IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BATTA ENVIRONMENTAL ASSOCIATES, INC., a Delaware Corporation,	)	
Plaintiff	)	
	)	
v.	)	
	)	**C.A. No. 1999-05-328**
B&B MANAGEMENT, INC., a Delaware Corporation,	)	
Defendant	)	

Submitted November 1, 2004
Decided January 7, 2005

Joseph M. Bernstein, Esquire
300 Delaware Ave, Suite 1130
Suite 1130
Wilmington, DE 19801
Attorney for the Plaintiff

Jeffrey S. Welch, Esquire
824 Market St, Suite 805
PO Box 25307
Wilmington, DE 19801
Attorney for the Defendant

DECISION AFTER TRIAL

Batta Environmental Associates, a Delaware corporation (hereinafter "Batta") brings this action for payment of services rendered in relation to a property it alleged is owned or controlled by B&B Management (hereinafter "Defendant"). Defendant denies the existence of a contract, and asserts Defendant realized no benefit from actions of Bata. At the close of Batta's case-in-chief, the Court entered judgment for the Defendant on the contract claim holding that the facts failed to establish the existence of a contract. The court reserved decision on Batta's quantum meruit claim and permitted the parties to submit supplemental briefs and oral arguments. This is the Court's decision following supplemental briefing and oral argument.

FACTS

The facts in the record indicate the property, (hereinafter referred to as the "yard") was originally owned by Michael DiSabatino. The property was contaminated by a leaking underground tank. DiSabatino met with Batta, and several other people October 1996 to determine the extent of the clean up and the cost of the project. At the time of the meeting, Michael DiSabatino was the title owner of the property but the property was subject to a lien held by Norman and Robert Aerenson. DiSabatino had retained Batta to conduct the preliminary test analysis on the yard because they had worked together on other projects. The October meeting was also held to determine how the yard clean up process was able to proceed and who would be responsible for such costs. Michael DiSabatino died before this civil action was commenced.

Anthony Flynn, Esquire (hereinafter "Flynn") of Young, Conaway, Stargatt & Taylor (YCS&T) testified for the Plaintiff. Because Batta was concerned about payment it wanted the cost of its services deposited into an escrow account and Mr. Flynn was asked to draft such agreement. Flynn stated that it was not clear who were to be the parties to the agreement. He was first told the parties were Norman and Robert Aerenson[1] but he was later told by Norman Aerenson that the agreement should be with B&B Management. The original terms required payment in the amount of $17,000.00. This amount was to be deposited in an escrow with YCS&T before the work would start. Flynn testified the escrow agreement first drafted was not well received by Norman Aerenson. He further testified Plaintiff's price increased to $32,410.00 after conditions at the yard were further evaluated. Flynn testified Norman Aerenson became concerned about the price change.

Flynn further testified that after the first draft he was informed by Norman Aerenson that the proper party to the escrow agreement was B&B Management. However, he was never able to get a signed writing between the parties. He is also not aware of any payments made to Batta. Flynn testified that he knew Batta stopped working on the site January of 1997, and that Batta offered the soil test results to Enercon[2] for a fee, but it was never purchased. Flynn testified Defendant never deposited any funds in escrow, never agreed to the terms, and never signed the proposed agreement.

[1] Norman and Andrew Aerenson were father-son partners in the law firm of Aerenson & Aerenson. The original contract stated Aerenson & Aerenson, giving the impression the law firm was a party to the contract. Norman and Robert Aerenson are father-son principals in B&B Management. This claim is brought against B&B Management not Aerenson & Aerenson n.

[2] Enercon is an environmental clean-up company who was originally asked to submit a bid for the work by Batta Environmental Associates.

Naresh Batta (hereinafter "Naresh"), owner of Batta Environmental Associates, Inc., testified he and his technical manager Joseph Ayler met with Michael DiSabatino, Robert and Norman Aerenson, and several other people October 1996 to discuss clean up of the property. Naresh stated he was hired to do testing and oversee clean up of the site. At the meeting it was not clear who would pay for the services, so Naresh had the escrow agreement sent to Michael DiSabatino and the Aerensons. Naresh testified no one ever deposited the monies in escrow, yet the Aerensons wanted the project to get moving.

Batta started Phase I testing and solicited bids for the clean up of the site.[3] Thereafter, Batta was instructed by Robert Aerenson to stop work and leave the site and were not paid for its services performed between November of 1996 and January of 1997. Naresh testified from a billing document admitted into evidence that Batta spent $4,088 on samples taken from the work site, and incurred $1,652.45 in out of pocket business expenses.

Joseph Ayler testified for Batta and stated he was present at the October 1996 meeting and took personal notes. It was his understanding that Norman Aerenson was purchasing the DiSabatino property. He also testified that there were two other people at the meeting from the Capano Group. Ayler assumed that Capano was financing the original $17,000. Mr. Ayler admits he did not participate in the meeting, but was there for technical questions and took his own notes.

