STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

BAYVIEW ELECTRIC COMPANY, LLC, a Michigan limited liability company,

Plaintiff, **Case No: 20-011317-CB**

-v- **Hon. Edward Ewell, Jr.**

COMAU, LLC, a foreign limited liability Company; CMF GROUP, INC, a Michigan Corporation; and FEDERAL INSURANCE COMPANY, a foreign corporation,

Defendants.

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 7/14/2023

PRESENT: Edward Ewell
Circuit Judge

This matter is before the Court on Defendant Comau, LLC and Defendant Federal Insurance Company's motion for partial summary disposition pursuant to MCR 2.116(C)(7) and (8). For the reasons stated below, the Court will grant in part and deny in part the motion for summary disposition.

1. Facts and Procedural History

This case arises out of disputes surrounding a project to install robotic body welding systems at the FCA Mack Avenue Plaint in Detroit, Michigan between 2019 and 2020. Defendant

Comau designs and builds robotic assembly systems for automotive plants, Defendant CMF is an industrial installation company, and Plaintiff Bayview is an electrical contractor.

FCA, now Stellantis, contracted with Defendant Comau for the design, manufacturer, installation, and commission of the project. Comau then entered into a subcontract with CMF whereby CMF would perform the installation work. CMF then sub-subcontracted with Bayview to perform electrical work on the project.

Numerous issues apparently arose as work on the project proceeded. According to Bayview and CMF, there were delays in the project which were caused by Comau's failure to perform, including Comau's failure to provide correct designs, order and deliver materials in a timely manner, deliver correctly-sized materials, or address the many issues that arose during the installation project. As a result of Comau's alleged failures, Bayview and CMF assert that they suffered damages, including monies spent on increased manpower needed to finish the project.

When Comau and CMF failed to pay Bayview's increased costs, Bayview filed the instant suit. Pertinent to the instant motion, Bayview asserts claims against Comau for unjust enrichment (Count III), negligent misrepresentation (Count IV), fraud in the inducement (Count V), and fraud-bad-faith promise (Count VI). CMF then filed a cross-claim against Comau alleging, in relevant part, breach of contract (Count I), cardinal change (Count II), fraudulent inducement (Count II), fraud and intentional misrepresentation (Count IV), and negligent misrepresentation (Count V).

Presently before the Court is Comau's partial motion for summary disposition in which it seeks dismissal of CMF's claims arising on or before March 16, 2020, CMF's fraudulent inducement claim, and Bayview's claims of unjust enrichment, fraud, and negligent misrepresentation.

2. Standard of Review

Comau brings its motion for summary disposition pursuant to MCR 2.116(C)(7) and (8).

"MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment. . . or other disposition of the claim before commencement of the action." *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). "When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011).

MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A court considering a motion for summary disposition under MCR 2.116(C)(8) must decide the motion on the pleadings alone, accepting all factual allegations as true. *Id* at 160. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*.

3. Analysis

A. CMF's Claims Arising on or Before March 16, 2020

Comau first argues that CMF's claims arising on or before March 16, 2020 are barred by the Settlement Agreement and Waiver executed by the parties in January and March of 2020.

On January 10, 2020, Comau and CMF entered into an agreement (the Settlement Agreement) which provides:

> The parties have reached agreement regarding continuation of work and resolution of claims for extra compensation (whether by change or otherwise) regarding the above-referenced Subcontract and Project, on the terms outlined below:

1. CMF will continue to complete its work under the Subcontract. CMF shall at a minimum maintain current staffing, as required, until completion of the work of CMF and its subcontractors.

2. Comau (upon receipt of invoices for the full amount) shall accelerate payments under the subcontract by paying $5,329,775.75 on January 10, 2020 according to the attached schedule.

3. CMF agrees to except a maximum of $1,950,000 (over and above the total value of issued purchase orders) for any and all claims for extra compensation due to events arising on or before January 6, 2020. CMF shall submit appropriate documentation and the parties shall negotiate in good faith all submitted changes. In return, Comau shall accelerate payment of up to $1,950,000 toward the claims for extra compensation to be agreed. Payment shall be made within seven days of invoicing of agreed extras.

