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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE DORCHESTER COUNTY COURT OF COMMON PLEAS

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No.: 2015-002198

R. H. Moore Company, Inc. Respondent,

vs.

Knight's Precast, Inc., Tobias & West, LLC, Eric W. Tobias, P.E., Dorchester County Water and Sewer Department, Underground Solutions, Inc., BP Barber and Associates, Inc. n/k/a URS Corporation, and Utility Services Authority, LLC, Defendants

Of which Underground Solutions, Inc. is the Appellant.

FINAL BRIEF OF RESPONDENT

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FINAL BRIEF OF RESPONDENT

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Mt. Pleasant, South Carolina
May 23, 2016

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III. **If the Circuit Court Order is immediately appealable, the grant of partial summary judgment in favor of Plaintiff/Respondent on the recoupment affirmative defense was correct because the Defendant/Appellant unequivocally testified in its Rule 30(b)(6) Deposition that it never intended to be paid for replacement pipe, and the Plaintiff/Respondent is not claiming any damages for the cost of replacement pipe.**

STATEMENT OF THE CASE

This appeal arises out of the grant of summary judgment by the Trial Court in favor of the Plaintiff/Respondent R.H. Moore Company, Inc. ("Contractor") on the Defendant/Appellant Underground Solutions Inc.'s ("Supplier") counterclaims for quantum meruit/unjust enrichment/restitution and recoupment. There remain pending causes of action between the same parties that have yet to be tried.

This action was commenced by Contractor on August 21, 2012. *See* Complaint (R. pp. 10-18). The operative pleadings are the Third Amended Complaint, filed on October 17, 2014, and Supplier's Answer and Counterclaim to the Third Amended Complaint. *See* Third Amended Complaint (R. pp. 19-48). *see also* Supplier's Answer and Counterclaim to the Third Amended Complaint (R. pp. 49-56). Contractor alleged five causes of action against Supplier. The causes of action include: (1) Breach of Contract; (2) Strict Liability; (3) Breach of Implied Warranty of Merchantability under S.C. Code Ann. Section 36-2-314; (4) Breach of Implied Warranty of Fitness for a

Particular Purpose under S.C. Code Ann. Section 36-2-315; and (5) Breach of Express Warranty. *See* Third Amended Complaint (R. pp. 19-48). Supplier filed its Answer and Counterclaims to the Third Amended Complaint on October 31, 2014. The counterclaims alleged were for quantum meruit/unjust enrichment/restitution and recoupment. *See* Supplier's Answer and Counterclaim to the Third Amended Complaint (R. pp. 49-56). Contractor replied to the Answer and Counterclaims on November 13, 2014. *See* Reply of Contractor to Answer and Counterclaims (R. pp. 57-60).

Contractor filed a motion for summary judgment as to all liability and damage claims related to Supplier on March 20, 2015. *See* Contractor's Motion for Summary Judgment (R. pp. 61-62). Supplier filed a cross motion for summary judgment on March 23, 2015.

A hearing was held before the Honorable Diane S. Goodstein on April 17, 2015. *See* Transcript of Hearing (R. pp. 77-148). On October 1, 2015, Judge Goodstein entered an order on the parties' motions for summary judgment. *See* Order (R. pp. 1-9). The Order denied summary judgment to both parties on the breach of contract and warranty claims. Id. These causes of action have yet to be tried. The Order granted summary judgment in favor of Supplier on the strict liability claim. Id. The Order also granted summary judgment for the Contractor on the counterclaims/affirmative defenses of Supplier. Id. The Order did not finally conclude the action as to the parties to this appeal. The installer of the pipe, subcontractor to Contractor, was granted summary judgment as there was no evidence of any installation problems. The grant of summary judgment to the installer subcontractor was not appealed. Supplier did not file a Rule 59(e), SCRCP, motion.

Subsequent to the Order, the entire action[1] was called for trial at number one on the roster for the October 26, 2015 term in Dorchester County. *See* Email of October 19, 2015 (R. p. 633). The following day, on October 20, 2015, Supplier filed its notice of appeal to this Court. As such, the remaining causes of action were not tried during the October 26, 2015 term of court and have been delayed by this appeal.

STATEMENT OF THE FACTS

The present action arises out of a public works project known as "The Waste Water System Improvements of Dorchester County Water and Sewer Department, for the Pump Station 67 upgrade and a new 20 inch force main" ("Project"). Dorchester County Water and Sewer Department was the owner of the Project. Contractor was the general contractor for the Project. Supplier sold materials to the Contractor for the Project.