No witnesses testified for the Defense. The deposition of Norman Aerenson was admitted into evidence as Defense Exhibit 1. The affidavits of Norman and Robert

Aerenson were also admitted as Defendant's Exhibit 9 and 8. In his affidavit Robert Aerenson states he is one of the principals of B&B Management. He admitted that Plaintiff performed certain tests of soil samples on the property and attempted to sell these results to Enercon for $5,000. Norman Aerenson, as a principal, never signed a contract with the Plaintiff.

The deposition of Norman Aerenson, who was a partner in B&B Management, was admitted into evidence. Norman Aerenson states he was aware of the work being done by Batta and that he was concerned about the changes in pricing and refused to sign the escrow agreement. Norman Aerenson explained that he was not sure if the Defendant partnership was going to use Batta for the clean up of the property. Norman Aerenson was aware that his son, Robert Aerenson, was the one who instructed Batta to stop working on the site and that Defendant would not be using Batta for the environmental work. Both Robert and Norman Aerenson were aware of Batta's presence at the work site. The Defendant paid Enercon $100,000 for the clean up phase. Norman Aerenson was also aware that the Plaintiff had offered the test results to Enercon for $5,000.

DISCUSSION

Batta seeks recovery on the basis of two theories. First, Batta alleges the existence of a contract for its services. Second, it argues that if the Court failed to find a valid contract, it is entitled to recover the reasonable value of its services in quantum meruit.

---

[3] Letter from Batta Environmental to Norman Aerenson dated November 4, 1996. Bids solicited for the clean up phase included Enercon, as listed in the letter. Plaintiff in the letter advised Mr. Aerenson to go with Enercon. See Aerenson exhibit 6.

To establish a contract, there must be an offer, and acceptance, and consideration. S*alisbury v. Credit Services*, 199 A. 674 Del. Super., (1937). The formal elements of a contract are mutual assent to the terms of the agreement and the existence of consideration. *Faw, Casson & Co. v. Cranston,* Del. Ch., 375 A.2d 463 (1977); Restatement Law of Contracts, Sec. 19 (1932). An offer or a proposal means the signification by one person to another of his willingness to enter into a contract with him on the terms specified in the offer. *Salisbury v. Credit Services*, 199 A. 674 Del. Super., (1937).

The testimony of both Batta and YCS&T establish the intent to make an offer and enter into a contract with Defendant. At the direction of Batta, an agreement was drafted by YCS&T and presented to Defendant. The terms of the contract stated a price and specified the work to be done. The agreement also required a deposit of monies in an escrow account held by YCS&T. Upon presentation of the offer, there were concerns expressed by Defendant regarding the terms and fees. Defendant did not sign the contract nor did Defendant deposit the monies in an escrow account. At no time was there mutual assent to the terms of the agreement or acceptance by Defendant. The evidence presented does not support the existence of a valid contract. Therefore, since a contract did not exist, there is no legal basis for a claim of breach of contract.

Secondly, Batta seeks payment on the basis of quantum meruit. Quantum meruit, a quasi-contract claim, permits a party to recover the reasonable value of his or her services if: (1) the party performed the services with the expectation that the recipient would pay and (2) the recipient should have known that the party expected to be paid. *Chabott Petrosky Commer. Realtors v. Peterson*, 2004 Del. LEXIS 433. Quasi-

contractual relationships are imposed by law in order to work justice and without reference to the actual intention of the parties. Under the theory of quantum meruit, a plaintiff may recover the reasonable value of his services only if he establishes that the services were performed with an expectation that the recipient of the benefit would pay for them, and that the services were performed, absent a promise to pay, under circumstances which should have put the recipient of the benefit upon notice that the plaintiff expected to be paid. *Griffin DeWatering Corp. V. B.W. Knox Constr. Corp.,* 2001 Del. Super. LEXIS 176.

The party seeking recovery must prove two elements. First, he must demonstrate the services were performed with an expectation of payment. The facts demonstrate from the beginning that Batta had a full expectation of being paid. The costs of the clean up were discussed at the original meeting on October of 1996. Batta attempted to secure payment of services by requiring an escrow agreement. In an attempt to salvage some of the costs, Batta attempted to sell the work product to Enercon for $5,000. For these reasons the first element of payment expectation are met.

Secondly, claimant must demonstrate the recipient of the services should have known that it expected to be paid. Defendant's representatives were present at the October 1996 meeting where payment was discussed. Batta directly requested the Defendant's representatives to pay into an escrow account. Defendant knew Batta was working at the clean up site because the Defendant was the one who told the Batta they would not be using their services to complete the project and directed them to leave the work site. Therefore, for these reasons the Defendant was on notice that the Batta was doing work and expected to be paid.

