

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

FLATS EAST DEVELOPMENT, LLC, <i>et al.</i>)	CASE NO. CV 10 743901
)	
Plaintiffs,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY AND</u>
)	<u>PRELIMINARY INJUNCTION</u>
FORUM ARCHITECTURAL)	
SERVICES, LLC, <i>et al.</i>)	
)	
Defendants.)	

John P. O'Donnell, J.:

Plaintiffs Flats East Development, LLC,¹ and FED/Main Street, LLC, filed their complaint on December 20, 2010, against defendants Forum Architectural Services, LLC² and Forum Architects, LLC.³ The complaint included motions for a temporary restraining order and preliminary injunction. A temporary restraining order was granted *ex parte* on the date the complaint was filed and a hearing on the preliminary injunction motion was held January 14 through 24, 2011. This entry follows.

THE COMPLAINT AND COUNTERCLAIM

The plaintiffs' complaint is an action for breach of contract, promissory estoppel, declaratory judgment and slander of title. The plaintiffs allege that they hired the defendants to produce schematic and design drawings for a real estate development project on the east bank of Cleveland's Flats. The plaintiffs claim they have paid the defendants over \$3.1 million and are entitled to ownership and use of the drawings. Among other relief, the plaintiffs seek a

¹ Referred to throughout this entry as Flats East.

² Referred to throughout this entry as FAS.

³ Referred to throughout this entry as Forum.

preliminary injunction to allow their continued use of the drawings to build the project while this lawsuit is pending.

The defendants filed an answer admitting they agreed to provide architectural services but denying that they have been paid enough to transfer ownership of the architectural drawings to the plaintiffs. They have also asserted counterclaims for breach of contract and unjust enrichment.⁴ The essence of these claims is that the plaintiffs have not paid the defendants for their architectural services.

STATEMENT OF FACTS

The Witnesses

Testimony for the plaintiffs at the preliminary injunction hearing was given by Dennis Wilcox, Christopher Warren, Don Frantz, Adam Fishman and Laura Rees. Wilcox is the outside general counsel for the Cleveland-Cuyahoga County Port Authority, which issued bonds to finance the Flats East Bank project. Warren is Cleveland's chief of regional development. Frantz is an architect and the president of Metro Consulting, LLC, a development consultant. He served as a developer's representative for the project. Fishman is the managing member of Fairmount Properties, LLC, which is a member of plaintiff Flats East Development, LLC. Rees is a registered architect and the director of architecture at URS Corporation, an engineering and architectural services firm.

Testimony for the defendants was given by Gordon R. Baker, Peter F. Spittler and Mike Spittler. Baker is a licensed professional engineer with Thorson Baker & Associates, Inc., a multi-disciplinary engineering firm. Peter Spittler is an architect and the sole member of defendant Forum Architectural Services, LLC. Mike Spittler is an employee of defendant Forum

⁴ The counterclaims for direct consequential damages (Count III) and interest (Count IV) need not be discussed here.

Architectural Services, LLC, and is responsible for the management of the firm's business affairs. The Spittlers are brothers.

The hearing's last witness, on rebuttal for the plaintiffs, was Jeffrey Appelbaum, a lawyer and director of Project Management Consultants, a firm hired by the plaintiffs to assist in the Flats East Bank project.

The plaintiffs and defendants each produced many documents admitted into evidence at the hearing. These documents will be described as necessary in this entry.

The Hearing Evidence

Phase I of the Flats East Bank project calls for an office building and attached 150-room hotel plus retail shops and a restaurant on a 24-acre piece of land in Cleveland's Flats neighborhood on the east bank of the Cuyahoga River near Lake Erie. Plaintiff FED/Main Street, LLC, is the fee owner of the land and plaintiff Flats East Development, LLC, is the project developer.⁵

Scott Wolstein is the president of Flats East. He has envisioned a mixed-use development on the east bank for about a decade. Peter Spittler became involved almost as long ago when he won, in 2002, an unpaid design competition for a master plan for development of the area. At that time, Spittler was the owner of the architectural firm GSI Architects, Inc. When Spittler's design won the competition, GSI began to work with Wolstein on turning the vision into a reality. The relationship between GSI was conducted through "handshake"⁶ and "letter"⁷ agreements and not under a written, integrated contract. This remained true in the ensuing years for work by GSI, Forum Architects, LLC, and Forum Architectural Services, LLC: none of the defendants ever had a written contract with the plaintiff.

