2009 WL 1263965

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.

MAGHIE & SAVAGE, INC., Plaintiff-Appellant,
v.
P.J. DICK INC. et al., Defendants-Appellees.

No. 08APP-487. | May 5, 2009.

Synopsis

Background: Drywall subcontractor brought action against general contractor and widow subcontractor, alleging that it was due additional sums under subcontract for extra labor costs incurred to meet accelerated schedules in project, and alleging it was entitled to damages, as a third-party beneficiary to window-installation subcontract, arising from window subcontractor breach of window subcontract. After summary judgment was entered in favor of window subcontractor, a jury trial was held, after which the Court of Common Pleas, Franklin County, No. 05CVH12-14513, entered a directed verdict in favor of contractor. Drywall subcontractor appealed.

Holdings: The Court of Appeals, French, P.J., held that:
[1] drywall subcontractor did not satisfy notice provision of subcontract;
[2] contractor did not waive notice provision; and
[3] drywall subcontractor was not a third-party beneficiary to window-installation subcontract.

Affirmed.

Appeal from the Franklin County Court of Common Pleas.

Attorneys and Law Firms

Schottenstein Zox & Dunn, and Roger L. Sabo, for appellant.

Thompson Hine LLP, and Daniel F. Edwards; Chamberlain, Hrdlicka, White, Williams & Martin, and Gina M. Vitiello, for appellees.

Opinion

FRENCH, P.J.

*1 {¶ 1} Plaintiff-appellant, Maghie & Savage, Inc. ("M & S"), appeals from the Franklin County Court of Common Pleas' judgment on a directed verdict in favor of defendant-appellee, P.J. Dick Inc. ("PJD"), and entry of summary judgment in favor of defendant-appellee, Blakley Corporation ("Blakley"). For the following reasons, we affirm.

{¶ 2} This action arises out of the construction of the Austin Knowlton School of Architecture (the "project") at The Ohio State University ("OSU"). Construction began in June 2002 and was originally scheduled for completion in April 2004. The completion date for the project was informally extended to June 2004, but the project was not completed until August 2004.

{¶ 3} The project involved a number of separate prime contracts. PJD was the prime contractor for the general trades work, the lead contractor, and responsible for scheduling all of the contractors' work. PJD entered into subcontracts with M & S and Blakley. PJD's subcontract with Blakley (the "Blakley subcontract") encompassed the installation of windows, skylights, curtainwall, and other glass exteriors, and its subcontract with M & S (the "subcontract") encompassed the framing, hanging and finishing of drywall, and the installation of ceiling tiles.

{¶ 4} Article 9 of the subcontract specified the procedures by which M & S could assert a claim for additional compensation. Paragraph 9.1.1 provides as follows:

> If Subcontractor's Work is delayed, accelerated, compressed, re-sequenced or if Subcontractor is adversely impacted in any way in the prosecution of the Work due to the schedule, or the acts of Owner and/or its agents, other independent contractors of Owner, Contractor, or Contractor's other subcontractors, and Subcontractor suffers delay, acceleration, compression, loss of efficiency, extended overhead, or any other type of damages, losses or impacts therefrom, or if Subcontractor has any other type of claim for additional compensation to be asserted against Contractor or any of such other entities, Subcontractor agrees to provide written notice within two (2) business days of the event or occurrence giving rise to the impact to Subcontractor's Work, or such claims shall be barred. Time shall be of the essence.

Plaintiff's Exhibit 1. Paragraph 9.1.2 states that "failure to provide timely written notice to Contractor of any * * * adverse impact to Subcontractor's work" will preclude recovery of damages incurred "as a result of any adverse impact to Subcontractor's Work ." Paragraph 9.3.1 requires the subcontractor's written notice to include "a brief statement of the impact to Subcontractor's Work, the entity Subcontractor believes to be responsible for the impact to Subcontractor's Work, and any damages known to Subcontractor arising from such additional work or impact."

{¶ 5} Blakley's installation of windows and skylights was originally scheduled to commence in September 2003, but was rescheduled to November 2003. By January 2004, however, Blakley had not begun installation because the windows had not shipped from the supplier. Upon learning, in late 2003, of Blakley's delay, PJD temporarily enclosed the building with visqueen, a plastic material, and provided temporary heaters from December 2003 through March 2004.