A portion of the Project required the installation (referred to in the industry as "drilling") of what is known as Fusible PVC pipe ("FPVC") under the ground and beneath the Ashley River. *See* Ex. A to the Affidavit of Henry Moore (R. pp. 577-604). Supplier is in the business of selling FPVC pipe. *See* 30(b)(6) Deposition of Supplier (King), (R. pp. 525-526). Supplier sold its FPVC pipe to Contractor specifically for use on the Project. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 449-454). *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 457-463.

Prior to the Project, Supplier was contacted by the engineer in furtherance of the creation of plans and specifications for the Project. Representatives from Supplier then

[1] This case originally involved two issues arising out of the same sewer project. The first issue related to the Fusible PVC piping (the subject of the present appeal), and the second issue related to a wet well (one of the components of the sewer system). The entire case was to be tried at one time. Currently, the only parties remaining in the entire action are the parties to this appeal.

visited the site of the Project and assessed the location for the FPVC pipe to be installed, including the fact the FPVC pipe would be drilled under the Ashley River. Subsequent to visiting the site, Supplier recommended to the Project engineer that its FPVC pipe was suitable for the Project. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 449-454). At the time of recommending its FPVC pipe to the engineer, Supplier was aware that the FPVC pipe would need to meet pressure testing. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. p. 455).

Supplier was informed that its FPVC pipe had been selected by the Project engineer and received a complete set of specifications at that time. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 457-460). Included in the specifications was a test pressure performance specification mandating that the FPVC pipe must meet or exceed certain test pressures after it was completely installed. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 462-463). *See* Ex. A to the Affidavit of Henry Moore (R. pp. 577-604). Supplier had actual knowledge that the testing would be performed and that its FPVC pipe would need to meet the performance specification. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 455-456).

Supplier, through its regional sales representative, then directly contacted Contractor in an effort to sell its product for use at the Project and represented that its FPVC pipe would meet the test pressure performance specification. Supplier expected Contractor to rely on its representation that the FPVC pipe would pass the test pressure performance specification testing. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 462-463). Supplier then sold its FPVC pipe to Contractor for a price of $640,925.72. *See* 30(b)(6) Deposition of Supplier (King) (R. pp. 525-526). *See* Ex. 9 to the 30(b)(6)

Deposition of Supplier (Shepherd) (R. p. 619). The pipe was fused[2] together at the Project site by the Supplier. The pipe was installed/drilled by the subcontractor installer.

Subsequent to installation, the FPVC pipe sold by Supplier failed to meet the pressure test performance specification. *See* 30(b)(6) Deposition of Supplier (King) (R. p. 519). Supplier does not know why its FPVC pipe failed to meet the test pressure performance specification, however it admits that its pipe failed to withstand the required pressure.[3] *See* 30(b)(6) Deposition of Supplier (King), (R. p. 519, p. 547, p. 549). The FPVC Pipe could not be pressure tested until it was fully drilled and installed in the ground and under the Ashely River. *See* Ex. A to the Affidavit of Henry Moore (R. pp. 577-604). Supplier has no evidence of misuse by Plaintiff or the subcontractor installer. *See* 30(b)(6) Deposition of Supplier (King) (R. p. 555).

After the failure, Supplier concluded that the only way to address the failure and ensure that its FPVC pipe met the test pressure performance specification was to supply new FPVC pipe and re-drill the FPVC pipe under the Ashley River. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. 479-481). Supplier in fact provided the replacement FPVC pipe and performed the associated fusion of the replacement pipe without any expectation of payment from anyone. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. pp. 492-495).

Supplier, in its 30(b)(6) deposition, testified as follows:

Q. Do you know why Underground Solutions was sending any replacement pipe to this project?

A. I know – I do know why we sent it, and we sent fusion services because we basically had a great marketplace there between Dorchester [County Water and Sewer], URS and R.H. Moore, all good customers. USA is a driller. And

[2] "Fusing" is connecting sections of the pipe together to form a seamless single run of pipe.

[3] Once again, based upon the lack of any evidence of improper installation or misuse, the subcontractor installer was granted summary judgment.

we felt that if we could assist them in this manner to get this project completed and get on board completed and tested, if [sic] would reflect well on us, and we would be able to maintain our position with those entities. So we made that tactical decision to assist.

Q. And that was Underground Solutions' sole decision to send that, correct?

A. That's correct.

Q. And do you understand that Underground Solutions has now sued to be paid for that replacement piping?

A. I wasn't aware of that.

Q. Okay. Do you draw a distinction between the replacement piping that would be for the what I call the 300 foot section and the 1,900 foot section?