Thirdly, did the party from which payment is sought benefit from the services rendered? In a letter from Batta to Norman Aerenson dated November 4, 1996, Batta outlined the work to be done, and notified the Defendant of the bids that Batta had solicited for the work. The letter also made a direct recommendation to the Defendant to use Enercon, one of the companies the Batta had solicited a bid. Defendant decided after the letter was received, not to use Batta, and instead paid Enercon to clean up the site. It is reasonable to conclude that since Enercon had already been solicited by Batta for a bid, that Batta had performed substantial work on the project. For these reasons, I find Defendant did receive a benefit from Batta's service and there is basis for the quantum meruit claim.

During closing argument, B&B argued that Batta's claim on quantum meruit must fail for two reasons. First, the action is against B&B Management, Inc., a Delaware corporation which does not exist as a legal entity, but the real entity is B&B Management Partnership. Secondly, B&B argues that the complaint does not put forth a claim in quantum meruit.

In post-trial submissions, Batta argued contract by silence and moved to amend the pleadings to properly name the Defendant. The Court finds no basis for the contract by silence. Further, raising this issue post trial comes too late and does not provide the B&B with adequate notice.

Plaintiff's motion to amend the pleadings requires a more detailed analysis. Court of Common Pleas Civil Rule 15(b) and (c)(s) provide in relevant parts:

> (b) . . . If evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action

> will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice the objecting party in maintaining that party's action nor defense upon the merits.
>
> (c) Amendment of the pleading relates back to the date of the original pleading when:
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the forgoing provision (2) is satisfied and, within the period provided by the statute or these rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The U.S. Supreme Court enunciated the general standard for leave to amend as to be freely given unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, futility or the like. *Forman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962.) Justice may not require that leave to amend be freely given if the party seeking to amend has been inexcusably careless, or if the amendment would have unfairly prejudiced an opposing party. *Annone v. Kawasaki Motor Corp*., Del., 316 A.2d 209 (1974). The Court in *Hess v. Carmine*, 396 A.2d 173 (Del. Super., 1978), evaluated the adequacy of notice, lack of prejudice to the opposing party, and whether the movant was inexcusably careless in failing to file a timely motion to amend.

In evaluating adequacy of notice, delay alone is not a sufficient basis to deny amendment of the pleadings, although inexcusable delay and repeated attempts at amendment may justify denial. *Parker v. State of Delaware*, 2003 Del. Super. LEXIS 349, Decided October 14, 2003. The language of Court of Common Pleas Civil Rule

15(a) has been held to clearly direct the liberal granting of amendments when justice so requires. *Id. at* 353. Corporations with substantially identical officers, shareholder, or directors, and similar names are said to have "identity of interest." Relief to amend should be granted in cases of identity of interest. *Williams v. Pennsylvania R. Co.,* D.Del. 91 F.Supp. 652 (1950).

The Court record indicates original service was made upon B&B Management, Inc. via its registered agent on 1300 N. Market Street, Wilmington, and left with "Carol" on June 21, 1999. The Sheriff's Office again served Robert Aerenson, at the Concord Pike address, on August 6, 1999. This summons was accepted by Ruth Ann King, paralegal. The affidavit of both Robert and Norman Aerenson state in line 1 "I am one of the principals of defendant B&B Management, Inc." Correspondence between the parties which are in the Court's record, also refer to B&B Management, Inc. It was not until three weeks before trial, in the deposition of Norman Aerenson, that Defendant assert B&B Management was a partnership, not a corporation. Defendant accepted service under B&B Management, Inc., proceeded in litigation as B&B Management, Inc., referred to B&B Management, Inc. as the correct name, and then less then three weeks before trial informs Plaintiff that B&B Management is a partnership. For these reasons the Court finds adequate notice of the Plaintiff's attempt to name the correct party.

For the previous reasons, the Court also finds no prejudice to the Defendant in allowing the Plaintiff to amend the complaint to correct the name of the Defendant. The actions of the Plaintiff were not done in bad faith, or in an attempt to promote a different argument. It appears while Batta could have been more diligent in efforts to obtain the correct name of the Defendant, Batta was not inexcusably careless as evidenced above.

Further, in accordance with *Williams v. Pennsylvania R. Co.,* D.Del. 91 F.Supp. 652 (1950), relief to amend should be granted in cases of identity of interest.

Accordingly, for the reasons herein, the Court grants Plaintiff's motion to amend the pleading to correct the name of the party. The Court also finds for Batta on its quantum meruit claim in the amount of $5,746.45.

IT IS SO ORDERED this 7th day of January 2005.

_____

Judge Alex Smalls
Chief Judge

Batta-OP Dec04