STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2173

Oscar Caldas, et al.,
Appellants,

vs.

Affordable Granite & Stone, Inc.,
Respondent,

Dean Soltis,
Defendant.

Filed May 23, 2011
Affirmed
Harten, Judge[*]

Hennepin County District Court
File No. 27-CV-09-18378

Justin D. Cummins, Brendan D. Cummins, Miller O'Brien Cummins, PLLP, Minneapolis, Minnesota (for appellants)

David M. Wilk, Jennifer L. Young, Larson, King, LLP, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Schellhas, Judge; and Harten, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Appellants challenge the summary judgment dismissing their breach of contract and unjust enrichment claims against respondent, their employer. Because no genuine issue of material fact precludes summary judgment and respondent is entitled to judgment as a matter of law, we affirm.

FACTS

In 2007, respondent Affordable Granite & Stone, Inc., (AGS) submitted a proposal to the City of Minneapolis (the city) to perform work on the city's convention center. The city accepted AGS's proposal, and they entered into a contract. One of its requirements was that AGS submit a Prevailing Wage Certificate (PWC) of its compliance with the city's Prevailing Wage Ordinance (PWO).

The PWO provides in relevant part that, if a contractor is found noncompliant,

> the contract monitoring officer or officers may place the contractor on a suspended or disbarment list and, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the city for damages sustained thereby. The city reserves the right to withhold contract payments to the extent of the underpayment of required wages.

Minneapolis, Minn., Code of Ordinances (MCO) § 24.250 (2010).

Appellants, a group of AGS employees who were paid an hourly rate of $16.28 for their work on the convention center, worked on it from March or April 2008 to January

2009. In June 2009, they brought this action against AGS, alleging that they should have been paid $44.31 per hour as terrazzo mechanics and claiming breach of contract and unjust enrichment.[1]

Both parties moved for summary judgment. Following a hearing, the district court granted AGS's motion and denied appellants' motion, dismissing their claims. Appellants challenge the summary judgment, arguing that (1) they are third-party beneficiaries of the contract between AGS and the city; (2) they have a right of action under the PWO; and (3), in the alternative, the city was unjustly enriched by paying appellants an inadequate wage.[2]

D E C I S I O N

In reviewing summary judgments, we ask two questions: whether there are genuine issues of material fact and whether the district court erred in its application of the

[1] A claim under the Minnesota Fair Labor Standards Act, Minn. Stat. §§ 177.25, .30 (2010), was also dismissed and is not pursued on appeal.

[2] Before bringing this action, appellants asked the Minneapolis Department of Civil Rights (MDCR) to investigate the adequacy of their wage. In September 2008, MDCR wrote to appellants' attorney, saying that appellants' work was janitorial or maintenance in nature and that the wage they were being paid was appropriate. After appellants had commenced this action, MDCR again investigated and, in February 2010, informed appellants' attorney by letter that appellants should have been paid as terrazzo mechanics at $44.31 per hour and that the city was withholding $107,345 from AGS. AGS did not receive a copy of MDCR's letter. At oral argument, neither party could explain why this action had been begun while the administrative remedy prescribed by the PWO was still in process. *See Cnty. of Blue Earth v. Minn. Dep't of Labor and Indus*., 489 N.W.2d 265, 268 (Minn. App. 1992) ("[I]mplying a judicial cause of action prior to exhaustion of the administrative remedy is inconsistent with the purposes of the legislative scheme, which is to have a specialized administrative agency handle the setting of prevailing wage rates and contested cases.").

law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review both questions de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

1. Third-Party Beneficiary Status

Appellants acknowledge that their claims under the PWO depend upon the existence of a contract or other legal source requiring them to be paid a specific wage; the ordinance contains no private right of action. *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 126 (Minn. 2007) (noting that Minnesota prevailing wage law does not guarantee employees any particular wage but rather provides that an employer who does not pay wages by a certain time must pay a statutory penalty).

The contract between AGS and the city incorporated the Prevailing Wage Certificate (PWC), which provided that "Laborers and Mechanics shall be paid according to the Contracts for Public Works Ordinance [PWO], Minneapolis Code of Ordinances, Chapter 24, Section 24.200 through 24.260." The PWO required AGS to comply with federal labor standards and prevailing wage provisions; it provided a remedy for noncompliance by giving the city the right to terminate the contract or withhold payment from AGS.

Appellants argue that they are third-party beneficiaries of the contract and, specifically, of the PWC. "The interpretation of a contract is a question of law if no ambiguity exists . . . ." *City of Va. v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. 18 Apr. 1991). Here, no one alleges ambiguity.