A. Well, I thought you were talking about the 1,900 foot section. With that distinction, yes.

Q. So there's two situations. One, Underground Solutions made the decision on its own, sole decision internally, to send replacement piping, fusion services for the 1,900 foot section of piping, correct?

A. That's correct.

Q. And you didn't know that they, in fact, sued to be paid for the pipe, correct? You've not been involved in that discussion?

A. No.

Q. You thought that they were sending pipe because you thought it was a good market to send it to and send the pipe as replacement pipe because there had been a failure, correct?

A. That's exactly what I thought.

Q. And nobody was going to pay for that 1,900 square [sic] feet because you all made the decision on your own to send it, correct?

A. At the time, that's correct.

Q. And with regard to the 300 linear foot section, do you know what I am talking about there?

A. Yes.

Q. Was a repair or replacement efforts undertaken for that failure?

A. There were.

Q. And did Underground Solutions make the sole decision to do that on its own.

A. We did.

Q. For the same reasons that you did for the 1,900 linear feet section, correct?

A. Well, there's a distinction in that we didn't have to supply any additional pipe, maybe a short section, because all we did was cut that out, but all of the other efforts that we undertook to get that pipe pulled out and put back into place, we did that of or [sic] own volition.

Q. And that would be true for the 1,900 foot section and whatever you did on what we call the 300 foot –

A. At the time, yes.

Q. You say "at the time," what do you mean at the time?

A. That's all I can speak to. I don't know about what's happened since then, since the litigation. But at the time all this was occurring back in 2012, that was the intention.

Q. Was to send the pipe, nobody's going to pay for it, you all were just going to send

the pipe with fusion services?

A. That's correct.

Q. That was Underground Solutions intention?

A. That's correct.

See 30(b)(6) Deposition of Supplier (Shepard) (R. p. 492, line 18-p. 495, line 17).

Counsel for the Supplier at the hearing on the motions for summary judgment stated as follows:

Court: And if he [30(b)(6) witness] in fact said, with no intention to charge for the pipe, what of the motion for summary judgment to dismiss the counterclaim, assuming he said that[4].

Counsel for Supplier: Right, assuming he said that, you know, again where there is a claim made and a complaint made, and we're in good faith effort trying to provide a product to them, you know, I can tell you that, had we not been sued, there would have never been a counterclaim or never been a complaint against them. [...]

See Transcript of Hearing (R. p. 102, lines 2-15).

The cost of the replacement pipe is not an issue in the Contractor's case. The damages asserted in this case, and the liability therefore, arise out of Supplier's refusal to pay for the re-drill costs for the replacement of the FPVC pipe which were necessary to allow the pipe to perform as warranted. *See* 30(b)(6) Deposition of Contractor (Thornton) (R. pp. 267-269). The only evidence in the record as to the cost of the re-drill for the replacement pipe is in the amount of $454,958.00. *See* Ex. 19 to the 30(b)(6) Deposition of Contractor (Thornton) (R. pp. 620-632). This amount represents the damages claimed by the Contractor in this action[5]. It does not include the cost of the replacement pipe or any fusion services, which were provided by the Supplier with no intention of being paid for a second time.

[4] At the time of the hearing the transcript of the 30(b)(6) deposition was not yet available. The transcript of the 30(b)(6) deposition was provided to the Court on May 29, 2015

[5] Contractor is also seeking prejudgment interest on that amount.

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[5] Contractor is also seeking prejudgment interest on that amount.

II. If the Circuit Court Order is immediately appealable, the grant of partial summary judgment in favor of the Contractor on the unjust enrichment counterclaim was correct because Supplier unequivocally testified in its Rule 30(b)(6) Deposition that it never intended to be paid for replacement pipe and that it provided the replacement pipe on its own volition for its own benefit.

The Trial Court granted summary judgment on the Supplier's counterclaims because the Supplier testified that it alone made the decision to send the replacement pipe without charge and that it did not intend to be paid for the replacement pipe or the fusion services.

"Restitution is a remedy designed to prevent unjust enrichment." Sauner v. Pub. Serv. Auth. Of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003). "To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." Id.

The present facts do not meet the three part test. First, and most importantly, as admitted by the Supplier, any benefit received by the Contractor was gratuitous or without expectation of payment. The Supplier did not expect payment, and, in fact, sent the replacement pipe and fusion services for its own benefit.