⁵ References in this entry to the plaintiff in the singular are to Flats East Development, LLC.

⁶ Frantz hearing testimony.

⁷ Peter Spittler hearing testimony.

Not only did the parties not have a written contract, it is difficult to discern what entities are parties to what agreements. During the early years of Wolstein's and Spittler's relationship, GSI sent invoices for payment addressed to Wolstein at 3300 Enterprise Drive, Beachwood. The defendants' hearing Exhibit 9 consists of nine such invoices sent from November 1, 2002, through January 2, 2004, all for "master planning/conceptual design services" related to GSI's project number 02-467. These invoices were calculated by multiplying hours worked by an hourly rate.

Sometime around 2004,⁸ GSI went out of business and Spittler became an employee of Forum Architects, LLC. At Forum, he and others continued to work on the project. However, Forum, unlike GSI, billed The Wolstein Group, not Scott Wolstein personally, at 3300 Enterprise Drive. Defendants' hearing Exhibit 10 consists of 30 invoices from Forum to The Wolstein Group from May 3, 2005, through February 4, 2009. In May, June, and July of 2005, Forum sent nine invoices for "FEBN infrastructure" (Project 04-589) and "FEBN parking" (Project 05-613). These invoices were calculated on an hourly basis.

Then, on August 1, 2005, Forum sent four separate invoices for four different "billing groups": reimbursable expenses, reimbursable project expenses, pre-development services, and pre-development design services. For the first time, the invoices were submitted against "contract maximums" of \$104,188 for reimbursable project expenses; \$150,000 for pre-development services; and \$50,000 for pre-development design services. Thereafter, through October, 2005, the contract maximums changed at least once for each billing group. No satisfactory explanation was given at the hearing for the sudden appearance of a "contract maximum" or what it really meant. Moreover, Forum's invoices after October, 2005, contain no reference to any contract maximums. No invoices – to The Wolstein Group or any other person

⁸ No specific date was testified to at the hearing.

or entity – for the rest of 2005 and all of 2006 and 2007 were offered into evidence at the hearing. The next invoice in evidence is dated November 5, 2008 and followed by eight more invoices through February 4, 2009. These last invoices identify the project, for the first time, as “FEBN – Flats East Bank Neighborhood Project” and show the Forum project number as 06-654. All of the invoices from this group that include billing for professional services are billed on an hourly basis.

Around the time of Forum’s last invoices, a credit crisis afflicted the economy and put the future of the East Bank Project in doubt. On December 4, 2008, Wolstein wrote to Spittler at Forum that the project has been in a “temporary holding pattern.”⁹ Also around that time,¹⁰ Spittler incorporated Forum Architectural Services, LLC, as its sole member.

By Mike Spittler’s calculation, GSI and Forum were paid \$936,345.16¹¹ through December 4, 2008. The source of these payments was not established by the production of canceled checks or another record showing the individual or corporation who made the payments. Also by Mike Spittler’s calculation, GSI and Forum are still owed a total of \$497,323.¹² Evidence produced at the hearing failed to show that FAS succeeded to GSI and Forum’s accounts receivable.

After the change in the broader economy made credit less available, the developer scaled down the project to its current proportion and a new project delivery method was put in place. The project would be built using a hybrid of traditional design-bid-build and design-build methods known as a bridging agreement. Under a design-bid-build method, the architect of record works directly for the owner, allowing the owner to retain control over construction but

⁹ Defendants’ hearing Exhibit 14, page 00902.

