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NEWSLETTERS

At Risk Of Providing Free Construction Work In Illinois? When A Contractor May Rely On Quantum Meruit To Recover For 'Extra Work'

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In *Archon Construction Co. v. U.S. Shelter, L.L.C., 2017 IL App (1st) 153409*, the Illinois Appellate Court held that a contractor could not recover on a *quantum meruit* claim for extra work even though the contractor did not recover for the extras in a breach of contract action. The court's ruling rejects the common contractor argument that a claim for *quantum meruit* exists where the defendant requested the services rendered but cannot recover payment for those services under the terms of an existing contract.

In so ruling, the court in *Archon* announced a clear test for determining whether a contractor is entitled to recover under *quantum meruit*: "[A] claim for *quantum meruit* lies when the work that the plaintiff performed was wholly beyond the subject matter of the contract that existed between the parties." Stated differently, *Archon* reaffirms that quantum *meruit* is not available in Illinois where the extra work involved the same "general subject matter" as a construction contract.

The case arose from the installation of a sanitary-sewer system in connection with the development of a new subdivision in the City of Elgin, Illinois. The subdivision was developed by U.S. Shelter, LLC, U.S. Shelter Group Inc., and Oak Ridge of Elgin, LLC (collectively, the developer). Archon Construction, the contractor, submitted a proposal to build the sewer system and other underground utilities not at issue in the case based on existing plans and the applicable specifications of both the city and the state of Illinois. The plans and specifications generally required the contractor to install a sewer system that was acceptable to the city. The developer accepted the contractor's final proposal, and the proposal became the governing contract between the parties.

The plans and specifications permitted the contractor to install a sewer system made of either ductile iron or PVC, provided that the PVC had at least a specific wall thickness relative to the pipe's diameter (a Minimum Wall Thickness). The contractor's proposal was based entirely on the installation of PVC pipe and did not provide for the installation of ductile iron for any of the sewer lines. Under the proposal, "[a]ny additional work items not listed will be completed on negotiated price or [time and materials]." On three separate occasions during construction, the contractor excavated and repaired various portions of the sewer system that were constructed with PVC pipe that did not meet the requirements for Minimum Wall Thickness. The contractor did not seek additional payment for this work. Following final completion, the developer's civil

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engineer confirmed that the contractor's work complied with the plans and specifications.

Approximately two years after the contractor completed its work, and as a condition to final acceptance by the city, both the developer and the city inspected the sewer system for defects. The city claimed that a portion of the sewer system was cracked, with fill material entering the lines. The city refused to accept the sewer system unless the developer dug up the impacted portion and replaced the contractor's PVC pipe with ductile iron in that section. The contractor completed the necessary repairs and sent the developer a bill for approximately $250,000 determined on a time-and-material basis. When the developer refused to pay, the contractor filed a lien claim. This lawsuit followed.

The contractor initially pursued claims for breach of contract. Under Illinois law, however, the contractor cannot collect contract damages for extra work unless it can prove by clear and convincing evidence that, in pertinent part, "the extra work was not made necessary through the fault of the contractor." After discovery, the trial court granted summary judgment against the contractor on the grounds that the contractor could not present evidence to prove this essential fact. The appellate court reversed, with one justice dissenting on the grounds raised by the trial court. After remand, the contractor abandoned its contract claims and proceeded with a trial limited to its *quantum meruit* claim. Following a bench trial, the trial court ruled that the contractor could not pursue claims for *quantum meruit* as a matter of law because the repair work was covered under the terms of the express contract between the developer and the contractor.

On review, the appellate court reiterated that "[i]t is long settled in Illinois that an action in quasi-contract, such as *quantum meruit*, is precluded by the existence of an express contract between the parties regarding the work that was performed." However, the court noted the potential for confusion in the construction context:

> Where do we draw the line between work being 'outside the scope of a contract' [a contractual claim for extras] versus there being no express contract governing the work [a quasi-contractual claim]? They would seem to cover a lot of the same territory, but as a matter of law, they cannot…. [T]he answer is that a claim for quantum meruit lies when the work that the plaintiff performed was wholly beyond the subject matter of the contract that existed between the parties.
> ***
> If the work for which a plaintiff seeks remuneration under a quantum meruit theory concerned the same subject matter of the express contract, then the quantum meruit claim is barred as a matter of law.

In so holding, Archon foreclosed the common contractor argument that *quantum meruit* is available when the contractor cannot recover payment on a breach-of-contract claim. The court held: "[W]hether [the contractor] ultimately could have prevailed on that contractual claim or not, the fact remains that a contractual remedy was the only claim available to [the contractor] as a matter of law."

Applying the law to the facts of the case, the contractor's *quantum meruit*

claim sought to recover the cost to repair the same sewer system that it contracted to install. The repairs “unquestionably involved the same ‘general subject matter’ as the contract” and, therefore, the contractor could not recover in *quantum meruit* even though it had little chance of success on proving its contract claim for the extra work.

Archon makes clear that a contractor assumes the risk that it will be paid for extra work that falls within the same general subject matter as its contract if it carries out that work without either a signed change order or a construction change directive. If the resulting contract claim for extra work fails for any reason, then Illinois law may not permit the contractor to recover for that extra work under the theory of *quantum meruit*.

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