the subcontractor has failed to properly preserve its rights under a mechanic's lien." *Steel Quest*, 1997 Ohio App. LEXIS 4769, at *4. Even though this situation involves a general contractor and a supplier, the same logic applies.

{¶27} Finally, appellee maintains that summary judgment was justified because there has been no showing that USA Concrete Specialists lacks the necessary funds to pay its debt to appellant. However, in moving for summary judgment, appellee did not raise this particular issue. Instead, appellee only noted that there was no dispute that it had paid USA Concrete Specialists more than \$1,869,526.40. But, the mere fact that USA Concrete Specialists had those funds at one point does not mean that it presently has the ability to pay appellant, thereby rendering the unjust enrichment claim moot.

{¶28} As the moving party in summary judgment, appellee had the initial burden, inter alia, of identifying the evidentiary materials in the record that show the absence of

any factual dispute as to a material element of the underlying claim. *Silvey v. Washington Square Chiropractic Clinic*, 11th Dist. Geauga No. 2011-G-3047, 2012-Ohio-6214, ¶¶21-22, quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 296 (1996). In light of the foregoing analysis, appellee's evidentiary materials were not sufficient to carry its initial burden. On this basis alone, the trial court erred in granting summary judgment in favor of appellee on appellant's unjust enrichment claim. Accordingly, appellant's sole assignment of error has merit.

{¶29} The judgment of the Trumbull County Court of Common Pleas is reversed, and the case is hereby remanded for further proceedings consistent with our opinion.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.