Third-party beneficiaries may be either intended beneficiaries or incidental beneficiaries. *Cretex Cos. v. Constr. Leaders, Inc*., 342 N.W.2d 135, 139 (Minn. 1984) (relying on and adopting Restatement (Second) of Contracts § 302 (1979)). Only an intended beneficiary may recover under a contract. *Id*. An intended beneficiary must meet either the "duty-owed" test or the "intended-beneficiary" test. *Id*.

A. The Duty-Owed Test

The duty owed test requires that "performance of the [contractual] promise will satisfy an obligation of the promisee to pay money to the beneficiary." Restatement (Second) of Contracts § 302(1)(9). The contract here required AGS (the promisor) to perform certain work for the city (the promisee) and to comply with the PWO by paying appellants the prevailing wage. The city had no duty to pay money to appellants; thus, AGS's performance of the work and payment of the wage could not satisfy an obligation of the city to pay money to appellants. *See Twin City Constr. Co. v. ITT Indus. Credit Co*., 358 N.W.2d 716, 717-18 (Minn. App. 1984) (holding duty-owed test was met when lender assumed borrower's duty to pay construction company and affirming summary judgment awarded to construction company as third-party beneficiary).

Appellants argue that the PWO imposes a duty on the city to see that appellants receive the prevailing wage, but, as the district court concluded, payment of the wages appellants seek would not fulfill such a duty; that duty would continue to exist as a function of the PWO, which is an ordinance, not a contract. Appellants do not meet the duty-owed test.

B. The Intent-to-Benefit Test

The intent-to-benefit test requires that "circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 302(1)(b); *Cretex*, 342 N.W.2d at 139. It applies when the performance is rendered to the third party; if performance is rendered to the promisee, any benefit to a third party is incidental, and the third party may not recover. *Concordia College Corp. v. Salvation Army*, 470 N.W.2d 542, 545 (Minn. App. 1991), *review denied* (Minn. 2 Aug. 1991). To ascertain the parties' intent, courts look to the circumstances at the time of contracting, *id.*, and to the context of the contract as a whole using "a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract . . . as a whole." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc*., 666 N.W.2d 320, 324 (Minn. 2003) (quotation omitted).

None of the three relevant documents before us reveals an intent to benefit appellants. The contract between AGS and the city does not mention appellants. The PWC is a statement of the city's intent to comply with the relevant law, namely the PWO. The PWO provides, in the event of AGS's noncompliance with the law, that the city may terminate the contract or withhold payment; the PWO does not confer any right on any "laborer, mechanic, or employee" such as appellants. AGS's performance under the PWO is compliance with the law, and that performance is rendered to the city; any benefit to appellants is incidental.

Thus, as the district court concluded, appellants do not meet either the intent-to-benefit test or the duty-owed test and may not recover as third-party beneficiaries of the contract between AGS and the city.

2. Right to Bring a Private Action

Even if appellants were third-party beneficiaries of the PWC, they would not have a private right of action against AGS. As third-party beneficiaries, appellants may recover only if "recognition of [their] right to performance . . . is appropriate to effectuate the intention of the parties [to the contract]." Restatement (Second) of Contracts § 302.(1); *Cretex,* 342 N.W.2d at 139. The performance appellants seek is a private action against AGS to compel its compliance with the PWO. Thus, appellants must show that recognizing their right to such an action "is appropriate to effectuate the intent of [AGS and the city]." But the contract between AGS and the city does not mention appellants, and there is no indication that either the city or AGS intended to enable appellants to enforce the PWO by bringing a private action against AGS.

The city would have no reason to contract for appellants' right to sue AGS. If the city had wanted to enable employees to sue their employers for noncompliance with the PWO, it would have included such a provision either in the PWO itself or in the city's contracts with employers. What the city intended was to have the right to compel employers' compliance with the PWO, and the PWO provides that right to the city—not to employees. What AGS intended was to satisfy the city's requirement that contractors

on city projects comply with the PWO. At most, AGS's compliance with the PWO would benefit appellants incidentally.[3]

Finally, even if appellants were third-party beneficiaries to the contract between AGS and the city, permitting them to "recover" by giving them a private right of action against AGS would not be "appropriate to effectuate the intent of the parties." Restatement (Second) of Contracts § 302(1); *see Cretex*, 342 N.W.2d at 139. Appellants' claim under the contract between AGS and the city fails.[4]

3. Unjust Enrichment

In the alternative, appellants argue that they are entitled to the wages they claim under the doctrine of unjust enrichment. Unjust enrichment is an equitable remedy. *Southtown Plumbing, Inc., v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137, 140 (Minn.