4. This agreement represents a complete agreement as to all claims for extra compensation under any legal theory under the above-reference Subcontract and Project. All rights with respect to the completion and quality of the work, equipment buyoff, acceptance, etc. are expressly reserved.

On March 17, 2020, CMF signed a Partial Conditional Waiver (the Waiver) which provided in pertinent part:

> CMF Group Inc. ("Contractor") has a contract with Comau LLC ("Comau") to provide labor and materials for the improvement to the property described as 4000 St. Jean Avenue, Detroit, Michigan 48214, Wayne County, Sidwell No. 21044288-572 ("the Property"), related to the FCA Mack Engine Plant Project ("the Project"), and hereby waives its construction lien to the amount of **$2,098402.43** for services, labor and/or materials provided through the 16th day of March, 2020. The undersigned certifies that to the best of the undersigned's knowledge, information, and belief, the work for which the undersigned has been paid is free and clear of liens, claims, security interests, and other encumbrances of the undersigned's suppliers, employers, sub-subcontractors, and agents for labor, service, and material supplied for said Project through the date of this Partial Conditional Waiver.
>
> **This waiver is conditional on actual payment of $2,098, 402.43** for payment of labor, service, and material supplied for the said Project up to and including the date set forth above, and the undersigned unconditionally and, upon receipt of such payment, forever waives and releases any and all claims, causes of action,

> rights to file a mechanics lien under Michigan's Construction Lien Act, and any and all rights against any laborer's or materialmen's bond, for labor, services, equipment, and materials furnished for the said Project through the date set forth above.

Comau argues that under the clear and unambiguous terms of both the Settlement Agreement and the Waiver, CMF's claims which arise before March 16, 2020 should be dismissed.

"The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012). "If the language of the contract is clear and unambiguous, it must be enforced as written." *McCoig Materials, LLC v Galui Construction, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). "Parties are presumed to understand and intend what the language employed [in a contract] clearly states." *Chestonia Twp v Star Twp*, 266 Mich App 423, 432; 702 NW2d 631 (2005). A party who signs a settlement "cannot seek to avoid it on the basis that . . . he supposed that it was different in terms." *Nieves v Bell Industries, Inc*, 204 Mich App 459, 463; 517 NW2d 235 (1994).

A provision is ambiguous only if it irreconcilably conflicts with another provision or it is equally susceptible to more than a single meaning. *Sau-Tuk Industries, Inc v Allegan Co*, 316 Mich App 122, 136; 892 NW2d 33 (2016). The Court will not distort a contract's plain language in such a way "to create an ambiguity where none exists." *UAW-GM v KSL Recreation Corp*, 288 Mich App 486, 491; 579 NW2d 411 (1998). Further, unless a contract contains an ambiguity, courts must apply the language as written without resort to extrinsic evidence of the parties' intentions. *Universal Underwriters Insurance Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).

Analysis of the Settlement Agreement and Waiver establishes that they lack any ambiguity. Pursuant to the terms of the Settlement Agreement, CMF agreed "to accept a maximum of

$1,950,000 (over and above the total value of issued purchase orders) for any and all claims for extra compensation due to events arising on or before January 6, 2020." The Settlement Agreement also stated that "[t]his agreement represents a complete agreement as to all claims for extra compensation under any legal theory under the above-referenced Subcontract and Project." Contrary to CMF's argument here, these statements are not ambiguous. CMF agreed to accept up to $1.95 million for its claims of extra compensation which accrued before January 6, 2020 and agreed that the Settlement Agreement was "a complete agreement" as to its claims, under any legal theory, to extra compensation.

Because the terms of the Settlement Agreement are unambiguous, the Court will not consider the extrinsic evidence presented by CMF regarding events and discussions leading up to the execution of the Settlement Agreement, and the actions of the parties evidencing their intent under the contract.

The Waiver executed by CMF is also unambiguous. Per the terms of the Waiver, CMF agreed to waive its construction lien in the amount of $2,098,402.23. In the Waiver, CMF agreed that it "unconditionally, and upon receipt of such payment, forever waives and releases any and all claims [and] causes of action. . . through the date set forth above." Again, CMF attempts to use extrinsic evidence to establish the intent of the parties in executing the waiver. However, because the Waiver is unambiguous, the Court will not consider such evidence. Pursuant to the clear and unambiguous Waiver, CMF waived and released any and all claims and causes of action for payment arising before March 16, 2020.

