

STATE OF MICHIGAN
COURT OF APPEALS

MIDTOWN AGGREGATE, INC., MR. MCGOO
& ASSOCIATES, INC., and GRS
CORPORATION,

UNPUBLISHED
July 27, 2006

Plaintiffs-Appellants,

v

No. 267980
Wayne Circuit Court
LC No. 04-433215-CK

CLEAN AIR WORKS, INC., and MICHAEL
COLLINS,

Defendants,

and

CITY OF DETROIT,

Defendant-Appellee.

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order denying their motion for leave to amend their complaint and granting defendant city of Detroit's¹ motion for summary disposition. We affirm.

General contractor Clean Air Works, Inc. (Clean Air) and defendant entered into a contract whereby Clean Air agreed to haul and dispose of rubble from various locations in the city. Plaintiffs are three subcontractors that provided labor, services, and materials to Clean Air on the hauling project. Defendant paid Clean Air for the hauling services, but Clean Air failed to pay plaintiffs.

In its complaint, plaintiffs contended defendant failed to comply with MCL 570.101 *et seq.* Plaintiffs brought a motion to amend their complaint to alter their citation of MCL 570.101

¹ The singular "defendant" refers to the city of Detroit only. All claims involving the other defendants are not at issue on appeal.

to MCL 129.201 *et seq.* Plaintiffs also requested leave to add claims of unjust enrichment and constructive trust. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), and requested that the court dismiss plaintiff's complaint because MCL 570.101 was inapplicable. The trial court found that MCL 129.201 was inapplicable, and therefore that any amendment to the complaint would be futile. The court further found that because plaintiffs' claims for unjust enrichment and constructive trust would be brought under MCL 129.201, an amendment to add those claims would also be futile. Therefore, the court denied plaintiffs' motion to amend their complaint and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8).

On appeal, plaintiffs contend the court abused its discretion in denying their motion to amend the complaint to include claims pursuant to MCL 129.201 *et seq.*, as opposed to MCL 570.101 as initially written in the complaint. This Court reviews a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). Generally, leave to amend a complaint shall be freely granted where justice requires. MCR 2.118(A)(2). However, leave to amend should be denied where the amendment would be futile. *Jenks, supra*.

Issues of statutory interpretation are reviewed de novo. *Sotelo v Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004). The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "Statutory language should be construed reasonably, keeping in mind the purpose of the statute. . . . If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). Nothing will be read into an unambiguous statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

In this case, there is no dispute that defendant contracted with Clean Air to haul rubble at two locations in the city. Clean Air, in turn, contracted with plaintiffs who provided equipment and labor for dirt removal and hauling services. Therefore, the issue on appeal is whether a contract for hauling rubble is subject to MCL 129.201.

MCL 129.201 provides, in relevant part:

Before any contract, exceeding \$50,000.00 for the construction, alteration, or repair of any public building or public work or improvement of the state or a county, city, village, township, school district, public educational institution, other political subdivision, public authority, or public agency hereinafter referred to as the "governmental unit", is awarded, the proposed contractor, hereinafter referred to as the "principal contractor", shall furnish at his or her own cost to the governmental unit a performance bond and a payment bond which shall become binding upon the award of the contract to the principal contractor.

The plain language of the statute reads that any contract exceeding \$50,000.00 involving "construction, alteration, or repair," to any of the following three areas, "public building or

public work or improvement,” requires a payment bond. MCL 129.201. See also *Modern Transit-Mix, Inc v Michigan Bell Tel Co*, 130 Mich App 300, 302-303; 343 NW2d 14 (1983) (stating that MCL 129.201 covers only “construction, alteration or repair”). Therefore, the issue is whether hauling rubble qualifies as a construction, alteration, or repair.

The statute does not define the terms construction, alteration, or repair. However, a common dictionary defines “construction” as “the act, process, or art of constructing.” *Random House Webster’s College Dictionary* (1997), p 284. “Construct” is defined as “to build or form by putting together parts.” *Id.* In this case, plaintiffs did not build or put together parts of a public building, public work, or improvement of a governmental unit.

A common dictionary defines “alteration” as “the act of altering or the state of being altered.” *Random House Webster’s College Dictionary* (1997), p 39. “Alter” is defined as “to make different in some particular, as size, style, course, or the like; modify” *Id.* In this case, plaintiffs did not modify any public building, public work, or improvement of a governmental unit.

Finally, a common dictionary defines “repair” as, “to restore to a good or sound condition after decay or damage; mend.” *Random House Webster’s College Dictionary* (1997), p 1101. In this case, plaintiffs did not restore any object to its previous state.

