

IN THE SUPREME COURT OF THE STATE OF NEVADA

ACE FIRE SYSTEMS, INC., A NEVADA CORPORATION,

Appellant/Cross-Respondent,

vs.

DICK CORPORATION, A PENNSYLVANIA CORPORATION,

Respondent/Cross-Appellant,

and

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, A

FOREIGN CORPORATION,

Respondent.

No. 43273

**FILED**

**SEP 28 2006**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Suber*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a judgment entered after a bench trial and an appeal from an order denying attorney fees. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

The City of Henderson awarded Dick Corporation (DC) a general contract to construct an addition to the city hall, a public works project. DC awarded the fire protection part of the work to Ace Fire Systems, Inc. (ACE). DC and ACE negotiated the terms of an agreement while ACE was working on the project, but the parties never signed a subcontract agreement. The City of Henderson paid DC for work performed on the job, including work by ACE for the fire protection systems. But ACE left the project mid-term when DC did not pay.

ACE brought suit against DC for breach of contract, unjust enrichment, fraudulent or negligent misrepresentation, conversion and a claim against the project's payment bond. DC counterclaimed, alleging promissory estoppel, negligent misrepresentation, and fraud. The district court denied all of the claims except ACE's unjust enrichment claim, but

refused to award attorney fees to ACE. We assume the parties are familiar with the facts and do not recite them further, except as necessary to this order.

ACE challenges the district court's findings that (1) no express or implied-in-fact contract was formed between DC and ACE, (2) payments made by the City of Henderson to DC for work performed by ACE did not constitute conversion, and (3) ACE was not entitled to attorney fees. DC appeals the unjust enrichment judgment against it, and the claim against the payment bond.<sup>1</sup> We affirm the district court's judgment and order.

The express or implied-in-fact subcontract

The parties dispute on appeal whether an express contract was formed based on the general contract principle requiring a meeting of the minds. However, neither party addresses the district court's finding that signatures were necessary for an enforceable subcontract agreement.

In general, when circumstances show that the parties contemplated a particular procedure to enter into a contract, a binding contract is not formed when the procedure is not met.<sup>2</sup> Nevertheless, even if the particular procedure is not satisfied, a contract may still exist if substantial evidence that is both convincing and subject to no other reasonable interpretation demonstrates that the parties intended to be

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<sup>1</sup>National Fire Insurance Company of Hartford did not appeal, rendering arguments on its behalf improper. See Ace Fire Systems v. Dick Corp., Docket No. 43273 (Order Dismissing Appeal (Docket No. 45309) and Denying Motions to Strike and For Sanctions (Docket No. 43273), October 14, 2005). Thus, DC's argument as to that issue may not be considered.

<sup>2</sup>Shetakis v. Centel Communications, 104 Nev. 258, 261, 756 P. 2d 1186, 1188 (1988).

bound.<sup>3</sup> Substantial evidence supports the district court's finding that DC required ACE's signature to create an enforceable contract.<sup>4</sup> The requirement that any contract be signed was conveyed to ACE, was an internal rule at DC, and is an industry custom. Thus, no contract could have existed in the absence of a signature and ACE did not sign a subcontract agreement. Further, the parties' conduct surrounding the project does not convincingly demonstrate that both parties intended to be bound by any proposed contract, regardless of the signature requirement. The parties failed to resolve a workers' compensation insurance issue and ACE left the job with the term outstanding. Therefore, no express contract was reached by the parties.

ACE argues, however, that it can recover under an implied-in-fact theory. We disagree. The terms of an implied-in-fact contract are manifested by the conduct of the parties.<sup>5</sup> An implied-in-fact contract is "founded upon an ascertainable agreement."<sup>6</sup> "In order to prevail on the theory of a contract implied in fact, the court would necessarily have to determine that both parties intended to contract, and that promises were

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<sup>3</sup>Id.

<sup>4</sup>First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (providing that "[s]ubstantial evidence is evidence that 'a reasonable mind might accept as adequate to support a conclusion'" (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986))).

