

January 21, 2010

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Re: CL08-5906
Betco Construction, Inc.
v.
NWJ Chesterfield Apartments, LLC., et al.

Dear Counsel:

As you will recall after argument, there has been pending for decision defendant's demurrer to plaintiff's First Amended Complaint. The contested pleading consists of allegations of civil conspiracy, fraud, breach of contract, unjust enrichment and quantum merit. The conspiracy claim is actually two, one at common law and the other statutory under Va. Code § 18.2-499 and 500.

As alleged the case revolves around a written contract for several projects relating to an apartment building including the installation of HVAC window units, electrical installation in apartment closets, and window replacement. The initial cost for the work is said to have been \$691,700 but after change orders, the total amount due is alleged to be \$1,73,308.15. The plaintiff, Betco Construction, Inc., has named NWJ Chesterfield Apartments, LLC, a Delaware limited liability company that was registered to transact business in Virginia, and Chesterfield Building, L.L.C., a Virginia limited liability company, as defendants. Additionally, plaintiff has sued three individuals who are agents or employees of defendants NWJ Chesterfield Apartments, LLC and Chesterfield Building, L.L.C. in their

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individual capacities with reference to their actions in connection with the written contract. One of the named individuals is named as "Trustee in Liquidation" for the alleged nonexistent corporate defendant, Chesterfield Building, L.L.C.

With respect to the claims of conspiracy and fraud, the claim is, inter alia, that two of the named individual defendants knew that one of the corporate defendant's corporate status was not in place at the time of the contract's execution and not the owner of the property. The individual defendants allegedly planned to deceive plaintiff into providing construction services with the present intent to not pay for its services.

Previously, the court sustained defendants' demurrer to plaintiff's original complaint on the thinking of Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc., 256 Va. 553, 507 S.E. 2d 344 (1998), on the ground that the case as pled was in essence only a contract dispute. Thus, there being otherwise insufficient facts pled to support the other claims, conspiracy, fraud, etc., the case presented only a legally cognizable claim for contract breach.

Now, with leave previously granted, the First Amended Complaint amplifies facts previously stated. On demurrer, this pleading can be permitted to stand if the facts alleged suggest violations of common law duties separate from any duty arising under the contract. Id. On this occasion the court will overrule the demurrer as to the contract claim asserted against the corporate defendants, overrule the demurrer to the tort claims asserted against the individual defendants, sustain the demurrer as to the tort claims asserted against the corporations, sustain the demurrer as to the conspiracy claims against all the defendants and sustain the demurrer as to the claims of unjust enrichment and quantum merit.

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Regarding the contract-tort (fraud) issues, the court said in McDevitt that the source of duty must be determined. Quoting Burks Pleading and Practice § 234 at 406 (4th ed. 1952) the court noted the distinctions as follows:

If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of the contract, to take due care, and the defendants are negligent, then the action is one of tort.

In more detail, the facts alleged in plaintiff's First Amended Complaint are as follows. As noted, the parties entered into a written contract in January, 2008, which is attached to the pleading as exhibit A. The parties to the writing are plaintiff and Chesterfield Building, LLC (CB), the alleged building owner. Thereafter, the parties entered into a number of written change orders which are also attached as a part of exhibit A. Before execution of the contract, CB's corporate status had ended as of January, 2007. In July, 2007, ownership of the property had conveyed to another corporate defendant, NWJ Chesterfield Apartments (NWJ). The rest of the allegations comprise concealment, fraud, and conspiracy relative to the corporate existence of CB, the ownership of NWJ, vis-à-vis the property, ability to pay, and misleading plaintiff to continue to work on the project to completion.

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It is evident that plaintiff is relying on a written contract entered into under misrepresentations of the corporate existence of the entity said to be obligated to do the work made by agents/employees regarding ability to pay and continue the work through change orders based on assurances that the project would be paid for upon completion. On this summary, it is clear that no implied contract is involved as the pleadings present through the referenced exhibit a written AIA contract with subsequent written change orders, all evidence of the expressed written intentions of the parties to the contract. This negates claims of unjust enrichment and quantum merit as these theories are based on a contract by implication. See Schmidt v. Household Finance Co., 276 Va 108,116 (2008).

And while under familiar pleading rules, a party may plead in the alternative, the facts presented as alleged do not support such because theories like quasi contract, quantum merit and contract implied in law can support recovery even though there is no contract to avoid unjust enrichment. Flory Small Business Development v. Commonwealth, 261 Va 230,235 (2001). Here, the pleadings affirm the parties' written contract and advance facts to support recovery under it.

Lastly, regarding the conspiracy counts. With the defendants' argument about intra-corporate conspiracy as a bar aside the conspiracy claim lack specificity and are conclusory for the reasons mentioned in Defendants' Memorandum In Support Of Their Demurrer And Grants Of Demurrer to Plaintiff's First Amended Complaint, pp 9-13.

Counsel are directed to confer on the drafting of a suitable order sustaining in part and overruling in part defendants' demurrer to plaintiff's First Amended Complaint. This can be submitted to entry with exceptions noted. Plaintiff may have leave to amend on or by February

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8, 2010 with defendants to file any response 10 days
following receipt of any amended pleading.

Very truly yours,

Melvin R. Hughes, Jr.

slc