Accordingly, contrary to plaintiffs’ position, MCL 129.201 is inapplicable. Such an interpretation is in accordance with the intent of the statute. The Michigan Supreme Court has explained the purpose of the statute:

“The necessity for providing some means of protecting contractors, subcontractors, laborers, or materialmen, who perform labor or furnish materials for improvement of real property has been recognized in this state prior to the time that it was a state. See 2 Territorial Laws 331 (1827). . . .

To [fulfill] the state’s basic policy to protect laborers and materialmen in construction work contracts . . . the Legislature adopted the forerunner of [MCL 129.201 *et seq.*; MSA 5.2321(1) *et seq.*]. The purpose of that statute was to provide protection in the construction of public buildings where protection is not afforded by the mechanics’ lien law” [*Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 182 n 11; 504 NW2d 635 (1993), quoting *Milbrand Co v Dep’t of Social Services*, 117 Mich App 437, 440; 324 NW2d 41 (1982).]

Clearly, the purpose of MCL 129.201 is to protect contractors and subcontractors that entered into construction contracts to construct, alter, or repair various public structures because said contractors and subcontractors are unable to obtain liens on the relevant public property. Interpreting this statute to include service contracts, such as hauling away rubble, would improperly expand the reach of this statute. Therefore, MCL 129.201 is inapplicable to the instant case, and any amendment relative to the statutory citation would have been futile. Accordingly, the court did not abuse its discretion in denying plaintiffs’ motion to amend the complaint to add a claim pursuant to MCL 129.201. *Jenks, supra.*

Next, plaintiffs contend the court abused its discretion in denying their motion to amend the complaint to include claims of unjust enrichment and constructive trust. To establish a claim of unjust enrichment plaintiffs must prove: (1) that defendant received a benefit from plaintiffs and (2) that an inequity results to plaintiffs because of the retention of the benefit by defendant. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). In such circumstances, the law will imply a contract to prevent the unjust enrichment of defendant. *Kammer*, supra at 185-186. Because implying a contract invalidates normal contract principles, the courts employ the doctrine of unjust enrichment with caution. *Id.* at 186. Moreover, the court will not imply a contract where there is an express contract covering the same subject matter. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992).

On appeal, plaintiffs contend the Michigan Supreme Court in *Kammer*, supra, provided for independent claims of unjust enrichment and constructive trust, regardless of whether MCL 129.201 applied. In *Kammer*, the defendant school district contracted with general contractor Dougherty Construction (Dougherty) for the construction and renovation of athletic facilities in the district. *Id.* at 179. Pursuant to MCL 129.201, Dougherty furnished the defendant with a payment bond. *Id.* Dougherty then subcontracted with the plaintiff for base and paving work. *Id.* The plaintiff notified the defendant of its intended performance and its reliance on the payment bond. *Id.* The defendant paid Dougherty, but Dougherty did not pay the plaintiff. *Id.* at 179-180. When the plaintiff expressed concern over Dougherty's failure to pay them, the defendant indicated that they need not worry because the plaintiff's interests were protected by the payment bond. *Id.* at 180. However, the defendant discovered the payment bonds were invalid. *Id.* The defendant eventually terminated its contract with Dougherty, at which time the plaintiff learned of the fraudulent nature of the bonds. *Id.* The plaintiff then filed suit against the defendant claiming, inter alia, that the defendant was liable for its failure to ensure the validity of the bond, unjust enrichment, and constructive trust. *Id.* at 180-181. The circuit court granted summary disposition for the defendant, finding that no legal duty existed for governmental units to ensure the validity of the bonds. *Id.* at 181. The court further found that the plaintiff's claims for unjust enrichment and constructive trust were unsupported. *Id.*

With respect to whether the defendant was responsible for ensuring the validity of the bonds, our Supreme Court in *Kammer* found that a governmental entity verifies the validity of a payment bond when it provides a subcontractor a copy of the bond at the subcontractor's request. *Id.* at 184. With respect to plaintiffs' claim for unjust enrichment, the Court stated:

The Court of Appeals analysis must be rejected because defendant failed to notify plaintiff of the fraudulent nature of the bonds after it had assured plaintiff the bonds would secure its interests. Defendant was aware over a year before the termination of the contract that Dougherty was failing to compensate plaintiff and other subcontractors, and plaintiff repeatedly informed defendant of its reliance upon the bonds to secure compensation. Indeed, defendant indicated that there was no need to worry because the payment bond protected the subcontractors' interest. However, defendant knew for approximately seventy-five days that the bonds were fraudulent, and never notified plaintiff until after it terminated its contract with Dougherty. Standing alone, these facts sufficiently support a claim of unjust enrichment. Furthermore, as soon as difficulties arose – nearly a year before the termination of the contract – defendant verified the

validity of the bonds by supplying plaintiff with certified copies of the bonds. In these circumstances, regardless of its fulfillment of the contract to the general contractor, once defendant possessed actual knowledge of the invalidity of the bonds and failed to inform plaintiff, reasonable minds could find that defendant was unjustly enriched. [*Id.* at 186-187.]

