2023 WL 5943709
Supreme Court, Appellate Division,
Second Department, New York.

BEDFORD–CARP CONSTRUCTION, INC., appellant,
v.
BROOKLYN UNION GAS
COMPANY, etc., respondent.

2021–00893
|
(Index No. 600752/20)
|
Argued—April 10, 2023
|
September 13, 2023

**Synopsis**

**Background:** Contractor, which contracted with city to install box storm sewer, brought action against gas company, asserting claims for breach of contract and unjust enrichment arising from contractor's remediation of contaminated soil which city ordered gas company to remove and remediate, as well as judgment declaring that gas company must compensate contractor for soil removal. The Supreme Court, Nassau County, Vito M. DeStefano, J., granted gas company's motion to dismiss, and contractor appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] contractor failed to state claim for breach of contract, and

[2] contractor stated claim for unjust enrichment.

Affirmed as modified.

**Procedural Posture(s):** On Appeal; Motion to Dismiss.

West Headnotes (7)

**[1]** **Contracts** Duties and liabilities of third persons

Contractor, which contracted with city to install box storm sewer, failed to state claim for breach of contract against gas company, arising from contractor's remediation of contaminated soil which city had ordered gas company to remove and remediate, where there was no contractual relationship or privity between contractor and gas company.

More cases on this issue

**[2]** **Contracts** Privity of Contract in General

Liability for breach of contract does not lie absent proof of contractual relationship or privity between parties.

**[3]** **Implied and Constructive Contracts** Declaration, complaint, or petition

Allegation by contractor hired by city to install box storm sewer, that it remediated contaminated soil which city had ordered gas company to remove and remediate, was sufficient to state claim against contractor for unjust enrichment; complaint alleged that gas company was unjustly enriched at contractor's expense by remediation of soil, and that it would be against equity and good conscience to permit gas company to retain what was contractor to recover.

More cases on this issue

**[4]** **Implied and Constructive Contracts** Unjust enrichment

Unjust enrichment lies as quasi-contract claim and contemplates obligation imposed by equity to prevent injustice, in absence of actual agreement between parties.

**[5]** **Implied and Constructive Contracts** Unjust enrichment

To recover under theory of unjust enrichment, litigant must show that: (1) other party was

  

enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit other party to retain what is sought to be recovered.

**[6] Implied and Constructive Contracts** Unjust enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.

**[7] Implied and Constructive Contracts** Persons entitled

**Implied and Constructive Contracts** Persons liable

Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated.

**Attorneys and Law Firms**

Law Office of Steven Cohn, P.C., Carle Place, NY (Matthew T. Feinman of counsel), for appellant.

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MARK C. DILLON, J.P., LARA J. GENOVESI, WILLIAM G. FORD, JANICE A. TAYLOR, JJ.

DECISION & ORDER

***1** In an action to recover damages for breach of contract, for declaratory relief, and to recover damages for unjust enrichment, the plaintiff appeals from an order of the Supreme Court, Nassau County (Vito M. Destefano, J.), entered January 27, 2021. The order granted the defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendant's motion which was pursuant to CPLR 3211(a) to dismiss the third cause of action, to recover damages for unjust enrichment, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

On or about May 10, 2016, the plaintiff contracted with the New York City Department of Design and Construction (hereinafter NYCDDC) to install a box storm sewer in and around Neptune Avenue, in Brooklyn, and an adjacent parcel known as Coney Island Creek. While it was performing work under the contract, the plaintiff discovered that approximately 45,000 tons of soil and subsoil at the construction site was contaminated. After an environmental consultant approved by NYCDDC found that the defendant's gas facilities had caused the contamination, the NYCDDC directed the defendant to remove and remediate the contaminated soil. The defendant refused to do so, and the plaintiff remediated the contamination in order to proceed with its work. Subsequently, the plaintiff commenced this action asserting causes of action alleging breach of contract, for a judgment declaring that the defendant must compensate the plaintiff for the removal, and alleging unjust enrichment. The defendant moved pursuant to CPLR 3211(a) to dismiss the complaint. The Supreme Court granted the motion, and the plaintiff appeals.

**[1] [2]** "Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties" (*Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 104, 878 N.Y.S.2d 97; *see KTG Hospitality, LLC v. Cobra Kitchen Ventilation, Inc.*, 201 A.D.3d 710, 711, 156 N.Y.S.3d 878; *CDJ Bldrs. Corp. v. Hudson Group Constr. Corp.*, 67 A.D.3d 720, 722, 889 N.Y.S.2d 64). Here, the Supreme Court properly granted those branches of the defendant's motion which were to dismiss the first cause of action, alleging breach of contract, and the second cause of action, for a declaratory judgment, in effect, on the ground that the there was no contractual relationship or privity between the plaintiff and the defendant (*see* CPLR 3211[a][3], [7]).

**[3] [4] [5] [6] [7]** However, the Supreme Court erred in granting that branch of the defendant's motion which was to dismiss the third cause of action, alleging unjust

  

enrichment. "Unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Columbia Mem. Hosp. v. Hinds,* 38 N.Y.3d 253, 275, 172 N.Y.S.3d 649, 192 N.E.3d 1128 [internal quotation marks omitted]; *see Georgia Malone & Co., Inc. v. Rieder,* 19 N.Y.3d 511, 516, 950 N.Y.S.2d 333, 973 N.E.2d 743). "To recover under a theory of unjust enrichment, a litigant must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Columbia Mem. Hosp. v. Hinds,* 38 N.Y.3d at 275, 172 N.Y.S.3d 649, 192 N.E.3d 1128 [internal quotation marks omitted]; *see Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104). " '[T]he essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered' " (*Columbia Mem. Hosp. v. Hinds,* 38 N.Y.3d at 275, 172 N.Y.S.3d 649, 192 N.E.3d 1128, quoting *Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [internal quotation marks omitted]). "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104; *see Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012).

***2** Here, affording the complaint a liberal construction, we find that it sufficiently alleged that the defendant was unjustly enriched, at the plaintiff's expense, by the plaintiff's remediation of the contaminated soil, and that it would be against equity and good conscience to permit the defendant to retain what was sought to be recovered (*see Trenholm–Owens v. City of Yonkers,* 197 A.D.3d 521, 524, 153 N.Y.S.3d 26; *see also Paterno & Sons, Inc. v. Jamaica Water Supply Co.,* 52 A.D.2d 595, 595, 382 N.Y.S.2d 114). Moreover, we find that the Supreme Court erred in determining, in effect, that the connection between the parties was too attenuated to support a claim for unjust enrichment (*cf. Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104). Accordingly, the court should have denied that branch of the defendant's motion which was to dismiss the third cause of action, alleging unjust enrichment.

DILLON, J.P., GENOVESI, FORD and TAYLOR, JJ., concur.

**All Citations**

--- N.Y.S.3d ----, 2023 WL 5943709, 2023 N.Y. Slip Op. 04566