¹⁰ The record is again not clear.

¹¹ He did not testify to this exact figure. It is calculated by adding all payments from January 27, 2003, through December 4, 2008, shown in defendant’s hearing Exhibit 8. (The addition may not be precise.)

¹² See defendants’ hearing Exhibit 8, line item 1, amounts owed to GSI and Forum.

also keeping the potential for legal liability with the owner and its architect. Under a design-build arrangement, the legal liability shifts to the contractor because the architect of record works for the contractor, but the owner's ability to control construction is diminished. Under a bridging agreement, a "bridging" architect – FAS in this case – does initial architectural work for the owner to the point that a guaranteed maximum price can be calculated by the contractor. The contractor then retains an architect of record who uses the bridging architect's initial schematic and design drawings as the basis for the actual construction drawings. By this method, the owner retains control until a guaranteed maximum price is established and then the legal liability shifts to the contractor¹³ and its architect of record.

As Fishman testified, the "core notion" of a bridging agreement is that the design architect (FAS) will turn its drawings over for use by the architect of record (URS), and the developer and FAS "conducted ourselves everyday" with that understanding. Pete Spittler claimed that "the whole bridging concept was somewhat cloudy" but concedes that he was well aware, and agreed, that URS would have the full use of FAS's drawings as the basis for URS's own construction drawings. Toward that end, FAS unconditionally shared its work with Flats East and URS as early as July, 2009. The drawings were shared even though Forum dunned Fishman in October, 2008 for invoices going as far back as 2005 and despite the fact that FAS continued to claim an unpaid balance throughout 2009 and to the present. It was not until the closing of financing was imminent in November, 2010, that FAS reversed its position and demanded return of all the drawings that had been freely shared until then.

The drawings at issue are listed in plaintiffs' hearing Exhibit 8, a 13-page drawing log of over 350 documents. Although Pete Spittler testified that the work done by GSI and Forum "had an impact" on the drawings, the evidence shows that the large majority, if not all, of the drawings

¹³ Gilbane Building Company for this project.

were made in May, 2009, and after, *i.e.* not by GSI or Forum, but by Forum Architectural Services and its sub-consultant, Thorson Baker.¹⁴

FAS began submitting invoices in March, 2009. The defendants claim that by then the balance owed to GSI and Forum was \$497,226.53.¹⁵ Not all of FAS's invoices were offered into evidence at the hearing, but those that were show they were submitted by Forum Architectural Services, LLC, to Flats East Development, LLC, at 2618 North Moreland Road, Cleveland. Every invoice shows that it is for FAS's project number 09-148, "flats east development: office tower/ hotel/retail/site."¹⁶ These invoices were calculated not on an hourly rate but on a flat-fee basis. The flat fee was proposed by FAS but never explicitly agreed to by the developer. Moreover, the flat fee changed from invoice to invoice.

FAS's hearing Exhibit 8 shows it has been paid \$2,134,157 since February, 2009, but that it is still owed \$2,408,066, including \$1,025,101 that FAS owes on its contract with Thorson Baker for work mostly done after August, 2009. Because FAS has not paid Thorson Baker, it does not own or control Thorson's drawings.¹⁷

LAW AND ANALYSIS

To obtain a preliminary injunction, the plaintiffs must show, by clear and convincing evidence: (1) the likelihood of success on the merits; (2) granting the injunction will prevent irreparable harm; (3) the potential injury that may be suffered by the defendants will not outweigh the potential injury suffered by the plaintiffs if the injunction is not granted; and (4) whether the public interest will be served by granting the injunction.¹⁸

¹⁴ Thorson Baker and FAS did not enter into a contract until July 21, 2009. See defendants' hearing exhibit 12.

¹⁵ Defendants' hearing Exhibit 8, page 00123.

¹⁶ Defendants' hearing Exhibit 11.

¹⁷ Hearing testimony of Gordon Baker.

¹⁸ *Cleveland v. Cleveland Electric Illuminating Co.* (1996), 115 Ohio App. 3d 1, 12.