[3] We note that appellants seek damages under the Minnesota Prevailing Wage Act, which is based on the federal Davis-Bacon Act. *Dicks v. Minn. Dep't of Admin*., 627 N.W.2d 334, 337 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). The Supreme Court has declined to decide "whether the [Davis-Bacon] Act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations." *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 769, 101 S. Ct. 1451, 1460 (1981). Although Minnesota has not addressed the issue, various other jurisdictions have held that there is no private right of action under the Davis-Bacon Act. *See, e.g., Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co*., 135 F.3d 671, 676 (9th Cir. 1998); *Weber v. Heat Control Co*., 728 F.2d 599 (3rd Cir. 1984); *United States v. Capelletti Bros*., 621 F.2d 1309, 1314 (5th Cir. 1980); *Peatross v. Global*, 849 F. Supp. 746, 748 (D. Haw. 1994). *But see Amaral v. Cintas Corp No. 2*, 163 Cal. App. 4th 1157, 1194, 78 Cal. Rptr. 3d 572, 601 (2008) (holding that employees working on public works projects had a private right of action under the California living wage ordinance).

[4] Appellants argue that the issue on appeal is whether there is a genuine issue of material fact as to whether the wages they seek were "actually earned." *See* Minn. Stat. § 181.13(a) (2010) (providing that discharged employees' wages "*actually earned* and unpaid . . . are immediately due and payable upon demand of the employee" and that an employee may collect a day's wage for every day the employer is in default up to 15 days) (emphasis added). Because we conclude that appellants' contract claim fails, we, like the district court, do not reach this issue.

App. 1992). A decision on an equitable claim is reviewed for an abuse of discretion. *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 312 Minn. 277, 279, 251 N.W.2d 642, 644 (1977). The district court determined that appellants' unjust enrichment claim also failed.

To recover under unjust enrichment, appellants must show that AGS knowingly received something of value to which it was not entitled. *See Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). It is not sufficient to show that AGS benefitted from appellants' efforts; appellants must show that AGS "was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." *Id.*

Appellants' argument is based on the premise that they were entitled to be paid as terrazzo mechanics, at $44.31 per hour, for all the work they did on the convention center and that AGS illegally or unlawfully paid them less. But the record shows that, throughout the project, appellants accepted the lower wage and continued to work for AGS. There is no indication that any appellants complained to AGS that their wage was inadequate or that any of them quit because of inadequate wages. Not until June 2009, when they were no longer AGS employees, did appellants begin to notify AGS that they were dissatisfied with their wage. Between June 2009 and November 2009, they sent identical letters to the AGS president saying:

> This letter is a demand for prompt payment of all wages that you owe me for work I performed for [AGS] that was covered by prevailing wage laws and requirements. I have worked on prevailing wage projects for your company but wasn't paid the required prevailing wages. Please send the wages owed to me at the following address:

None of the letters provided any specifics of what amounts appellants claimed, what work they had done to deserve those wages, or why they had continued working for many months and accepting a much lower wage.

Unjust enrichment is an equitable remedy; one seeking equity must "come into equity with clean hands." *Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 117, 153 N.W.2d 281, 290 (1967) (quotation omitted). If appellants believed they had a right to almost three times the amount they were being paid for nine or ten months, they had an obligation to inform AGS that the wage they were receiving was inadequate while they were receiving it, not six months after the project was completed and the lower wage was received and accepted. "Laches is an equitable doctrine applied to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (quotation omitted). If appellants knew they had a right to a higher wage while they were working for AGS, they were not diligent in asserting it, and AGS was prejudiced by their delay in claiming almost three times the amount they had been paid.

The district court inferred from appellants' tacit acceptance of the lower wage that they did not, in fact, expect to be paid more than they were receiving, and concluded that appellants' unjust enrichment claim failed because they were entitled to be paid only in accord with their expectation. If appellants did expect a higher wage, they knew by April 2008 that they were not receiving it; they chose to accept the lower wage until the project was completed; and they did nothing for six months after the project was completed. In either event, they do not bring their unjust enrichment claim with "clean hands."

Appellants were not third-party beneficiaries of the contract between AGS and the city, and, even if they had been, that contract did not give them a right to bring a private action against AGS to enforce the PWO. Their unjust enrichment claim fails because, if they were third-party beneficiaries, they had a contractual remedy, and, if they were not, they cannot show the "clean hands" necessary for equitable relief.

Affirmed.