CMF additionally argues that Comau abandoned its rights to enforce the Waiver. "The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted." *Dault v Schulte*, 31 Mich App 698, 700; 187 NW2d 914 (1971) (quoting 17 Am Jur 2d

Contracts § 484). A party displays an intent abandon if it "positively and absolutely refuses to perform the conditions of the contract, such as a failure to make payments due, accompanied by other circumstances, or where by [its] conduct [it] clearly shows an intention to abandon the contract." *Collins v Collins*, 348 Mich 320, 326; 83 NW2d 213 (1957).

CMF argues that Comau's payment of several purchased orders which covered claims for extra compensation for work performed prior to March 16, 2020 evidence Comau's intent to abandon the contract. However, the fact that Comau may have paid several purchase orders which predate the Waiver, does not in itself establish that Comau abandon its rights under the Waiver. Comau fails to provide any details regarding the circumstances of the payments or any other actions Comau took pursuant to the waiver.

CMF next argues that Comau's interpretation of the Waiver conflicts with the Michigan Construction Lien Act (CLA). CMF specifically cites MCL 570.1302(2), which provides that the CLA "shall not be construed to prevent a lien claimant from maintaining a separate action on a contract." While the CLA may not be construed to preventing a lien claimant from maintaining a separate action on a contract, the CLA does not appear to prohibit a lien claimant from otherwise waiving its right to pursue a contract claim.

CMF also cites *Interior/Exterior Specialist Co v Devon Industrial Group, LLC*, unpublished opinion per curiam of the Court of Appeals, entered January 8, 2009 (Docket No. 276620); 2009 WL 49616, in support of its argument that the Waiver in this case in unenforceable because it conflicts with the CLA. Although unpublished decisions of the Court of Appeals are not binding, MCR 7.215(J)(1), the reasoning in an unpublished case may be adopted as persuasive. *Glasker-Davies v Auvenshine*, 333 Mich App 222, 232 n 4; 964 NW2d 809 (2020). The waiver in *Interior* provided:

> I/We have a contract with Devon Industrial Group to provide contract work for 9-1564-09 the improvement of the property described as SOUTHEASTERN HIGH SCHOOL and hereby waive my/your construction lien rights, rights against any payment bonds, and claims arising from the improvement, in the amount of $1,142,354.91 for labor material provided through 03-31-2004. *Id* at *4.

The *Interior* Court concluded that the Waiver only applied to construction lien rights because "the phrase 'claims arising from improvement' can reasonably be viewed only as addressing construction lien claims." *Id.* The *Interior* Court also noted that such an interpretation was consistent with MCL 570.1302(2).

Both the *Interior* waiver and the Waiver in the instant case contained language consistent with MCL 570.115(9), which provides in pertinent part that "[t]he following forms shall be used in substantially the following format to execute waivers of construction liens."

While the Waiver at issue in the instant case does contain similar language to that in *Interior*, the Waiver here contains additional, more specific language than that in the waiver at issue in *Interior* or that required by MCL 570.115(9). In addition to the standard waiver, CMF additionally agreed that to "unconditionally and, upon the receipt of such payment, forever waive and releases any and all claims, causes of action, rights to file a mechanics lien under Michigan's Construction Lien Act, and any and all rights against any laborer's or materialmen's bond, for labor, services, equipment, and materials furnished for the said Project through the date set forth above."

Accordingly, the holding in *Interior* does not apply to the instant case, where the Waiver went beyond the statutory language and clearly stated that CMF was waiving and releasing any claims and causes of action which arose through March 16, 2020 and not just those related to the construction lien.

Finally, CMF argues that the Settlement Agreement and Waiver are invalid because Comau fraudulently induced CMF to enter into the agreements. In response, Comau argues that CMF's fraudulent inducement claim should be dismissed because CMF failed to plead it with particularity and that CMF could not have relied on any alleged misrepresentation given the express terms of the agreements.