Q. Do you know why Underground Solutions was sending any replacement pipe to this project?

A. I know – I do know why we sent it, and we sent fusion services because we basically had a great marketplace there between Dorchester [County Water and Sewer], URS and R.H. Moore, all good customers. USA is a driller. And we felt that if we could assist them in this manner to get this project completed and get on board completed and tested, if [sic] would reflect well on us, and we would be able to maintain our position with those entities. So we made that tactical decision to assist.

Q. And that was Underground Solutions' sole decision to send that, correct?

A. That's correct.

Q. And do you understand that Underground Solutions has now sued to be paid for

that replacement piping?

A. I wasn't aware of that.

Second, there is absolutely no evidence in the record that Contractor was paid by Dorchester County Water and Sewer for the replacement pipe. It is well settled that the non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence in the form of affidavits or otherwise in support of its proposition. Woodson v. DLI Props., LLC, 406 S.C. 517, 529, 753 S.E.2d 428, 434 (2014). ("The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact; however, with respect to an issue upon which the nonmoving party has the burden of proof, the moving party may discharge his responsibility by pointing out to the trial judge there is an absence of evidence to support the nonmoving party's case. Evans v. Stewart, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006) (stating it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine); see also Rule 56(e), SCRCP (stating an adverse party may not rest upon the mere allegations or denials of his pleadings to withstand summary judgment, but must set forth specific facts showing a genuine issue exists for trial)"). If there was no payment for the replacement pipe to the Contractor, then any benefit would have been sustained by Dorchester County Water and Sewer—a former party to this action—not the Contractor. Just as indicated in the testimony of the Supplier above, however, the only reason in the record for sending the replacement pipe was for the benefit of Supplier, including good relations with Dorchester County Water and Sewer.

The Trial Court correctly found that Supplier never intended to be paid for the cost of the 1900 feet of replacement pipe, the related fusion services, and the repairs to the 300 foot section of pipe. The Supplier clearly and unequivocally testified that it did

not intend to be paid.

Q. You say "at the time," what do you mean at the time?[6]
A. That's all I can speak to. I don't know about what's happened since then, since the litigation. But at the time all this was occurring back in 2012, that was the intention.
Q. Was to send the pipe, nobody's going to pay for it, you all were just going to send the pipe with fusion services?
A. That's correct.
Q. That was Underground Solutions intention?
A. That's correct.

See 30(b)(6) Deposition of Supplier (Shepherd) (R. p. 495, lines 6-17). Moreover, the Contractor testified in its 30(b)(6) deposition that it understood the replacement pipe and services were to be provided at no charge. *See* 30(b)(6) Deposition of Contractor (Thornton) (R. pp. 267-269). There was no actual signed contract(s) for the replacement pipe and fusion services. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. p. 486, line 24 - p. 487, line 4). There is no record of any invoices ever sent by Supplier for the replacement pipe or fusion services. *See* 30(b)(6) Deposition of Supplier (Shepherd) (R. 487, lines 5-7). In fact, the Supplier testified as follows:

Q. Okay. Are you aware of any instance since you've been working at Underground Solutions for the past seven years where you all send some pipe over, provide fusion services, don't send an invoice, and then just sue the contractor for payment of the pipe; are you aware of that ever happening?
A. I am not aware of that ever happening.
Q. Typically, you all would send an invoice for piping that you would expect to be paid for, correct?
A. Correct.
Q. That's your normal business practice.
A. Sure.

See 30(b)(6) Deposition of Supplier (Shepherd) (R. 487, lines 8-20).

[6] Much of the Supplier's brief focuses on this "at the time" language as somehow creating an issue of fact. It is, however, clear from the testimony that at the time of the provision of the replacement pipe and fusion services all parties were of the understanding that there would be no cost for the replacement pipe and fusion services. It is disingenuous to argue that an issue of fact can be created by taking a completely different factual position after this action was filed—even while recognizing the original fact was true! This argument is the equivalent of a "do-over," and arguably arises to an admission of a meritless claim.

It simply turns the equitable concept of quantum meruit/unjust enrichment/restitution on its head to argue that a party can commit to providing something without cost (or even a charitable act or an act for its own benefit) and then change its position to seek payment in return under the guise of "unjust enrichment." There is no sense or equity in that situation. In fact, the Supplier, through counsel, has admitted that this counterclaim was only made as a result of the Contractor filing the present action for the costs of the re-drill. *See* Transcript of Hearing (R. p. 101, line 16 – p. 102, line 15). There is simply no such thing as a counterclaim for unjust enrichment/quantum meruit/restitution[7] that arises solely from the fact that an action has been filed against you.

