

STATE OF MICHIGAN
COURT OF APPEALS

B & V CONSTRUCTION, INC,

Plaintiff–Appellant,

v

TOWNSHIP OF CANTON,

Defendant–Appellee,

and

COMPOST SYSTEMS, INC,

Defendant.

UNPUBLISHED

August 6, 1996

No. 178889

LC No. 92-222633 CK

Before: Marilyn Kelly, P.J., and MacKenzie and R.J. Ernst*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition for defendant Canton Township pursuant to MCR 2.116(C)(8) and (10). We affirm.

In 1990, a consortium of townships known as the Western Township Utilities Authority entered into an agreement with Compost Systems, Inc., for the collection and disposal of compost material. The same year, defendant Canton Township, a member of WTUA, leased a parcel of township property to Compost Systems. Compost Systems subsequently contracted with plaintiff to install a roadway on the leased property to allow delivery truck access. The composting operation eventually proved unworkable, and the site was closed. Compost Systems failed to pay plaintiff the balance due under its construction contract. This action followed, with plaintiff alleging in relevant part that the township was liable under the Michigan Construction Lien Act, MCL 570.1101 *et seq.*; MSA 26.316(191) *et seq.*, and under an unjust enrichment theory.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff first contends that the trial court erred in granting summary disposition of its claim under the Construction Lien Act. The argument is without merit. This Court has held that the act's predecessor statute, the Mechanics' Lien Act, MCL 570.1 *et seq.*; MSA 26.281 *et seq.*, did not apply to the construction of public structures. *Adamo Equipment Rental Co v Mack Development Co, Inc*, 122 Mich App 233, 236; 333 NW2d 40 (1982). Rather, laborers and materialmen in contracts for construction on public projects were protected by the forerunner of the Contractors' Bond for Public Works Act, MCL 129.201 *et seq.*; MSA 5.2321(1) *et seq.* *Id.* Although the Mechanics' Lien Act was repealed and replaced by the Construction Lien Act, MCL 570.1101 *et seq.*; MSA 26.316 (101) *et seq.*, our Supreme Court has held the distinction between public projects and private sector construction still exists after the enactment of the Construction Lien Act. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 181-182; 504 NW2d 635 (1993). Plaintiff's claim of lien pursuant to the Construction Lien Act was, therefore, so clearly unenforceable on its face that no factual development could possibly justify a right to recovery, and summary disposition was appropriate pursuant to MCR 2116(C)(8).

Summary disposition of plaintiff's claim for unjust enrichment was also proper pursuant to MCR 2.116(C)(10). A contract will be implied in law if a party is unjustly enriched. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 686 (1992). However, a contract will only be implied if there is no express contract covering the same subject matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 370; 509 NW2d 791 (1993). In this case, an express contract covering this subject matter existed between plaintiff and Compost Systems, and plaintiff's claim pursuant to that contract was even reduced to a judgment in plaintiff's favor. The township is not liable on an implied contract because it received the benefit of this express contract. See *Sullivan v Detroit, Ypsilanti & Ann Arbor R Co*, 135 Mich 661, 667; 98 NW 756 (1904).

Finally, we reject plaintiff's argument that the trial court erred in denying its motion to amend its complaint to add a third-party beneficiary claim. To be an intended third-party beneficiary of a contract, the promisor must have undertaken to do something for the benefit of the party asserting such status. *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992). Where a contract is intended primarily to benefit its signatories, the mere fact that a third person would be incidentally benefited does not entitle that person to protection. *Id.* The indemnity provision in the lease between the parties indicates that a performance bond was required for the purpose of securing Compost Systems' obligations, and that the bond would name the township as the indemnified party. No promise was made on behalf of plaintiff in the lease. Plaintiff's amendment to add a third-party beneficiary claim therefore would have been futile. Compare *Kammer Asphalt, supra*. As such, it was not an abuse of discretion for the trial court to reject plaintiff's request. *Allegheny Ludlum Corp v Dep't of Treasury*, 207 Mich App 604, 605; 525 NW2d 512 (1994).

Affirmed.

/s/ Marilyn Kelly
/s/ Barbara B. MacKenzie
/s/ Richard J. Ernst