An injunction is an equitable remedy.¹⁹ Equity will grant relief where to deny it would work an injustice.²⁰ The primary goal of preliminary injunctive relief is to preserve the status quo pending final determination of the lawsuit.²¹ The status quo is the last uncontested status between the parties which preceded the controversy.²² In determining the status quo for a preliminary injunction, a court should look to the reality of the parties' relationship and not only to their legal rights.²³ The purpose of an injunction is to prevent a future injury, not to redress past wrongs.²⁴

It is basic contract law that to have an enforceable contract, there must be a meeting of the minds of the parties to the contract.²⁵ A contract is not enforceable if its essential terms, including the identity of the parties to the contract and a price, are not specific.²⁶ Where an express contract does not exist a party may proceed under a quasi-contractual theory such as promissory estoppel or unjust enrichment.²⁷

This case is a breach of contract lawsuit without a contract. Neither party has demonstrated a meeting of the minds on an essential contract term: price. For all that the plaintiffs assert that they have paid more than enough to equal the value of the services that produced the drawings, they never proved an agreed price and never proved the reasonable value of the services to support a quasi-contract claim.

But at least the plaintiffs are candid about the lack of agreement on a price term. The defendants insist that there is an agreed price, but ignore, first, inconsistent billing on an hourly

¹⁹ *Perkins v. Village of Quaker City* (1956), 165 Ohio St. 120, at syllabus.

²⁰ *In re: Beckman's Estate* (1951), 91 Ohio App. 42, 48.

²¹ *Crestmont Cadillac Corp. v. General Motors Corp.*, 2004-Ohio-488, Cuyahoga App. No. 83000, ¶26.

²² *Schier v. University of Colorado*, (10th Cir. 2005), 427 F.3d 1253, 1260.

²³ *Id.*

²⁴ *Lemley v. Stevenson* (1995), 104 Ohio App. 3d 126, 136.

²⁵ *Alligood v. Procter & Gamble Co.* (1991), 72 Ohio App. 3d, 309, 311.

²⁶ *Id.*

²⁷ *Dailey v. Craigmyle & Son Farms, L.L.C.*, 177 Ohio App. 3d 439, 2008-Ohio-4034, ¶ 14 and 20.

and then flat fee basis, second, the absence of any evidence that the plaintiff explicitly agreed to a particular amount and, third, the abundance of evidence that the plaintiff questioned what FAS was charging, especially beginning around the middle of 2009. FAS also failed to prove that the amounts GSI and Forum claim they weren't paid are owed to FAS. And while the defendants are not seeking injunctive relief and thus have no burden to prove their likelihood of success, it is fair to consider whether they are likely to prevail on the merits when deciding the plaintiffs' likelihood of success.

So, construing success on the merits narrowly as success in proving a contract, it cannot be said either that the plaintiff is likely to prove it has already paid for the drawings or that the defendants are likely to prove they are entitled to a \$2.91 million judgment. The ultimate money verdict may just as easily be at either end of that range or somewhere in between.

However, success on the merits shouldn't be confined to a consideration of whether the plaintiffs will prove a contract and all its essential terms. Instead, success on the merits is broadly defined as the plaintiffs ultimately getting ownership of the drawings. Looked at this way, the plaintiffs' success is certain, albeit possibly conditioned on the payment of a judgment. The defendants agree that they intended that the plaintiffs would have full ownership and use of the drawings – to include incorporation by URS into the construction documents – upon full payment. Toward that end, and well before what the defendants consider full payment, FAS had given the drawings to URS and was actively cooperating in the bridging design approach. FAS allowed this use despite its chronic complaints that Flats East wasn't paying invoices on time. This is the status quo that existed until FAS withdrew its permission to use the drawings on, almost literally, the eve of the finance closing, and this is the status quo that a preliminary

injunction would restore while the question of the amount of money owed for the drawings, if any, is litigated.