To establish a claim of fraudulent inducement or misrepresentation, a party must prove "(1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury." *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008).

As relevant to its claim for fraudulent inducement in connection with the Settlement Agreement and the Waiver, CMF stated in its cross-claim against Comau:

> 83. Comau made material representations of fact to CMF related to the Settlement Agreement with the intention that CMF would rely upon them, including but not limited to the fact that the Settlement Agreement was not an agreement to settle all issues that arose before January 6, 2020, but rather, was an agreement to resolve the specific CMF Change Order Request that existed at the time.
>
> 84. Comau made material misrepresentations of fact to CMF related to the Construction Lien Waivers with the intention that CMF would rely upon them, including but not limited to the fact that the Construction Lien Waivers constituted nothing more than a waiver of the right to make a lien claim for the amount of the payments made by Comau, and did not constitute a waiver of all "claims" for additional compensation or extra work through the date of the Waivers.
>
> 85. The representations were false when made.
>
> 86. Comau knew these representations were false when made.

> 87. Comau intended that CMF would rely upon these false representations when entering into the Subcontract Addendum, Settlement Agreement, and Construction Lien Waivers.
>
> 88. CMF did rely and its reliance was reasonable on said representations when entering into the Subcontract Addendum, Settlement Agreement, and Construction Lien Waivers.

"Fraud claims must be pleaded with particularity, addressing each element of the tort." *Stephens v Worden Insurance Agency, LLC*, 307 Mich App 220, 229-230; 859 NW2d 723 (2014). The particularity required to plead fraud has been described as "the who, what, when, where, and how of the alleged fraud." *Michigan ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 70; 852 NW2d 103 (2014) (CAVANAGH, J., concurring).

The Court agrees with Comau that CMF's fraudulent inducement claim was not pled with particularity. CMF fails to specify exactly who made what specific misrepresentation and when and where the alleged misrepresentations were made.

CMF's claim for fraudulent inducement of the Settlement Agreement and Waiver also fails because CMF could not have reasonably relied on any representation regarding the content of the agreements given that the agreements themselves indicated that CMF was releasing all claims. "There can be no fraud where a person has the means to determine that a representation is not true." *Cummins v Robinson Twp*, 283 Mich App 677, 695-696; 770 NW2d 421 (2009). Here, CMF should have known that the alleged representations were not true when it read the Settlement Agreement and Waiver before executing them.

Accordingly, the Court will dismiss CMF's fraudulent inducement claim as it relates to the Settlement Agreement and Waiver.

Bayview also argues in its response that because Bayview was not a party to the Settlement Agreement and Waiver, Bayview is not barred from asserting claims arising on or before March

16, 2020. However, the Court need not address this argument because Comau's motion for summary disposition does not seek dismissal of Bayview's claims arising on or before March 16, 2020. Comau only makes this argument as to CMF.

B. Bayview's Claim for Unjust Enrichment/Quantum Meruit

Comau next seeks dismissal of Bayview's unjust enrichment/quantum meruit claim because there is an express contract covering the same subject matter.

In the absence of an enforceable contract, "the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006). "[U]nder the doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 185; 504 NW2d 625 (1993). To establish a claim of unjust enrichment, a plaintiff must show "(1) the receipt of benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22-23; 831 NW2d 897 (2012). A court "may not imply a contract if the parties have an express contract covering the same subject matter." *AFT Mich v Michigan*, 303 Mich App 651, 661; 846 NW2d 583 (2014).

Bayview argues here that because there is no express contract between Comau and Bayview, Bayview may bring its unjust enrichment/ quantum meruit claim. Comau argues, relying on *Landstar Express Am, Inc v Nexteer Auto Corp*, 319 Mich App 192; 900 NW2d 650 (2017), that Bayview may not bring an unjust enrichment claim because express contracts exist for the procurement of services on the project. i.e. Bayview's contract with CMF and CMF's contract with Comau.