Third and finally, Supplier argues that there is a question of fact as to whether or not it intended to be paid. *See* Supplier's Brief, p. 13. Though this is in complete derogation of the facts and admissions presented above, the argument also fails as a matter of law and equity. If there did exist facts that the Supplier expected to be paid for the replacement pipe and that Contractor agreed to pay for the replacement pipe, then the Supplier would have a breach of contract claim. The Supplier could have also made a claim under the so-called "Little Miller Act." S.C. Code Ann. Section 29-6-210 *et seq.* The Supplier has made no such claims. This is both further evidence of the absence of any intent to be paid and a bar to any unjust enrichment claim. *See* Barrett, 321 S.E.2d at 199 ("Where a plaintiff has an adequate remedy at law, equitable relief is not normally in order.").

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[7] The Supplier argues in its brief that there is evidence from which a jury could determine that it has a right to unjust enrichment/quantum meruit/restitution; however, as these are all equitable concepts, there is no right to a trial by jury. Barrett v. Miller, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Ct.App. 1984)("Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff.")

Supplier does not have a claim for unjust enrichment/restitution. Supplier only filed the claim as a result of the Contractor's action for the cost of the re-drill. The Trial Court was correct in granting summary judgment.

III. If the Circuit Court Order is immediately appealable, the grant of partial summary judgment in favor of Contractor on the recoupment affirmative defense was correct because Supplier unequivocally testified in its Rule 30(b)(6) Deposition that it never intended to be paid for replacement pipe, and the Contractor is not claiming any damages for the cost of replacement pipe.

The Trial Court correctly identified Supplier's "recoupment" counterclaim as in the nature of an affirmative defense and correctly granted summary judgment to Contractor on the recoupment claim.

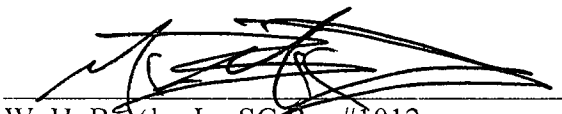
Recoupment is an affirmative defense. *See* Tuloka Affiliates, Inc. v. Moore, 275 S.C. 199, 268 S.E.2d 293 (1980). "A recoupment, unlike a counterclaim, only reduces the plaintiff's claim; it does not allow recovery of an affirmative money judgment for any excess over that claim. Unlike set-off, it must grow out of the identical transaction that gave rise to the plaintiff's claim." 268 S.E.2d at 295.

Here, the recoupment claim fails with the unjust enrichment claim. The Supplier is either entitled to payment for the replacement pipe or it is not. As presented above, the Trial Court correctly granted the motion for summary judgment ruling that Supplier is not entitled to payment for the replacement pipe—either directly or indirectly. Moreover, the Contractor is not claiming damages for the replacement pipe and fusion services. It is only claiming damages for the cost of the re-drill. There is, therefore, nothing to recoup from the Contractor, and the damages are not identical. Either the Supplier is liable for the cost of the re-drill or it is not. This issue remains to be tried.

CONCLUSION

This appeal should be dismissed because it is premature. In the stead of a dismissal, this Court should affirm the Trial Court's grant of summary judgment on the counterclaims of Supplier because the undisputed facts are that Supplier never intended to be paid for the replacement pipe. The Supplier has not unjustly enriched anyone, and it provided the replacement pipe for its own benefit. It is not entitled to any recoupment of costs for a product for which it never intended to be paid. Equity and the absence of any dispute regarding material facts compelled the Trial Court to grant summary judgment. The Trial Court's order should be affirmed for the reasons stated herein as well as any ground appearing in the record pursuant to Rule 220(c), SCACR.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



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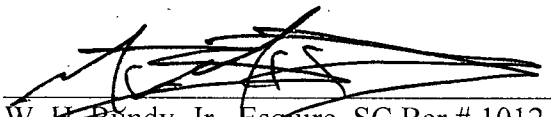
Of which Underground Solutions, Inc. is the Appellant.

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent R. H. Moore Company, Inc. complies with Rule 211(b), South Carolina Appellate Court Rules.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



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Of which Underground Solutions, Inc. is the Appellant.

PROOF OF SERVICE

I certify that I served the Respondent's Final Brief on the Appellant by depositing a copy of said document in the United States Mail, postage prepaid, on Appellant Underground Solutions, Inc., addressed to its attorney of record, Franklin J. Smith, Jr., Esquire, at Richardson, Plowden, Carpenter & Robinson, P.A., Post Office Drawer 7788, Columbia, SC 29201.

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