The plaintiff also sufficiently proved that the project will fail if the drawings can't be used. There was ample testimony that the plaintiffs' financing is contingent on adhering to a tight construction schedule and that the six-to-nine-month delay, and added expense, that would come with URS or another architect essentially re-creating FAS's work would cause a default on the financing and on the primary tenants' leases, dooming the project. Therefore, the plaintiffs have demonstrated that they will sustain irreparable harm if the status quo before litigation is not restored by a preliminary injunction.

To be sure, the defendants should not be punished for trying to accommodate Flats East by letting the developer and architect of record use the drawings while Flats East got its financial house in order, but it was FAS's choice to deliver the product – the drawings – that was the culmination of the parties' dealings before that product was paid for. In doing so, FAS, which never insisted on the protection of a written contract, took a risk that this court, in fairness to Flats East, which has arranged all of its affairs in reasonable reliance on continued use of the drawings, will not undo. If Flats East cannot use the drawings pending a jury's determination of whether it owes anything more for them, then the project dies and the drawings become worthless, in which case the plaintiff has paid over three million dollars for nothing.

Granting an injunction allowing Flats East to use the drawings will also not harm the defendants out of proportion to the harm it prevents. Indeed, if the defendants' \$2.91 million claim is meritorious, then the damage is already done. But that damage won't increase by letting the plaintiffs use the drawings. In fact, because the entire project will go under if Flats East

cannot use the drawings during this litigation, denying the injunction would likely harm the defendants by ensuring that any eventual damage award in their favor is uncollectible.

Considerable harm to third parties will also be avoided by granting an injunction. Thorson Baker has put over \$1 million worth of effort into the drawings at issue. FAS hasn't paid Thorson Baker yet and is not likely to if the project does not proceed. Evidence at the hearing showed that if this project defaults, losses to other third parties will include: damage to the Port Authority's bonding ability; the loss to the region of a Big Five accounting firm (Ernst & Young, a primary tenant of the new office building); lost construction jobs; lost jobs after construction is finished; and the loss of economic momentum in the region. By preventing these damages, a preliminary injunction maintaining the status quo will also serve the public interest.

Conclusion

The evidence of record is equivocal about whether the developer has fully paid, or still owes, for FAS's drawings. However, the evidence is undisputed that the developer already had the full use of those drawings, with FAS's consent and cooperation, for many months before this lawsuit. The evidence is also clear that no matter what a jury decides about how much, if anything, Flats East owes for the drawings, Flats East will get ownership of the drawings upon either a verdict in its favor or after satisfying any judgment on a verdict in the defendants' favor. Equity demands that the status quo be maintained and that Flats East be permitted to use the drawings now, pending a judgment, in the same way they were used pre-suit.

Therefore, the motion for a preliminary injunction is granted as follows:

PRELIMINARY INJUNCTION

Until this order is vacated or modified, but no later than a verdict is returned on the plaintiffs' complaint and defendants' counterclaims, Forum Architectural Services, LLC, its

owner, employees, and agents, and Forum Architects, LLC, its owners, employees and agents, are ordered restrained: from taking any action to interfere with the plaintiffs' use as if an owner of all of the drawings listed in the drawing log introduced into evidence as plaintiffs' hearing exhibit 8; and from taking any action intended to interfere with work on the project by the plaintiffs, URS Corporation and Gilbane Building Company, including but not limited to claiming, asserting, or otherwise threatening violations of the professional licensing statutes and codes against URS, Gilbane or their sub-consultants, or initiating any proceedings or filing any complaints with the Ohio Architects Board, the Ohio Professional Engineers & Surveyors Board, any other administrative board or agency, or any court.

Bond remains in the amount of \$2,500,000 as already set for the temporary restraining order.

IT IS SO ORDERED:

JUDGE JOHN P. O'DONNELL

Date: _____

SERVICE

A copy of this Journal Entry was sent by e-mail, this 28th day of February, 2011, to the following:

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JUDGE JOHN P. O'DONNELL