In *Landstar*, the plaintiff entered into a contract with a third party, Contech, for shipment and delivery of automotive parts to the defendant. Contech had a contract with the defendant for delivery of the automotive parts. After the plaintiff was unable to collect payment from Contech for delivery services the plaintiff had provided, the plaintiff sued the defendant under an implied contract/unjust enrichment theory, arguing that the defendant was receiving a benefit it had not compensated the plaintiff for. The Court of Appeals held that the plaintiff's claims failed because:

> [W]hile there was no direct contract between plaintiff and defendants, the fact that defendant contracted with Contech and Contech, in turn, contracted with plaintiff- with all contracts specifically and consistently providing that Contech is the party responsible for shipping costs- is sufficient to preclude the imposition of any implied contract to the contrary. *Id* at 203.

The *Landstar* Court also addressed Bayview's argument in the instant case that a claim for unjust enrichment is permissible where there is no express contract between the same parties. The *Landstar* Court noted that "the *Morris Pumps* Court qualified that 'generally' the same parties need to have an express contract on the same subject matter- it is not an absolute requirement." *Id* at 202. Further, although Bayview argues *Landstar* is distinguishable because the plaintiff in that case first brought suit against Contech in federal court, and only brought suit against the defendant when Contech proved to be uncollectable, this Court notes that there was no discussion of the prior federal case in the *Landstar* Court's analysis of the plaintiff's implied contract and unjust enrichment claim.

In the present case, Comau contracted with CMF to perform installation work on the project. CMF then contracted with Bayview to provide electrical work for the installation of the project. Bayview does not dispute that CMF was responsible for payment for work completed by Bayview. Pursuant to the holding in *Landstar*, the existence of these contracts is sufficient to

preclude claims for implied contract or unjust enrichment. Accordingly, the Court will dismiss Bayview's claim of unjust enrichment/quantum meruit against Comau.

C. Bayview's Fraud Claims

Comau next argues that Bayview's claims of fraud in the inducement and fraud/bad faith promise should be dismissed because Bayview has failed to plead them with sufficient particularity. The Court disagrees. The specifics of Bayview's fraud claims are set out in paragraphs 15-19, 22-23, and 24-27 of Bayview's Second Amended Complaint. Accordingly, Comau's motion to dismiss the fraud claims will be denied.

D. Bayview's Negligent Misrepresentation Claim

Finally, Comau argues that it is entitled to dismissal of Bayview's negligent misrepresentation claim because Bayview failed to allege that a duty of care was owed or breached.

"A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006).

Comau argues that Bayview has failed to state a claim for negligent misrepresentation because Bayview has not alleged that Comau prepared information without reasonable care or that Comau owed a duty to Bayview to prepare information with reasonable care.

Comau's argument that Bayview failed to allege that Comau prepared information without reasonable care is without merit. In Paragraph 62 of Bayview's Second Amended Complaint, it alleges that Comau was "negligent in making the representations."

However, the Court agrees that Bayview has failed to allege that Comau owed Bayview a duty of care. Although unpublished, the Court of Appeals holding in *Platt Laundromat, LLC v Detergent Solutions*, unpublished opinion per curiam of the Court of Appeals, entered July 30, 2020 (Docket No. 348529); 2020 WL 4390092, is instructive as to this issue. In that case, the

Court of Appeals upheld the dismissal of a negligent misrepresentation claim under MCR 2.116(C)(8) where the plaintiff failed to state what duty the defendants owed to the plaintiff. *Id* at *5.

In the present case, Bayview does not address the duty owed to it by Comau in its Second Amended Complaint. Accordingly, the Court will dismiss Bayview's negligent misrepresentation claim.

On the basis of the foregoing opinion;

IT IS ORDERED that Comau, LLC and Federal Insurance Company's motion for partial summary disposition is hereby **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that CMF's claim for fraudulent inducement of the Settlement Agreement and Waiver is hereby **DISMISSED**.

IT IS FURTHER ORDERED that all claims brought by CMF against Comau that arose on or before March 16, 2020 are hereby **DISMISSED**.

IT IS FURTHER ORDERED that Bayview's claim of unjust enrichment against Comau is hereby **DISMISSED**.

IT IS FURTHER ORDERED that Bayview's claim of negligent representation against Comau is hereby **DISMISSED**.

IT IS FURTHER ORERED that this Order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

DATED: 7/14/2023

/s/ Edward Ewell
Circuit Judge
Edward Ewell