IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

21st CENTURY CONCRETE CONSTRUCTION, INC., et al.	)	**CASE NO. CV-12-776960**
Plaintiffs,	)	**JUDGE DICK AMBROSE**
-vs-	)	
	)	**JUDGMENT ENTRY**
JANCE & COMPANY, LLC, et al.	)	**AND OPINION**
Defendants.	)	

{¶1} Before the Court are Defendants', FirstEnergy Nuclear Operating Company's ("FENOC") and FirstEnergy Corp. ("FirstEnergy"), Motions for Summary Judgment, both filed 01/09/13. For the reasons stated herein, Defendants' Motions are granted.

FACTS

{¶2} This case arises out of a construction contract dispute involving the project owners, FENOC and allegedly FirstEnergy; the general contractor, Jance & Company, LLC ("Jance"); and Jance's concrete subcontractor, 21st Century Concrete Construction, Inc. ("21st"). Specifically, 21st filed suit against FENOC, FirstEnergy and Jance based on 21st's subcontract with Jance, which was executed in June/July 2011. This subcontract concerned the supply of various construction materials and services for concrete work at the FirstEnergy Emergency Operation Facilities in Lindsey, Ohio. 21st alleges in its Second Amended Complaint that Jance, at the direction of FENOC/FirstEnergy, terminated the subcontract agreement after 21st provided $118,046.00 of labor and materials. Based on these allegations, 21st raises 6 Counts for relief: Breach

of Contract (Count I); Unjust Enrichment (Count II); Declaratory Judgment (Count III); Prompt Payment (Count IV); Account (Count V); and Tortious Interference with a Contract (Count VI). Counts I – V are asserted against Jance, and Counts II and VI are asserted against FENOC and FirstEnergy. This ruling is limited to Counts II and VI.

APPLICABLE LAW

I. Summary Judgment Standard.

{¶3} Summary judgment shall be rendered in favor of the moving party when, viewing all inferences in a light most favorable to the nonmoving party, 1) there is no genuine issue as to any material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion, which conclusion is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 1998 Ohio 389, 696 N.E.2d 201.

II. Unjust Enrichment Claim Against FENOC.

{¶4} In Count II, 21st alleges that FENOC was unjustly enriched as a result of valuable construction labor, materials, and services provided by 21st on FENOC's property. Count VI alleges that FENOC knew of 21st's subcontract with defendant Jance & Company, LLC ("Jance") and intentionally, without justification, directed Jance to terminate the subcontract with 21st, causing 21st to suffer damages.

{¶5} FENOC argues that it is entitled to summary judgment on 21st's unjust enrichment claim because, as a matter of law, a subcontractor cannot bring a claim against a project owner for unjust enrichment. To prevail on an unjust enrichment

claim, a plaintiff must establish: 1) a benefit conferred by the plaintiff on the defendant; 2) the defendant's knowledge of the benefit; and 3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 425, 2011 Ohio 6167, 967 N.E.2d 1249.

{¶6} Importantly, though, "a subcontractor may not assert an unjust enrichment claim against a property owner if the possibility exists that, for the same work or material supplied, the subcontractor can also recover from the contractor, or the property owner might also have to pay the contractor." *Meridien Mktg. Grp., Inc. v. J&E Bldg. Grp., Inc.*, 2nd Dist. No. 2011-CA-02, 2011 Ohio 4872, ¶5, Citing, *Booher Carpet Sales, Inc. v. Erickson*, 2nd Dist. No. 98-CA-0007, 1998 Ohio App. LEXIS 4643; See, also, *BFI Waste Sys. of Ohio, Inc. v. Prof'l Constr. and Safety Servs., Inc.*, 9th Dist. No.06CA008972, 2008 Ohio 1450. Said differently, there can be no danger of double recovery or double payment. Id.

{¶7} In response to FENOC's position, 21st argues that 1) FENOC has not established that Jance is financially stable; 2) Jance is not currently pursuing FENOC for money owed to 21st; and 3) there is no evidence that FENOC has paid for the project in full or that there is any risk of double recovery due to this court's presence of mind and plaintiff's professional integrity. However, "before a subcontractor can pursue an unjust enrichment claim against a property owner, it must establish that the general contractor is 'unavailable' for judgment and unable to pursue the owner for the money that the subcontractor is seeking." See, *BFI* ¶7, Citing, *Booher* at ¶7. Thus, the onus is on the subcontractor, 21st, to establish that Jance is unavailable for judgment and that Jance is

unable to pursue FENOC. 21ST has established neither of these elements. In fact, Jance is a party to this action and has made cross-claims against FENOC. Therefore, the court finds that there are no genuine issues of material fact on this issue and that FENOC is entitled to summary judgment on 21st's unjust enrichment claim as a matter of law.