<sup>5</sup>Smith v. Recrion Corp., 91 Nev. 666, 668, 541 P.2d 663, 664 (1975).

<sup>6</sup>Id. at 668, 541 P.2d at 665.

exchanged.”<sup>7</sup> The failure of the parties to agree on the essential term of workers’ compensation insurance demonstrates that all of the necessary promises were not exchanged, so that an ascertainable agreement cannot be found. Thus, substantial evidence supports the district court’s finding that no implied-in-fact contract existed.

The fraud/negligent misrepresentation and conversion claim under NRS 338.550

ACE maintains that it was defrauded, or in the alternative, that its funds were converted, when DC failed to pay ACE funds DC received from the City of Henderson that included payment for work performed by ACE. This argument is based on the claim that the statutory scheme governing public works projects, NRS Chapter 338, requires a contractor to disburse money paid to it within 10 days of receipt.<sup>8</sup> However, the public works statutes only apply to subcontractors with written subcontracts.<sup>9</sup> Therefore, ACE cannot rely on NRS Chapter 338 to support a claim for fraud/negligent misrepresentation or

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<sup>7</sup>Id. at 669, 541 P.2d at 665 (internal citation omitted).

<sup>8</sup>NRS 338.550.

<sup>9</sup>NRS 338.565; NRS 338.440 and NRS 338.445(2) (both requiring a written contract between contractors and subcontractors).

conversion.<sup>10</sup> Further, in the absence of any tort claim, ACE cannot make a claim for punitive damages.<sup>11</sup>

Attorney fees under NRS 338.640(1)

ACE sought attorney fees under NRS 338.640(1), which requires an attorney fee award to a subcontractor who is the prevailing party of a claim under NRS Chapter 338. However, ACE is not a subcontractor within the meaning of NRS 338.445 and, therefore, could not claim prevailing party status under NRS Chapter 338.

The unjust enrichment claim

DC argues that it was not unjustly enriched by ACE's work on the project because ACE left the project before completing its work and the replacement subcontractor caused an increase in costs. We disagree.

A quasi contract exists when a benefit is conferred on the defendant by the plaintiff, the defendant appreciates the benefit, and accepts and retains the benefit under circumstances that would be inequitable without payment for the benefit.<sup>12</sup> Substantial evidence supports the district court's unjust enrichment conclusion. DC received and retained the benefit of ACE's work, as demonstrated by DC's payment applications to the City of Henderson certifying the value of ACE's work.

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<sup>10</sup>We also reject ACE's claim of fraud/negligent misrepresentation because it failed to demonstrate by clear and convincing evidence that DC made any false representation to it about payments from the payment applications submitted to the City of Henderson.

<sup>11</sup>Sprouse v. Wentz, 105 Nev. 597, 602, 781 P.2d 1136, 1138-1139 (1989).

<sup>12</sup>Unionamerica Mtg. v. McDonald, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981).

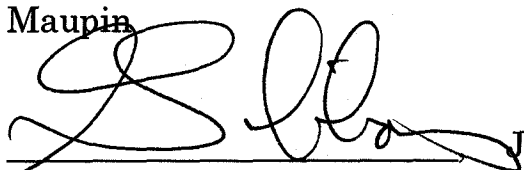
Further, DC could have replaced ACE much earlier and avoided any additional cost it claims to have sustained, and the replacement subcontractor benefited by the drawings ACE left behind when it departed the job.

Accordingly, we affirm the district court's judgment and attorney fees order.

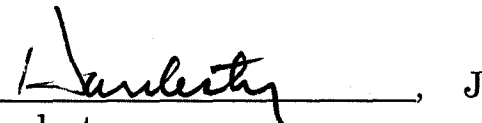
IT IS SO ORDERED.



Maupin



Gibbons



Hardesty

cc: Hon. Mark R. Denton, District Judge  
Bill C. Hammer, Settlement Judge  
Dixon Truman & Fisher  
Robert H. Domico  
Clark County Clerk  
Mead Pezzillo LLP