Arkansas Association of Defense Counsel

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Unjustly Sued: Problems With Unjust Enrichment Claims Against Contractual Non-Parties

Joseph Price and I recently represented a co-defendant sued in Arkansas state court by a plaintiff for breach of contract. The client was not a party to the contract at issue, so the plaintiff also brought an unjust enrichment claim based on the same underlying facts as the breach-of-contract claim. The case of *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005), addressed this situation.

Arkansas law is well established that, absent a few exceptions[1], unjust enrichment "has no application when an express written contract exists." *Servewell*, 362 Ark. at 612, 210 S.W.3d at 112. The Eighth Circuit explained the general rule:

> The reason for the rule that someone with an express contract is not allowed to proceed on an unjust enrichment theory, is that such a person has no need of such a proceeding, and moreover, that such a person should not be allowed by means of such a proceeding to recover anything more or different from what the contract provides for.

U.S. v. Applied Pharmacy Consultants, Inc., 182 F.3d 603, 609 (8th Cir. 1999). In *Servewell*, the Arkansas Supreme Court expanded the application of this general rule to non-parties to the contract. *See* 362 Ark. at 612, 210 S.W.3d at 112.

Servewell involved a contract dispute between a subcontractor and a general contractor and owner of a development project. Among other allegations, the subcontractor brought a claim for unjust enrichment against the developer of apartment buildings. The claim was based on the general contractor's failure to pay the subcontractor for property enhancements pursuant to a written contract between the general contractor and subcontractor. *See id*. at 601, 210 S.W.3d at 104. The developer was not a party to the contract between the subcontractor and general contractor. *See id.* The subcontractor argued that the developer had been unjustly enriched by the subcontractor's improvements to the developer's property, while the subcontractor had received no compensation for its performance in providing the benefits to the developer. *See id.* at 612, 210 S.W.3d at 111-12. The circuit court rejected the subcontractor's argument and dismissed the claim because the contract between the general contractor and subcontractor governed the payment for services aspect of the parties' relationship. *Id.*, 210 S.W. 3d at 112.

On appeal, the Supreme Court upheld the circuit court's ruling that the subcontractor's claim against the developer for unjust enrichment lacked merit. *Id.* at 612-13, 210 S.W.3d at 112. In doing

[1] Exceptions to this general rule may arise when an express contract is void or does not fully address a subject. *See Campbell v. Asbury Auto., Inc.*, 2011 Ark. 157, 23, 381 S.W.3d 21, 37; *see also Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 786 (8th Cir. 1996).

so, the Supreme Court reaffirmed the "settled principle" that a party may not recover under a theory of unjust enrichment when a valid contract exists. *Id.* at 612, 210 S.W.3d at 112. The Supreme Court, however, recognized a new and narrow exception to that settled principle, stating that the "subcontractor could recover from a [non-party to the contract], even when a separate contract exist[ed] between the subcontractor and general contractor, if the [non-party] has agreed to pay the general contractor's debt or if the circumstances surrounding the parties' dealings can be found to have given rise to an obligation to pay."[2] *Id.* at 612-13, 210 S.W.3d 112 (quoting *U.S. E. Telecomm., Inc. v. U.S. W. Commc'ns Servs., Inc.*, 38 F.3d 1289, 1296-98 (2d Cir. 1994)). Despite this recognition, the Supreme Court affirmed the dismissal of the subcontractor's unjust enrichment claim because "there [was] no evidence of any such agreement between [the parties]…the general rule—that one cannot recover in quasi-contract when an express contract exits—governs the matter." *Id.* at 613, 210 S.W.3d at112.

While *Servewell* is not a new case, and the majority of the opinion discusses construction law issues, *Servewell* did not limit its holding to the particular facts and more recent non-construction case law cites *Servewell*. *See Tuohey v. Chenal Healthcare, LLC*, No. 4:15CV00506 JLH, 2016 WL 1180339, at *5 (E.D. Ark. Mar. 25, 2016) ("This rule also applies to defendants who are not a party to the express contract.") (citing *Servewell*); *King v. Homeward Residential, Inc.*, No. 3:14CV00183 BSM, 2014 WL 6485665, at *2 (E.D. Ark. Nov. 18, 2014) ("Indeed, the existence of a valid and enforceable written contract usually precludes recovery in quasi-contract, even against a third party.") (citing same).

The tenets set forth in *Servewell* should be considered when representing a client sued for unjust enrichment when the case includes a written contract, even when the client is not a party to that contract.

[2] Despite this narrow exception, you should be aware of the statute of fraud's prohibition for these types of agreements.

The AADC thanks Lindsey Pesek of Quattlebaum, Grooms & Tull for writing this article.

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