***2** {¶ 6} M & S received a January 2004 start date for its interior work on the project, but, because of environmental conditions, including moisture, standing water, and temperatures

below 50 degrees, caused by weather and the absence of windows and skylights, M & S was hesitant to commence its drywall work. M & S maintains that the conditions in the building were inadequate for drywall installation and that the plastic enclosure and temporary heaters employed by PJD were insufficient to remedy the inadequate conditions. M & S notified PJD of its concerns in a series of letters dated between January 5, 2004 and March 23, 2004. A common thread in M & S's letters was that it could not warrant the installation performed in inadequate environmental conditions. On January 6, 2004, PJD responded to M & S's first letter, stating that "[t]he completion date of this project dictates that you start installing drywall." Plaintiff's Exhibit 13. As ordered by PJD, M & S began work under the subcontract in January 2004 and had completed 85 percent of its drywall work by the end of March 2004. M & S's expert witness, Kurt Keidel, testified that M & S's work, which included most of the drywall hanging, during the cold and wet weather was performed efficiently.

{¶ 7} In a letter dated January 14, 2004, Scott Conlon ("Conlon"), the OSU Project Manager, responded to notice from PJD that it was unable to meet the approved construction schedule with respect to Blakley's work. Conlon informed PJD that, "should the other Prime Contractors not be able to complete their work as a result of your inability to meet the schedule, [PJD] will be held responsible for all costs associated with the delays." Plaintiff's Exhibit 53.

{¶ 8} From January 5, 2004 through October 13, 2004, as a result of Blakley's delay, PJD issued eight change orders to Blakley, deducting various amounts from the Blakley subcontract for weather protection, drywall repair, water damage repairs, acceleration costs, and extended field office overhead. PJD also issued change orders to pay M & S for extra work to replace and repair water-damaged portions of its work.

{¶ 9} In a letter dated October 21, 2004, months after M & S completed its work on the project, M & S notified PJD that, "[a]s a result of the job conditions [including low temperatures, high moisture, standing water, and ice] our labor escalated for both hanging and finishing drywall." Plaintiff's Exhibit 48. M & S requested a change order authorizing additional costs of $248,459. Explaining the basis of M & S's claim, Keidel testified that M & S suffered labor inefficiencies and lost productivity from April to June 2004 as a result of acceleration of the project schedule, suboptimal crew size, and overcrowding. James Savage, an owner of M & S, testified that M & S waited until October 2004 to file a claim for additional costs because those costs could not previously be calculated. Savage explained that, in January 2004, when M & S notified PJD about the inadequate environmental conditions, M & S did not know the value of the impact those conditions would have on its work. Savage stated that M & S did not know whether "the other trades [were] going to be able to get out of our way, there was no possible way to put a price on the future because of the job conditions." (Vol. V Tr. 709.) PJD did not issue a written response to M & S's October 2004 claim letter.

*3 {¶ 10} On March 4, 2005, M & S sent a follow-up letter to PJD, reiterating its "claim for lost productivity due to acceleration required to meet schedules delayed by

environmental conditions." Plaintiff's Exhibit 54. That letter stated as follows:

> As you are aware, the lack of a completed shell (i.e.windows, roofing) caused the interior environment (lack of adequate temporary heat and presence of [too] much water) to delay the start of the hanging and finishing by 5 weeks. These conditions also contributed to poor production during the interior framing sequences. The additional hours referenced in my earlier letter were worked in a 3-month period and represent a doubling of our planned crew size for both the hanging and finishing work on this project. Many studies are available about the effect of overcrowding on productivity. All agree the loss is profound.

Although M & S requested a written response to its claim within two weeks, PJD did not respond.

{¶ 11} PJD did not pay M & S's claim. Barry Bandura, PJD's Senior Project Manager, testified that M & S had not given notice of the basis of its claim, as required by the subcontract, and did not offer any proof in support of its claim. Bandura testified that Randy Young, M & S's project manager, was in constant communication with PJD, but had not mentioned labor inefficiencies prior to the October 2004 letter.

{¶ 12} On August 17, 2005, Blakley filed an action against PJD in the Franklin County Court of Common Pleas, alleging a breach of contract and seeking to recover its subcontract balance and compensation for additional work. See *Blakley Corp. v. P.J. Dick, Inc.*, Franklin C.P. No. 05CVH08-8947. M & S filed this action against PJD and Blakley on December 28, 2005. Seeking recovery for additional costs due to labor inefficiency and loss of productivity, M & S alleged claims against PJD for breach of contract, negligence, breach of express and implied warranties, and punitive damages. M & S also alleged claims against Blakley as a third-party beneficiary to the Blakley subcontract and for punitive damages. With the parties' agreement, the trial court consolidated M & S and Blakely's actions.

{¶ 13} Upon motion, the trial court dismissed M & S's claims for negligence and punitive damages. Additionally, as a result of a settlement agreement between PJD and Blakley, those parties dismissed with prejudice all claims, counterclaims, and cross-claims against each other.

{¶ 14} On June 7, 2007, Blakley filed a motion for summary judgment on M & S's third-party beneficiary claim, and, on July 10, 2007, PJD filed a motion for summary judgment on M & S's claims for breach of contract, breach of warranties, and unjust enrichment. In its motion, PJD argued that M & S's breach of contract claim was barred due to M & S's noncompliance with the subcontract's notice requirements and that M & S's unjust enrichment claim was barred because the

subcontract governed the subject of that claim, thus precluding an action for unjust enrichment.

*4 {¶ 15} On December 28, 2007, the trial court granted Blakley's motion for summary judgment and granted PJD's motion for summary judgment as to M & S's breach of warranties claim. The trial court denied PJD's motion for summary judgment as to M & S's breach of contract and unjust enrichment claims, however. With respect to the breach of contract claim, the court warned M & S as follows:

> [I]f it should turn out that there were no further communications from M & S to [PJD] during the relevant period, or at least none that identify, in some terms, labor inefficiency as an impact on M & S, then it would appear that M & S did not satisfy its obligation [under the subcontract] to give written notice within two business days of the event or occurrence giving rise to the impact to [M & S's] work *that includes "a brief statement of the impact to Subcontractor's Work."*

(Emphasis sic.) As a result of the trial court's rulings and the stipulated dismissal, the only claims left pending for trial were M & S's breach of contract and unjust enrichment claims against PJD.

{¶ 16} A nine-day jury trial commenced on February 11, 2008. As on summary judgment, a predominant issue at trial was whether M & S was required to comply, and whether it did, in fact, comply, with the notice requirements in the subcontract. At the conclusion of M & S's case, PJD moved for a directed verdict. The trial court took PJD's motion under consideration, but allowed the trial to continue. Before submitting the case to the jury, the trial court granted PJD's motion for a directed verdict on M & S's unjust enrichment claim, but again reserved ruling on PJD's motion with respect to the breach of contract claim.

{¶ 17} The trial court submitted M & S's breach of contract claim to the jury, and the jury returned a verdict in favor of M & S, awarding damages of $62,567.96. The jury affirmatively answered an interrogatory that asked, "did six or more of you find that [M & S] satisfied or [PJD] waived the written notice requirement for claims on which you were instructed."

{¶ 18} Despite the jury verdict, the trial court subsequently granted PJD's motion for a directed verdict on M & S's breach of contract claim. The court stated that the record at the close of M & S's case contained no evidence that M & S provided PJD with contractually required, written notice of its claim. M & S moved the trial court to set aside the directed verdict and to reinstate the jury verdict, but the trial court denied that motion. In addition to reiterating that the record lacked evidence that M & S satisfied the notice requirements, the court also stated that M & S cited no evidence in the record to support a finding that PJD waived the notice requirements. The trial court entered final judgment in favor of PJD on May 12, 2008.

{¶ 19} M & S appeals, asserting the following assignments of error:

> 1. The lower court erred in granting a directed verdict for [PJD] following the jury verdict in favor of [M & S] in this matter.

*5 2. The lower court erred in granting a directed verdict for [PJD] premised upon a legal standard other than set forth in the jury instructions not objected to by [PJD].

3. The lower court erred in dismissing [Blakley] as a defendant in the lawsuit initiated by [M & S].

4. The lower court misconstrued the contract in granting a directed verdict to [PJD] when it misconstrued the term "impact."

5. The lower court misconstrued the contract in granting a summary judgment to [Blakley] when it ruled [M & S] was not a "third party [beneficiary]" under the "HEIRS" clause.

6. The lower court erred in failing to permit introduction of the terms of the settlement agreement between [Blakley] and [PJD].

7. The lower court erred in precluding evidence as to the change orders issued to the prime contractors by the owner, [OSU], due to delays.

8. The lower court erred in granting a directed verdict on the count of unjust enrichment, when that claim went to activities outside of the contract.

For ease of discussion, we divide M & S's assignments of error into three groups. First, we will address the four assignments of error stemming from the directed verdict. Second, we will address the two assignments of error stemming from the summary judgment on M & S's third-party beneficiary claim. Finally, we will address the two assignments of error concerning evidentiary issues.

{¶ 20} M & S's first, second, fourth, and eighth assignments of error arise from the directed verdict on M & S's claims for breach of contract and unjust enrichment. Pursuant to Civ.R. 50(A)(4), a trial court must grant a motion for a directed verdict if, after construing the evidence most strongly in favor of the non-moving party, it concludes that "reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to [the non-moving] party." See *Groob v. KeyBank,* 108 Ohio St.3d 348, 843 N.E.2d 1170, 2006-Ohio-1189, ¶ 14. "A motion for directed verdict tests whether the evidence is sufficient to warrant a jury's consideration, so * * * a trial court considers neither the weight of the evidence nor the credibility of the witnesses." *Jarupan v. Hanna,* 10th Dist. No. 06AP-1069, 2007-Ohio-5081, ¶ 8, 173 Ohio App.3d 284, 878 N.E.2d 66, citing *Estate of Cowling v. Estate of Cowling,* 109 Ohio St.3d 276, 847 N.E.2d 405, 2006-Ohio-2418, ¶ 31, and *Wagner v. Roche Laboratories,* 77 Ohio St.3d 116, 119, 671 N.E.2d 252, 1996-Ohio-85. The court's singular concern is whether the non-moving party adduced substantial competent evidence in support of each element of his or her claim. *Id.* A directed verdict presents a question of law that an appellate court reviews de novo. *Groob,* at ¶ 14.

{¶ 21} The trial court directed a verdict on M & S's breach of contract claim based on its finding that the record lacked evidence that M & S gave PJD contractually required, written notice of its claim or that PJD waived compliance with the subcontract's notice requirements. There is no dispute that the subcontract's notice requirements, as set forth in Article 9, apply to M & S's claims,

but the parties dispute what those sections require and whether M & S complied or was excused from complying. M & S makes several arguments in support of its contention that the trial court erred by directing a verdict on its breach of contract claim, including the following: (1) a directed verdict is contrary to the jury instructions; (2) the trial court misread the subcontract's notice requirements; (3) the record contained evidence that M & S satisfied the notice requirements; (4) the record contained evidence that PJD waived the notice requirements; and (5) M & S was excused from complying with the notice requirements as a result of PJD's alleged breach of the subcontract by ordering M & S to perform in adverse weather conditions.

***6** {¶ 22} We reject M & S's argument that entry of a directed verdict is contrary to, and precluded by, the trial court's jury instructions, which included the following:

> Under the terms of the [subcontract], * * * [M & S] is required to prove that it provided written notice within two business days of the event or occurrence giving rise to its claims, or such claims are barred. [M & S] must prove that such written notice included a brief statement of the impact, who [M & S] believed to be responsible for the impact, and any damages known to [M & S] arising therefrom. Accordingly, for each and every item included in its loss of efficiency or productivity claim and other claims [M & S] must show by a preponderance of the evidence that it provided the written notice required by the contract. Unless [M & S] can prove that [PJD] waived such notice requirement, failure to provide such notice constitutes a waiver of [M & S's] claims.
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> * * *
>
> If you find that [M & S] did not provide written notice of the claims at issue, including its loss of efficiency claim, within two business days, and that [PJD] did not waive the contractual requirement of such notice, then you must find in favor of [PJD].

(Vol. VI Tr. 1000-02.) Based on the principle that a court should generally give a requested jury instruction if it is a correct statement of the law and reasonable minds might reach the conclusion sought by the instruction, see *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, M & S contends that the instruction on notice and waiver constitutes a determination that the record contained sufficient evidence from which reasonable minds could conclude that M & S satisfied the notice requirements or that PJD waived those requirements. M & S maintains that, by giving the jury instruction, the court made a finding contrary to that required for a directed verdict.

{¶ 23} This court has previously held that the provisions of Civ.R. 50 are consistent with a trial court's discretion to reserve ruling on a motion for a directed verdict until after the jury has returned a verdict. *Crawford v. By Lamb Builders, Inc.* (Aug. 10, 1993), 10th Dist. No. 93AP-282. We stated that that procedure promotes judicial economy because, if an appellate court reverses the ruling on the motion for a directed verdict, the jury verdict can be reinstated. To the extent that a court may reserve ruling on a motion for a directed verdict until after a jury returns its verdict, we must reject M & S's argument here. By its nature, the

necessary finding underlying a directed verdict will conflict with the jury instructions when the trial court submits the case to a jury. The relevant question with respect to a motion for a directed verdict is whether there is sufficient evidence to warrant a jury's consideration, and the giving of an instruction and submission of the case to a jury does not create evidence where there is none.

{¶ 24} M & S next argues that the trial court directed a verdict based on its misreading of the subcontract. Specifically, M & S argues that the subcontract did not require written notice identifying the type of impact that M & S suffered. M & S proposes, instead, that impact is implied, and that, while the subcontract requires notice that there has been an impact, it does not require identification of that impact. Contrary to M & S's proposition, Paragraph 9.3.1 unambiguously defines the contents of the written notice required when the subcontractor asserts a claim based on time impact and requires that the written notice include "a brief statement of the impact to [the subcontractor's] Work." M & S's construction of the subcontract would render Paragraph 9.3.1 meaningless, in violation of established principles of contract interpretation. See *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 363, 678 N.E.2d 519, 1997-Ohio-202 (a court must "attempt to give effect to each and every part of [a contract] * * * and avoid any interpretation of one part which will annul another part"). [1] Accordingly, we reject M & S's argument that the trial court's directed verdict is the result of an erroneous reading of the subcontract.

*7 **[1]** {¶ 25} M & S next argues that the record contained evidence from which reasonable minds could conclude that M & S satisfied the subcontract's notice requirements. Upon review, we agree with the trial court that the record lacked evidence that M & S complied with the notice requirements, as set forth in Paragraphs 9.1.1 and 9.3.1. Young was aware that M & S would be affected as a result of performing in adverse weather conditions between January and March 2004, but his October 21, 2004 letter was the first to PJD identifying the impact on M & S's work. Young admitted that none of his earlier letters to PJD mentioned labor inefficiencies or loss of productivity. Thus, those letters did not constitute notice of M & S's claims based on labor inefficiencies or loss of productivity, as required by the subcontract.

{¶ 26} Keidel testified that M & S was not claiming a loss of efficiency or productivity during the cold weather period, from January to March 2004, but, rather, from April to June 2004, when the work schedule was accelerated to compensate for the earlier delays. In fact, Keidel testified that M & S hung most of the drywall prior to April 2004 and that M & S performed that work efficiently. According to Keidel, M & S's alleged labor inefficiencies and loss of productivity resulted from overcrowded conditions, including different trade contractors working at the same time, and suboptimal crew sizes. During April, May, and June 2004, while M & S was allegedly experiencing labor inefficiencies and loss of productivity, M & S presented no written notice to PJD of that impact. Bandura testified that, prior to the October 21, 2004 letter, he had no discussions or correspondence with M & S

about labor inefficiencies or lost productivity. Accordingly, we find no error in the trial court's conclusion that the record lacked evidence that M & S provided timely written notice of its claim for damages resulting from labor inefficiencies or loss of productivity during April, May, and June 2004.

[2] {¶ 27} We next consider whether the record contained evidence from which reasonable minds could conclude that PJD waived the subcontract's notice requirements or that M & S was otherwise excused from complying with those requirements. "Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional." *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 861 N.E.2d 109, 2006-Ohio-6553, ¶ 49. A party asserting waiver must prove it by establishing a clear, unequivocal, decisive act by the other party, demonstrating the intent to waive. *City of N. Olmsted v. Eliza Jennings, Inc.* (1993), 91 Ohio App.3d 173, 180, 631 N.E.2d 1130, citing *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190, 198-99, 2 N.E.2d 501. Silence does not amount to waiver where a party is not under a duty to speak. *N. Olmsted*, at 180, 631 N.E.2d 1130. While there is no dispute that PJD *could* have waived the subcontract's notice requirements, PJD maintains that the record contained no evidence of a clear, unequivocal, decisive act from which reasonable minds could conclude that it intended to do so. We agree.

***8** {¶ 28} M & S bases its waiver argument on the contention that PJD told it to file a claim for additional compensation and did not respond to M & S's claim letters in October 2004 and March 2005. At oral argument, M & S's counsel directed this court to testimony regarding a lunch meeting between Savage and Bandura in the fall of 2004. Bandura testified about that meeting, as follows:

> [Savage] explained to me that he got killed on this job, and we were kind of both- I explained to him we also got killed. He was looking for money, he was looking for help. I said: ["]Jim, no one is going to write you a check just because you're a nice guy. You helped us, you did a good job, but I can't just write you a check. You have to give me something I can work with. There [are] provisions in the contract that deal with these type of situations, and that's the way you will have to proceed[,"] and that was the extent of it.

(Vol. V Tr. 799.) Young also testified that Bandura requested that M & S submit a claim, and that Bandura's request precipitated the October 21, 2004 claim letter. Even viewing the evidence in the light most favorable to M & S, reasonable minds could not conclude that Bandura's statements constitute clear and unequivocal acts demonstrating PJD's intent to waive the contractual notice requirements. Rather, the evidence simply demonstrates that PJD referred M & S to the contractual procedures for asserting claims for additional compensation. Furthermore, PJD's failure to issue written responses to M & S's claim letters will not be construed as a waiver where, as

here, the subcontract imposed no affirmative duty upon PJD to respond to M & S's claims in writing.

[3] {¶ 29} M & S also argues that PJD waived the subcontract's notice requirements because it breached the subcontract by ordering M & S to perform in adverse weather conditions. We disagree. M & S agreed to perform "in full accordance with the Contract between the Owner [OSU] and the Contractor [PJD], the plans, drawings, schedules, specifications and contract documents as included in Contractor's Contract with the Owner," collectively the "Contract Documents," all of which were incorporated by reference into the subcontract. Plaintiff's Exhibit 1, at ¶ 1.1. The project specifications relating to M & S's drywall work required that the work "[c]omply with ASTM C 840 requirements or gypsum board manufacturer's written recommendations, whichever are more stringent ." Plaintiff's Exhibit 11. Young explained that those requirements mandate a temperature above 50 degrees and dry conditions to install drywall. M & S's obligation to comply with the environmental conditions incorporated into the project specifications was a performance obligation toward PJD, which PJD waived when it undisputedly ordered M & S to perform during adverse weather conditions and chose to pay M & S for extra work as a result of damage due to the weather in an attempt to minimize delay on the project. Where facts are undisputed, the determination of whether conduct constitutes a breach of contract is a question of law. *Corna/Kokosing Constr. Co. v. South-Western City School Dist. Bd. of Edn.*, 10th Dist. No. 02AP-624, 2002-Ohio-7028, ¶ 12, citing *Luntz v. Stern* (1939), 135 Ohio St. 225, 20 N.E.2d 241, paragraph five of the syllabus. Thus, the question of whether PJD breached the subcontract by ordering M & S to perform during adverse weather conditions was a question of law. By finding no evidence that M & S was relieved of its contractual notice obligations, the trial court at least implicitly found that PJD did not breach the subcontract, and we discern no error in that conclusion.

***9** {¶ 30} While M & S also asserts that waiver of a contractual term does not require evidence of a clear and unequivocal act in the context of construction contracting, the cases that M & S cites for that proposition do not involve questions of waiver or are easily distinguishable. For example, in *Cleveland Constr., Inc. v. Ohio Public Emp. Retirement Sys.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630, where the trial court determined that the question of whether the plaintiff was contractually obligated to request an extension of time was a factual question, the issue was not whether the notice requirement had been waived, but whether that requirement applied to the plaintiff's claim at all. See also *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 864 N.E.2d 68, 2007-Ohio-1687, ¶ 41 ("[W]e reject Dugan & Meyers's argument that it was excused from complying with the specific change-order procedure for requesting extensions because the state had actual notice of the need for changes to the deadline, and therefore any failure to comply with procedure was harmless error. The record lacks evidence of either an affirmative or implied waiver by the department or OSU of the change-order procedures contained in the contract.").

{¶ 31} Lastly, *Roger J. Au & Son, Inc. v. Northeast Ohio Regional Sewer Dist.* (1986), 29 Ohio App.3d 284, 504 N.E.2d 1209, in which the Seventh District Court of Appeals held that a contractor's claims were not barred, as a matter of law, for lack of required written notice, is also distinguishable. The contract in that case required the contractor to promptly notify the owner in writing of differing construction site conditions, but permitted the contractor to specify the exact nature of its claims and to seek adjustment of the contract price any time prior to final payment. The court stated, "[t]here is no reason to deny the claims for lack of written notice if [the owner] was aware of differing soil conditions throughout the job and had a proper opportunity to investigate and act on its knowledge, as the purpose of the formal notice would thereby have been fulfilled." *Id.* at 292, 504 N.E.2d 1209. Unlike the contract in *Roger J. Au,* the subcontract here required notice specifically targeted to the subcontractor's claim, including notice of the event or occurrence impacting M & S's work, a brief statement of the impact, the entity responsible, and any known damages. Moreover, as stated above, the record here contains no evidence that PJD had notice of M & S's labor inefficiencies or loss of productivity prior to October 2004.

{¶ 32} For all these reasons, we conclude that the trial court did not err in granting a directed verdict in favor of PJD on M & S's breach of contract claim. We now turn our attention to the trial court's directed verdict on M & S's unjust enrichment claim, which is the subject of M & S's eighth assignment of error.

{¶ 33} Unjust enrichment, like quantum meruit, is a doctrine derived from the natural law of equity, and the essential elements of both are the same. *U.S. Health Practices, Inc. v. Byron Blake, M.D., Inc.* (Mar. 22, 2001), 10th Dist. No. 00AP-1002, citing *Loyer v. Loyer* (Aug. 16, 1996), 6th Dist. No. H-95-068. A plaintiff must establish the following three elements to prove unjust enrichment: (1) a benefit conferred by the plaintiff upon the defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 465 N.E.2d 1298. In the absence of bad faith or fraud, an equitable action for unjust enrichment will not lie when the subject of the claim is governed by an express contract. *Kucan v. Gen. Am. Life Ins. Co.,* 10th Dist. No. 01AP-1099, 2002-Ohio-4290, ¶ 39, citing *Rumpke v. Acme Sheet & Roofing, Inc* . (Nov. 12, 1999), 2d Dist. No. 17654.

***10 [4]** {¶ 34} The trial court directed a verdict in favor of PJD on M & S's unjust enrichment claim based on its finding that the subcontract precluded a claim for unjust enrichment. M & S now argues that, because PJD demanded that M & S install drywall under conditions contrary to the project specifications, the work upon which it bases its unjust enrichment claim was outside the scope of the subcontract. In *Allied Erecting & Dismantling Co., Inc. v. Uneco Realty Co.,* 146 Ohio App.3d 136, 765 N.E.2d 420, 2001-Ohio-3387, the court held that an equitable claim is only precluded by the existence of a contract where the basis for the equitable claim is within