III. Tortious Interference with a Contract Claim Against FENOC.

{¶8} In its claim for Tortious Interference against FENOC, 21ST must establish: 1) the actual existence of a contract; 2) the defendant's knowledge of the contract; 3) the defendant's interference with the contract; 4) the defendant's conduct was malicious and without legal justification; and, 5) damages. *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 90 Ohio App.3d 284, 291 (8th Dist. 1993). FENOC argues that it is entitled to a privilege, which allows it to interfere with 21st's subcontract with Jance. When determining whether justification exists, as FENOC claims it does, a court must evaluate the concept of privilege. *Sekerak v. Friedman*, 8th Dist. No. 51997, 1987 Ohio App. LEXIS 7022, ¶7, citing Juhasz v. Quick Shops, Inc. (1977), 55 Ohio App.2d 51, 57. "A party is privileged to purposely cause another not to perform a contract with a third person by in good faith asserting or threatening to protect a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the contract. *Juhasz* at 57, Citing, Restatement of Torts, Section 773. Once privilege is established, it can only be overcome by a showing of actual malice. *Wagner-Smith Co. v. Ruscilli Constr. Co., Inc.*, 139 Ohio Misc.2d 101, 2006 Ohio 5463, ¶23.

{¶9} In the case at bar, there is no dispute that FENOC had an interest in the subcontract between 21st and Jance. As owner of the project, FENOC was justified through privilege to protect its own interests affected by the performance or non-performance of the subcontract between 21st and Jance. Consequently, 21st can only make a claim against FENOC for Tortious Interference by establishing that FENOC acted with actual malice when interfering with the subcontract. 21st alleges in its second amended complaint that FENOC intentionally and without justification directed Jance to terminate the subcontract with 21st. However, 21st fails to provide any factual support for these allegations.

{¶10} It is well established that "the party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996 Ohio 107. In the case at bar, FENOC has established that 21st cannot prove an essential element of its claim, to wit "the defendant's conduct was malicious and without legal justification." Once the moving party meets the standard for summary judgment, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). The nonmoving party may not rest upon its pleadings, but must set forth specific facts showing there is a genuine issue for trial. *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 464, 2008 Ohio 87. Here, 21st has offered no evidence outside of the pleadings to demonstrate that FENOC was without justification in interfering with the subcontract between 21st and Jance. 21st also fails to set forth any

facts that would show that FENOC acted with actual malice when it interfered with the subcontract between 21st and Jance. 21st has therefore failed to meet its burden to show why summary judgment is inappropriate regarding its claim of tortious interference with a contract.

IV. Unjust Enrichment and Tortious Interference with a Contract Claims Against FirstEnergy.

{¶11} FirstEnergy argues that it cannot be liable under either a claim for unjust enrichment or tortious interference with a contract because it is not a proper party to this action. Specifically, FirstEnergy asserts that it was not the owner of the construction projects, did not exercise control over the projects, and was not a party to any of the operative agreements for the projects. Therefore, FirstEnergy argues, 21st cannot meet its burden in proving the essential elements of its claims, i.e. FirstEnergy was not unjustly enriched because it was not the owner of the projects and that it did not interfere with any contract because FirstEnergy took no action in connection with the subcontract at issue. FirstEnergy supports these arguments with the affidavit of the manager in the corporate claims department at FirstEnergy.

{¶12} In response, 21st argues that a genuine issue of material fact remains as to whether FirstEnergy was involved because the general contract and correspondence suggests that both FENOC and FirstEnergy were involved in overseeing the project. Based on the September 15, 2011 letter from Kathy McIntyre, project manager at FirstEnergy, to Tanya Dorsey, project manager at Jance, the Court finds that a genuine issue of material fact remains as to whether FirstEnergy was involved in the project. Primarily, FENOC and FirstEnergy are used interchangeably in the letter. It appears

from the correspondence attached to 21st's opposition that it is FirstEnergy who informs Jance of 21st's documented safety violations, 21st's inadequate project management and work performance, and that Jance must work overtime at no cost to FirstEnergy to compensate for delays. Thus, FirstEnergy's Motion for Summary Judgment fails in this regard.

{¶13} However, as asserted by 21st, FirstEnergy and FENOC are treated as one and the same – the project owner. Therefore, the unjust enrichment and tortious interference claims alleged by 21st against FirstEnergy cannot survive summary judgment for the same reasons set forth above regarding 21st's claims against FENOC.

CONCLUSION

{¶14} Based on the foregoing, the Court grants summary judgment in favor of Defendants FENOC and FirstEnergy as to Counts II and VI in 21st's Second Amended Complaint. Defendant Jance's Crossclaims and Third Party Plaintiff AJ Goulder Electric Inc.'s claims against FENOC and FirstEnergy remain pending.

IT IS SO ORDERED.

DATE: _____

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JUDGE DICK AMBROSE