With regard to plaintiffs' claim for constructive trust, the Court stated:

Plaintiff alleges that defendant "misrepresented' the existence of a payment bond to satisfy subcontractor claims." Examining the evidence in the light most favorable to plaintiff, defendant verbally assured plaintiff that it was protected by the bonds and certified their validity when it provided certified copies of them. Plaintiff may prove at trial that it would not have continued construction without relying upon this representation. If so, defendant received the benefit of plaintiffs' labor, and a constructive trust could have been established. [*Id.* at 189.]

Therefore, based on the facts presented, the Supreme Court allowed the plaintiff's claims of unjust enrichment and constructive trust to be presented to the jury. *Id.* at 190-191.

In the present case, with regard to plaintiffs' claim for unjust enrichment, plaintiffs correctly assert that the Court in *Kammer* did not expressly base its holding that the defendant was unjustly enriched on MCL 129.201. Rather, the Court analyzed the facts of the case pursuant to the two elements that must be established to sustain a claim of unjust enrichment, namely that defendant received a benefit from the plaintiff and that an inequity would result to plaintiff because of the retention of said benefit by defendant. *Belle Isle Grill Corp, supra* at 478. The *Kammer* Court implicitly found that the defendant received a benefit from the plaintiff. The Court then discussed why an inequity would result to the plaintiff from the retention of the benefit by the defendant.

In this case, it is undisputed that defendant received a benefit from plaintiffs. However, with regard to whether an inequity would result to plaintiffs because of the retention of said benefit by defendant, plaintiffs have not alleged that any of defendant's representatives explicitly lied to plaintiffs and told them that Clean Air obtained a valid payment bond. Therefore, unlike the defendant in *Kammer* that knowingly and expressly misrepresented the existence of the payment bond to the plaintiff, in this case, plaintiffs have not claimed that defendant expressly misrepresented the existence of a payment bond.

Moreover, defendant was not required to, and therefore did not, verify the validity of the bond in accordance with MCL 129.208. See *ABC Supply Co v River Rouge*, 216 Mich App 396, 401-402; 549 NW2d 73 (1996) (holding that *Kammer* does not construe MCL 129.201 *et seq.* as placing an affirmative duty on the governmental unit to require that the statutory bond be furnished; rather, the governmental entity is only under a duty when it verifies the validity of a payment bond by providing a certified copy of the bond at the request of a subcontractor). Defendant did not provide plaintiffs with a certified copy of the bond as no bond existed or was required. Therefore, unlike the defendant in *Kammer*, defendant in this case did not assure

plaintiff of the bond's validity or refuse to inform plaintiff of the bond's invalidity once it was discovered.

Additionally, defendant paid Clean Air for the hauling services. Defendant is not retaining services for which it did not pay. Plaintiffs' recourse, if any, is against Clean Air, the company with whom it contracted. Therefore, plaintiffs have failed to state a claim for unjust enrichment. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to add a claim of unjust enrichment because such an amendment would have been futile. *Jenks, supra*.

Next, plaintiffs contend the trial court erred in denying their motion to amend their complaint to add a constructive trust claim. "A constructive trust may be imposed where such trust is necessary to do equity or prevent unjust enrichment Hence, such a trust may be imposed when property has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property" *Kammer, supra* at 188 (internal quotations and citations omitted).

In this case, plaintiffs premise their claim of constructive trust on their claim of unjust enrichment. As noted above, plaintiffs have failed to state a claim of unjust enrichment. Therefore, plaintiffs' companion claim of constructive trust also fails. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to amend the complaint to add the claim of constructive trust because such an amendment would have been futile. *Jenks, supra*.

Finally, plaintiffs request that this Court review whether there is an independent cause of action against a municipality under these narrow circumstances, apart from the claims of unjust enrichment and constructive trust claims. However, plaintiffs do not suggest what cause of action they would like this Court to determine exists, nor do they provide any additional case law to support their request. "An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Thus, plaintiffs have established no error in this regard.

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood