STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: OCTOBER 4, 2012)

TANTARA CORPORATION, a/k/a TANTARA ASSOCIATES CORPORATION	**:**	
	:	**C.A. No. NC-11-55**
V.	**:**	**(Consolidated with**
	:	**NM-11-66, NM-11-67,**
BAY STREET NEIGHBORHOOD ASSOCIATION, LLC et al.	**:**	**NM-11-68, NM-11-69, NM-11-70, NM-11-71)**

DECISION

SILVERSTEIN, J. Before this Court is the Motion for Partial Summary Judgment of eighty-five individual, property-owning defendants (Owners) and Bay Street Neighborhood Association, LLC (BSN) (collectively, Defendants), pursuant to Super. R. Civ. P. 56. Tantara Corporation (Tantara) brought unjust enrichment claims against each of the Owners individually and one unjust enrichment claim against BSN for contaminated soil remediation work performed on the Owners' properties. (Compl. Counts Two - Eighty-Seven.) Additionally, Tantara brought claims for negligent misrepresentation and promissory estoppel against BSN alone. (Compl. Counts One, Eighty-Eight.) Finally, Tantara has brought mechanic's lien claims against six of the Owners who were also sued for unjust enrichment.[1] The Defendants seek summary judgment only on "Tantara's unjust enrichment and mechanics' lien claims relating to the excavation and removal of more soil than Tantara estimated it would be required to excavate and remove (hereinafter the 'Additional-Soil Claims')." (Def.'s Mem. Supp. Summ. J. 4.)

[1] These claims were filed separately as Docket Numbers NM-11-66, NM-11-67, NM-11-68, NM-11-69, NM-11-70, and NM-11-71. They were consolidated with this case, Docket Number N.C. 11-55, and transferred to the Providence Business Calendar.

I

Facts and Travel

In 2002, soil contamination was discovered in the Bay and Judson Street area (the Site) of Tiverton, Rhode Island. Subsequent investigations revealed widespread contamination at levels above health and safety criteria throughout the area. The investigations suggested that the source of the contamination was a gas plant in Fall River, Massachusetts previously owned and operated by the New England Gas Company (NEGC). Based on the investigations, the Owners brought suit against NEGC. (Def.'s App. CC, Ferreira Aff. ¶¶ 4-7.)

In August 2008, the Owners reached a tentative settlement with NEGC. Under the terms of the tentative settlement, the Owners would be responsible for the remediation of the properties, which would be financed by settlement proceeds. In order to evaluate the sufficiency of the settlement, the Owners solicited bids to perform the remediation from contractors. The solicitation requested "Lump Sum Fixed Price bids for the requested remediation." See id. ¶¶ 8-12.

Tantara and Environmental Compliance Services, Inc. (ECS) submitted a joint bid proposal to counsel for the Owners. (Def.'s App. CC, Ferreira Aff. ¶ 15.) EnviroLogic, LLC (EnviroLogic) and others also submitted bids. (Def.'s App. CC, Ferreira Aff. ¶ 14, 17.) On May 18, 2009, substantially relying on the Tantara/ECS and EnviroLogic bid proposals, the Owners finalized the settlement of the claims against NEGC. (Def.'s App. CC, Ferreira Aff. ¶ 18.) Ultimately, the Tantara-ECS proposal was not selected; BSN awarded the general contract to EnviroLogic.[2] (Def.'s App. CC, Ferreira Aff. ¶ 17.) On June 4, 2009, EnviroLogic and BSN

[2] The timing of the formation of BSN is unclear. According to Robert Ferreira, an Owner and former manager of BSN, the Owners formed BSN "in 2009 to implement aspects of the Site's remediation." (Def.'s App. CC., Ferreira Aff. ¶ 1.) The Owners, not BSN, received the Tantara-

signed a Pay for Performance Agreement (the Prime Contract), whereby EnviroLogic would perform the remediation for the "total fixed price amount of $2,003,000." (Def.'s App. I, Pay for Performance Agreement, Attachment A, at 6.)

On July 28, 2009, EnviroLogic and Tantara entered into a Master Subcontract Agreement (the Subcontract), whereby EnviroLogic subcontracted the remedial excavation and property restoration work to Tantara. (Def.'s App. A, Master Subcontract Agreement; Def.'s App. CC, Ferreira Aff. ¶ 21.) Under the terms of the Subcontract, EnviroLogic would pay a total of $850,000 to Tantara in installments, as Tantara met certain performance criteria. The Subcontract provided:

> "This is a fixed price contract. The Subcontractor shall not be entitled to any additional compensation if the Subcontractor underestimated the scope and/or cost of the work to be completed under this Agreement nor shall the Subcontractor be required to refund any payments made under this agreement if the Subcontractor overestimated the scope and/or cost of the work to be completed under this Agreement." (Def.'s App. A, Master Subcontract Agreement § 3.)

Exhibit A of the Subcontract described the "Scope of Work," including the "Excavation" Task. Initial excavations were set to a depth of one to two feet and "shall continue up to a depth of two feet . . . based on confirmation soil sample[s] . . . ." (Def. App. A, Master Subcontract Agreement, Ex. A. § 1(c).) Exhibit A also noted that "Table A1 summarizes the remedial properties that require known excavation and includes approximate volumes." Id. Table A1 stated that 5230 cubic yards were to be removed, which is equivalent to 7321 tons.[3] Id. at Table

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ECS bid in September 2008, but BSN awarded the project to EnviroLogic at an unspecified date. Id. ¶¶ 15, 17.

[3] The Subcontract described: "Total cubic yards to be removed = 5,230" and "Total removed in tons at a 1.4 multiplier = 7,321." (Master Subcontract Agreement, Table A1.)

A1. Exhibit A, however, also stated that Tantara would conduct excavations resulting from Contaminants of Concern at any of twelve additional boring locations. Id. at Ex. A § 1(c).

Tantara began work on the Site in August 2009. By November 2009, Chris Pereira, Tantara's Project Manager, expressed concern that Tantara had already excavated "over 5,200 tons of the anticipated 8,000 tons," but had only completed the remediation of twenty properties. (Def.'s App. N, Pereira Email.) Pereira reiterated these concerns at a meeting in January 2010 and formalized them in a letter to EnviroLogic on May 17, 2010. In that letter, Pereira alleged that the quantity excavated was a material change to the Subcontract, thus Tantara was seeking "Subcontract modification to account for every ton over the initial 7,321 tons in [the] Subcontract." (Def.'s App. P, Pereira Letter, May 17, 2010.) On May 19, 2010, Tantara sent an Invoice to Evirologic for "Additional Soil Quantities through March 18, 2010" in the amount of $298,510.52. (Def.'s App. R, Tantara's Invoice to EnviroLogic.)

Evirologic forwarded Tantara's invoice to BSN's counsel, Mark Roberts, to determine whether it was a valid change order. (Def.'s App. S, Email of Courtney Moore.) Roberts replied that the change order did not meet the material change provisions contained in the Prime Contract.[4] (Def.'s App. T, Roberts Email.) Over the next few months, discussions about the amount of contamination continued, but no change order was ever issued.

On August 9, 2010 EnviroLogic filed for Chapter 7 Bankruptcy under the United States Bankruptcy Code. As a result, Tantara stopped performing its obligations under the Subcontract. At that time, BSN had paid $801,200 to EnviroLogic—the full amount due under the Prime Contract for the level of completion—and EnviroLogic had paid Tantara $255,000—the full

[4] For a description of the interplay between the Prime Contract and the Subcontract regarding a change order, see infra Section III.A.3.a.

amount due under the Subcontract for the level of completion. (Def.'s App. BB, Aguiar Aff. ¶¶ 8-11.)[5]

On January 28, 2011, Tantara filed the Complaint in Docket Number NC-11-55 against BSN and the Owners. On February 4, 2011, Tantara filed the mechanic's lien Complaints against six Owners in Docket Numbers NM-11-66, NM-11-67, NM-11-68, NM-11-69, NM-11-70, and NM-11-71. All seven matters were transferred to Providence County and assigned to the Business Calendar on March 24, 2011. On April 14, 2011, the Defendants filed an Answer, Counterclaims, and a demand for a jury trial. On November 15, 2011, this Court consolidated the cases. The Defendants filed this Motion for Partial Summary Judgment on July 3, 2012, and the Court heard oral argument on August 14, 2012.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by

[5] In May 2011, BSN engaged Hoffman Engineering to complete the remediation and restoration work. As of April 30, 2012, BSN had paid Hoffman over $1.3 million for their work and BSN anticipated about $1 million in additional charges to complete the process. (Def.'s App. BB, Aguiar Aff. ¶¶ 12-14.)

competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113.

Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

A

Unjust Enrichment

To recover for unjust enrichment, a plaintiff must prove three elements: "First, a benefit must be conferred upon the defendant by the plaintiff. Second, there must be an appreciation by the defendant of such benefit. Finally, there must be an acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without paying the value thereof." R & B Elec. Co., Amco Const. Co., Inc., 471 A.2d 1351, 1355-56 (R.I. 1984). The Defendants do not contest Tantara's ability to prove the first and second elements. The Defendants, however, argue that Tantara cannot prove the final element because courts decline,

as a matter of law, to permit unjust enrichment claims where a valid contract governs the subject matter of the claim.

1

The Relationship of Unjust Enrichment and Contract

Before proceeding to a discussion of the core issue in this motion—the interpretation of the Tantara-EnviroLogic Subcontract—the Court must first address a threshold issue: whether the Defendants' lack of privity with Tantara prevents the Defendants from using the Tantara-EnviroLogic Subcontract to bar Tantara's unjust enrichment claims. In its opposition to the Defendants' Motion for Partial Summary Judgment, Tantara argues that the Defendants are not entitled to enforce the provisions of the Tantara-EnviroLogic Subcontract because the Defendants lack privity with Tantara. The Defendants argue that Tantara cannot pursue a claim for unjust enrichment because the subject of Tantara's claim is addressed by the Tantara-EnviroLogic Subcontract.

While the Defendants do lack privity of contract with Tantara, the Defendants can still use the Subcontract to bar Tantara's unjust enrichment claims because privity is not required to preclude an unjust enrichment claim. Because unjust enrichment is a quasi-contractual remedy, it is "ordinarily unavailable when a valid and enforceable written contract governing the same subject matter exists." Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp. 2d 275, 311 (S.D.N.Y. 1998); see EBC I, Inc., v. Goldman Sachs & Co., 5 N.Y.3d 11, 23 (2005) ("[T]he existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter."); R & B Elec. Co., 471 A.2d at 1355 ("[A]ctions brought upon theories of unjust enrichment and quasi-contract are essentially the same."). "This is true whether the contract is one between the parties to the lawsuit, or where

one party to the lawsuit is not a party to the contract." Granite Partners, 17 F. Supp. 2d at 311. In this case, the Subcontract governed the work that Tantara was to perform on the Owners' properties, which is also the subject matter of the "additional soil" unjust enrichment claims. Therefore, despite the Defendant's lack of privity, the Subcontract may prevent Tantara from asserting an unjust enrichment claim for work performed under the Subcontract.

This Court finds further support in a factual analogue in New York. In Metropolitan Elec. Mfg Co. v. Herbert Const. Co., Inc., 183 A.2d 758, 759 (N.Y. App. Div. 1992), the owners of studios in New York (studio owners), hired a general contractor to complete a construction project. The general contractor, in turn, hired a subcontractor. Id. The subcontractor ordered goods from the plaintiff and subsequently installed them on the studio owner's premises, but the subcontractor never paid the plaintiff for the goods. Id. The plaintiff brought an unjust enrichment claim against the studio owners and the general contractor. Id. The New York Supreme Court Appellate Division held that the plaintiff's only remedy was against the subcontractor, noting that "the existence of an express contract between the plaintiff and [the subcontractor] governing the particular subject matter of its claim for unjust enrichment precludes the plaintiff from maintaining a cause of action sounding in quasi contract against [the general contractor] or the owners." Id. Here, the chain is nearly identical, except that the Defendants are even one step closer to the contract governing the subject matter (the Subcontract) than the studio owners. Thus, the Subcontract may preclude Tantara's unjust enrichment claim against the Defendants.

While the Rhode Island Supreme Court has not spoken directly on this issue—whether a contract directly binding only one party in the lawsuit (the plaintiff) can still bar the plaintiff's unjust enrichment claim—the Court's other relevant case law suggests that the Court would

support the holdings in Granite Properties and Metropolitan Elec. Mfg Co. In Fondedile, S.A. v. C.E. Maguire, Inc., 610 A.2d 87, 97 (R.I. 1992), after public bidding, a contractor agreed to install root piles to stabilize a seawall. After beginning the project, however, the contractor experienced many problems that delayed project completion and allegedly cost an extra $2,663,749.83. Id. at 91, 97. In holding that the contractors were not entitled to recovery under a quasi-contract theory, the Court stated:

> "The plaintiff failed to confer a benefit on defendants for which defendants did not bargain. . . . The city bargained for plaintiff's service and it did not impede plaintiff's ability to perform. The city fulfilled its contractual obligation by paying the agreed compensation, and consequently did not appreciate a benefit for which it had not bargained." Fondedile, 610 A.2d at 97.

While Fondedile only addresses a contract between both parties in the lawsuit, its emphasis is on the existence of a bargain. See id. Here, Tantara bargained for the Subcontract with EnviroLogic. Additionally, the lack of privity raises less of a concern given that, in the Subcontract, Tantara assumed many of the responsibilities of the Prime Contract – the contract to which the Defendants are a party.

The Rhode Island Supreme Court also addressed a related situation in a summary decision. In Lehman v. Robitaille, 714 A.2d 605, 605 (R.I. 1998) (Mem.), property owners hired a general contractor to build a house on their property. The general contractor hired a subcontractor to perform the heating, ventilation, and air-conditioning work. Id. at 605-606. However, the general contractor filed for bankruptcy before paying the subcontractor for the work performed. Id. at 606. The Court held that the property owners were not unjustly enriched by the subcontractor "under all the circumstances of this case."[6] Id. at 607. While the

[6] After the bankruptcy, the subcontractor and the property owners entered an agreement to complete the work. Id. at 606. The terms of the agreement were disputed, but it was not relevant

circumstances of Lehman did not involve a fixed-price contact or unanticipated work, the Court's willingness to preclude a subcontractor's unjust enrichment claim against property owners supports the proposition that privity of contract is not required to bar an unjust enrichment claim when a valid contract governs the subject matter.

Because foreign case law holds, and Rhode Island case law supports, that a contract can preclude an unjust enrichment claim when only one party to the lawsuit was a party to the contract, the Subcontract may preclude Tantara's unjust enrichment claim against the Defendants.

2

Contract Interpretation

Having decided that the Tantara-EnviroLogic Subcontract can prevent Tantara from seeking unjust enrichment for work performed under the Subcontract, the Court must next consider the scope of the Subcontract. Unjust enrichment is only precluded where a valid contract governs the subject matter. See Granite Partners, 17 F. Supp. 2d at 311; Restatement (Third) of Restitution and Unjust Enrichment § 2(2) ("A valid contract defines the obligations of the parties as to matter as within its scope, displacing to that extent any inquiry into unjust enrichment."). If the matter is outside the scope of the contract, a claim for unjust enrichment may lie. See Clapp v. Goffstown School Dist., 977 A.2d 1021, 1025 (N.H. 2009) ("Unjust enrichment may be available to contracting parties where the contract was breached, rescinded, or otherwise made invalid, or where the benefit received was outside the scope of the contract.").

Here, the Court must determine whether the Tantara-EnviroLogic Subcontract is a fixed-price contract. If the Subcontract is a fixed-price contract, then all remediation is within the

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to the Court's decision. See id. The Court also held that a related mechanic's lien was unenforceable. Id. at 607.

scope of the contract, thus Tantara's "additional soil" unjust enrichment claims are precluded. See Granite Partners, 17 F. Supp. 2d at 312 (dismissing unjust enrichment claim where amounts paid were "at the heart of the contractual agreements"). If the Subcontract is for an identified scope, and Tantara's work exceeded that scope, then the "additional soil claims" are outside the scope of the contract, thus unjust enrichment is not precluded. See Spirit Locker, Inc. v. Evo Direct, LLC., 696 F. Supp. 2d 296, 305-06 (E.D.N.Y. 2010) (permitting unjust enrichment claim where subject matter was "not covered by valid, enforceable contractual obligation").

a.

The Clear and Unambiguous Meaning of the Subcontract

The Defendants argue that the Subcontract is clearly and unambiguously a fixed-price contract: Tantara agreed to perform all remediation of the Site for a fixed price of $850,000. The Defendants point primarily to Section 3 of the Subcontract, which states, "This is a fixed price contract. The Subcontractor shall not be entitled to any additional compensation if the Subcontractor underestimated the scope and/or cost of the work to be completed under this Agreement . . . ." (Def.'s App. A, Master Subcontract Agreement § 3.)

Tantara argues that the Subcontract is clearly and unambiguously a contract to remove the 5230 cubic yards of soil identified in Table A1 of the Subcontract. To support thus argument, Tantara contends that "[t]he work 'to be completed' was an identified scope (on Table A1), and not, as Defendants' assert, an unlimited scope to excavate and remediate any and all contamination whatsoever." (Pl.'s Mem. Opp. Summ. J. 24.) This Court disagrees.

Neither party argues that the Subcontract is ambiguous. "The language employed by the parties to a contract is the best expression of their contractual intent, and when that language is 'clear and unambiguous, words contained therein will be given their usual and ordinary meaning

and the parties will be bound by such meaning.'" Cathay Cathay, Inc. v. Vindalu, LLC, 962 A.2d 740, 746 (R.I. 2009) (citations omitted). Furthermore, when "the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids."[7] Id. (citations omitted). "Unambiguous contract language, therefore, renders the parties' intent irrelevant." Id.

Black's Law Dictionary defines a "fixed-price contract" as "[a] contract in which the buyer agrees to pay the seller a definite and predetermined price regardless of increases in the seller's costs or the buyer's ability to acquire the same goods in the market at a lower price." Black's Law Dictionary 369 (9th Ed. 2009). The United States Supreme Court has noted that "[a] pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than [the bid solicitor]." Bowsher v. Merck & Co., Inc., 460 U.S. 824, 826 n.1 (1983).[8] Here, Tantara agreed to furnish the service of soil contamination remediation. The Subcontract used the clear and unambiguous statement, "This is a fixed price contract." As described above, fixed price contracts place the risk on the contractor, not on the owner. If the Subcontract is only for the scope delineated in Table A1, then the risk would fall on the Defendants because they would still have to remediate

[7] For this reason, the Court does not address the arguments relating representations made outside the four corners of the contract. Misrepresentation allegations properly remain part of the misrepresentation claim (Count One), which is not raised in this Motion for Partial Summary Judgment.

[8] The court went on to say that "[v]ariations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements." Id. This limited variation appeared in this case in the form of Change Order provisions. See Def.'s App. A, Master Subcontract Agreement, at § 3; Def.'s App. I, Pay for Performance Agreement, at § 5. Under the terms of the provisions, however, neither Tantara nor EnviroLogic was entitled to a Change Order. See infra Section III.A.3.a.

the property at additional cost. Thus, Tantara's interpretation would render meaningless the clear and unambiguous statement, "This is a fixed price contract." Therefore, the plain meaning of this phrase supports the conclusion that Tantara agreed to perform more than just the remediation identified in Table A1.

While contractual provisions are not viewed in isolation, Tantara's assertion that Table A1 was the identified scope of the Subcontract flies in the face of many other provisions in the contract that identify additional, undefined excavations that were Tantara's responsibility. See Koziol v. Peerless Ins. Co., 41 A.3d 647, 650-51 (R.I. 2012). First, "Table A1 *summarizes* the remedial properties that require *known excavations* and includes *approximate* volumes." (Def. App. A, Master Subcontract Agreement, Ex. A. § 1(c) (emphasis added).) This language does not imply that Tantara is only bound to complete the excavation amounts contained in Table A1; it speaks to the inherent indefiniteness of Tantara's obligation. Second, the Subcontract is replete with areas where Tantara could be required to do work beyond Table A1. For example, while initial excavations were set to a depth of one to two feet, the Subcontract notes that the excavations "shall continue up to a depth of two feet . . . based on confirmation soil sample[s] . . . ." Id. Thus, this provision describes an initial amount, but adds an obligation to increase the amount of excavation based on the sampling results. Additionally, at the time of the Subcontract execution, up to twelve additional areas of soil were undergoing testing to address Owners' concerns. Id. Under the Subcontract, Tantara was required to "conduct excavations at any of these 12 additional boring locations if [Contaminants of Concern were] detected above Action Levels."[9] Id. This provides another example of the indeterminate excavation scope and further evidence that the Subcontract was a contract of unlimited scope.

[9] The full provision reads:

The provision that Tantara would "not be entitled to any additional compensation if the Subcontractor underestimated the scope and/or cost of the work to be completed under this Agreement nor shall the Subcontractor be required to refund any payments made under this agreement if the Subcontractor overestimated the scope and/or cost of the work to be completed under this Agreement" also lends support. Id. § 3. If the scope was defined by Table A1, no estimation would have occurred because the scope would have been contained in the table. Additionally, the dueling clauses—both not entitling Tantara to additional compensation for underestimation, but also not requiring repayment for overestimation—clearly show that the risk regarding the amount of work is on Tantara.

Finally, Tantara argues that agreeing to an unlimited amount of excavation and restoration "runs counter to any sense of commercial reasonableness." (Pl.'s Mem. In Opp. To Summ. J. 24.) This Court, however, will not weigh the commercial reasonableness of Tantara's decision to enter into the Subcontract. "As a general rule contracts among equals are not subject to postexecution judicial scrutiny for fairness or reallocation of risks and rewards." Fondedile, 610 A.2d at 97-98. Here, Tantara and EnviroLogic were both in the business of remediating soil contamination. Both had even bid on the general contract, thus they should have been amply apprised of the relevant, available facts. Therefore, this Court sees no reason to scrutinize the fairness of a contract between equals. The Subcontract is a fixed-price contract that required Tantara to perform all remediation, not just that described in Table A1.

> "Tantara shall conduct excavations as a result of COCs detected above Action Levels for additional borings conducted to address the Hoffman Study as outlined in the MOU. As part of the EnviroLogic work scope, up to 12 additional borings and soil samples were provided to address property owner concerns for data gaps. Tantara shall also conduct excavations at any of these 12 additional boring locations if COCs detected above Action Levels." Id.

3

Tantara's Alternative Arguments

a.

The Change Order Provision

Tantara argues that it was entitled to a Change Order for "Materially Different Conditions" under the BSN-EnviroLogic Prime Contract. (Def.'s App. I, Pay for Performance Agreement § 5.) The Subcontract between Tantara and EnviroLogic provides that EnviroLogic had the option to invite Tantara to provide additional products and/or services if "EnviroLogic is entitled to additional compensation under the Prime Contracts based upon a 'materially different condition' . . . ." (Def.'s App. A, Master Subcontract Agreement § 3.) Under the Prime Contract, a materially different condition includes: "the discovery of and/or testing of any MGP or Ash waste by any third party . . . outside the normal implementation of the remediation that results in a material change in cost." (Def.'s App. I, Pay for Performance Agreement § 5.) The Prime Contract, however, also includes list of conditions that would not be considered a materially different condition. That list included, inter alia, "the area(s) of impacted soil is greater than anticipated based upon the existing and anticipated environmental investigations." Id.

The Court finds that Tantara was not entitled to a Change Order because it underestimated the scope of the work to be done under the Subcontract. As discussed above, the Subcontract was a fixed-price contract requiring Tantara to perform all remediation, not just the known remediation contained in Table A1. Further, on November 29, 2009, Tantara's Site Manager Chris Pereira sent an email to EnviroLogic engineer Courtney Moore stating that Tantara had already excavated "over 5,200 tons of the *anticipated* 8,000 tons." (Pereira Email,

Def.'s App. N.) (emphasis added). Thus, this situation fits squarely within the list of circumstances that do not constitute materially condition, i.e. "the area(s) of impacted soil is greater than *anticipated* based upon the existing and *anticipated* environmental investigations." (Def.'s App. I, Pay for Performance Agreement § 5 (emphasis added).)[10]

b.

Mutual Mistake

Tantara argues that the record permits an inference of mutual mistake; specifically, "all of the contracting parties were mistaken about the full extent of the contamination." (Pl.'s Mem. Opp. Summ. J. 46.) "Mutual mistake is one that is common to both parties wherein each labors under a misconception respecting the same terms of the written agreement sought to be cancelled." McEntree v. Davis, 861 A.2d 459, 463 (R.I. 2004). "A party to a contract who labors under a mistake uncommon to the other side will not be accorded relief." Merrimack Mut. Fire Ins. Co. v. Dufault, 958 A.2d 620, 625 (R.I. 2008). "A party must prove mutual mistake by clear and convincing evidence before the court will reform, vacate, or dismiss a contractual agreement." McEntree, 861 A.2d at 463.

The record does not permit a mutual mistake inference because all of the evidence supports the conclusion that Tantara was the only party mistaken. The Defendants believed that they had entered into a fixed-price contract ab initio. When Tantara attempted to obtain a Change Order (through EnviroLogic), BSN's counsel, Mark Roberts, immediately replied by referencing the fixed-price nature of the contract and noting that the removal of more contaminated soil than anticipated was not a basis for a Change Order. (Def.'s App. S, Roberts

[10] Because the Court decides that Tantara was not entitled to a change order, the Court need not address the Defendants' alternative argument that neither Tantara nor EnviroLogic followed the required Change Order procedure.

Email.) Additionally, EnviroLogic understood the fixed-price nature of the contract. In denying Tantara's requests for additional payments, EnviroLogic's Principal, Richard Wozmak, stated, "The general principle that motivates us here is that this is a fixed price contract." (Def.'s App. V, Wozmak Email) He continued, "[Y]ou are not permitted to seek additional compensation if the scope of the contract or cost of the work to be provided was underestimated." Id. Thus, the mistake was unilateral on the part of Tantara, not mutual.

Moreover, Tantara bore the risk of mistake under the contract. Under the Restatement of Contracts, a party bears the risk of a mistake when, inter alia, "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Restatement (Second) of Contracts § 154(b) (1981). In addressing the lack of an entitlement to additional compensation and lack of a refund requirement, Section 3 of the Subcontract (text on page 3) clearly shows that Tantara treated its limited knowledge as sufficient because the bargain worked both ways, placing the benefit and burden of the risk on Tantara. Therefore, Tantara is precluded from invoking mutual mistake on that basis. See McEntee, 861 A.2d at 565 n.7 (discussing effect of allocation of risk on mutual mistake).

c.

Cardinal Change and Contract Abandonment

Tantara argues that the court should enforce neither the Subcontract nor Prime Contract under the doctrine of "cardinal change." The Rhode Island Supreme Court has not expressly adopted—or even discussed—the "cardinal change" theory. To support its argument under Rhode Island law, Tantara cites to Clark-Fitzpatrick, Inc. v. Gill, 1993 WL 853797 (R.I. Super Mar. 12, 1993), aff'd in part, rev'd in part sub nom. Clark-Fitzpatrick, Inc./Franki Foundation

Co. v. Gill, 652 A.2d 440 (R.I. 1994).[11] In Clark-Fitzpatrick, Inc. v. Gill, 1993 WL 853797, at *86-87, the State made a post-bid change to the design of bridge piles that changed the materials, personnel, training, and equipment needed for the project. The court held that the changes to the bid work materially altered the nature of an agreement, excusing the contractor from further performance and entitling the contractor to damages based in quantum meruit. Id. at *84.

The change in this case stands in stark contrast to the change in Clark-Fitzpatrick. The type of work did not change as it did in Clark-Fitzpatrick: no new materials, personnel, training, or equipment were needed for the remediation of the Site. See id. The change in this case was merely in the amount of remediation for Tantara to perform; an issue that was bargained for in the Subcontract. (Def.'s App. A, Master Subcontract Agreement § 3.) Even if the "cardinal change" doctrine was accepted, the facts of this case do not rise to the level of a "cardinal change."

Intermixed with its discussion of the "cardinal change" doctrine, Tantara raises "the related principle of 'contract abandonment,'" but cites no Rhode Island law in support. (Pl.'s Mem. Opp. Summ. J. 47.) Even applying this theory, however, Tantara would not be entitled to relief. Contract abandonment may permit recovery "when the work contracted for is altered beyond the contract's scope." J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc., 89 P.3d 1009, 1019 (Nev. 2004). Here, as discussed above, the uncertainty of the estimation was covered within the scope of both the Subcontract and the Prime Contract. Furthermore, "[g]enerally, contract abandonment occurs when both parties depart from the terms of the contract by mutual consent." Id. At no point in this case did the parties mutually consent to depart from the

[11] The Rhode Island Supreme Court affirmed the Superior Court's judgment on different grounds, without discussing the "cardinal change" doctrine. See Clark-Fitzpatrick, Inc./Franki Foundation, 652 A.2d at 449.

contract terms. Therefore, both the "cardinal change" doctrine and "contract abandonment" are unavailing to Tantara.

B

Mechanic's Liens

The Defendants argue that Tantara's contract price with EnviroLogic ($850,000) is the upper limit of Tantara's mechanic's lien claims. Rhode Island's Mechanic's Lien statute allows for the creation of a lien by a claimant upon an owner's property, provided that the claimant meets the prerequisite procedural requirements. See G.L. 1956 §§ 34-28-1(a), 4(a); Gem Plumbing & Heating Co., Inc. v. Rossi, 867 A.2d 796, 803-05 (R.I. 2005). The purpose of the law is to "to prevent unjust enrichment of one person at the expense of another." Gem Plumbing & Heating, 867 A.2d at 803 (quoting Art Metal Construction Co. v. Knight, 56 R.I. 228, 246, 185 A. 136, 145 (1936)). "Since a mechanic's lien is a security, the amount of the lien is the amount of the debt secured. The lien cannot attach for an amount greater than the debt which is secures." 53 Am. Jur. 2d Mechanics' Liens § 244 (2006).

When an express contract fixes compensation for complete performance of the contract, the parties have established the debt to be secured by the lien (the upper limit rule). Id. § 245. "Thus, the proper amount of a lien is the lien claimant's contract price, less any payments made on that contract to the lien claimant." Id. The Rhode Island Supreme Court has not explicitly adopted the upper limit rule. Maine, Maryland, and New York have adopted the rule. See Gui's Lumber and Home Ctr., Inc. v. Mader Constr. Co., Inc., 787 N.Y.S.2d 55 (N.Y. App. Div. 2004); Deiner v. Cubbage, 270 A.2d 471, 474 (Md. 1970) (finding that contract price is prima facie evidence of value of lien); Bangor Roofing & Sheet Metal Co. v. Robbins Plumbing Co., 116 A.2d 664 (Me. 1955). The Maine Supreme Judicial Court described the rule as follows:

> "When, as here, the owner is not party to the contract, the determination must be as to what is the fair and reasonable value of the labor and materials in place. In what amount has the property been enhanced by the labor and materials furnished? Where, as here, the sub-contractor has a fixed price contract with another contractor who stands between him and the owner, we think the price agreed upon represents a ceiling upon this fair and reasonable value, and it would be inequitable to permit a lien in excess of the sub-contract price." Id. at 666.

As discussed above, the Tantara-EnviroLogic Subcontract is a fixed-price contract; thus, all of the work that Tantara argues is outside the scope of the contract is within the contract.[12] Therefore, the total upper limit of Tantara's mechanic's lien claims is the amount due under the Subcontract minus the amount already paid.[13]

IV

Conclusion

After due consideration, this Court grants Defendant's Motion for Partial Summary Judgment on the unjust enrichment claims (Compl. Counts Two to Eighty-Seven) and on the upper limit of the mechanic's lien claims (NM-11-66, NM-11-67, NM-11-68, NM-11-69, NM-11-70, and NM-11-71). This Court finds that the Subcontract is a fixed-price contract, thus the unjust enrichment claims fall within the scope of the Subcontract. Further, the Subcontract price sets the upper limit on Tantara's mechanic's lien claims. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.

[12] For this reason, the thrust of Tantara's argument on this issue—the contract price is not the upper limit because the parties dispute the scope of the contract—is unavailing.

[13] The Defendants have argued that "[i]n the context of mechanics' lien cases, the claimant's contract with the general contractor establishes the upper limit of recovery." (Def.'s Mem. Supp. Summ. J. 35.) The Defendants have not argued that judgment on the mechanic's lien counts should enter in their favor because the Defendants have fulfilled their obligations under the contract.