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IN THE
COURT OF APPEALS OF INDIANA

BOYER CORP EXCAVATING,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 18A02-1007-PL-834
	)	
SHOOK CONSTRUCTION and	)	
BALL STATE UNIVERSITY	)	
BOARD OF TRUSTEES,	)	
	)	
Appellees.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Linda Ralu Wolf, Judge
Cause No. 18C03-0810-PL-15

December 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Boyer Corp Excavating ("Boyer") appeals the trial court's order following a bench trial in favor of Shook Construction ("Shook") and Ball State University Board of Trustees ("Ball State," and collectively with Shook, the "Appellees"). Boyer raises one issue, which we revise and restate as whether the court's Findings of Fact and Conclusions of Law were clearly erroneous. We affirm.

This case concerns certain work performed by Boyer pursuant to a subcontract agreement (the "Subcontract") with Shook to renovate Ball State's football stadium (the "Project"), as well as other work on the Project not specifically enumerated in the Subcontract. Hired by Ball State to serve as general contractor on the Project, Shook executed the Subcontract with Boyer, signed by Brad Boyer on September 21, 2006, in which Boyer was to be paid a sum of $690,000 to perform a variety of tasks on the Project including "site clearing, engineered fabric, earthwork, structure demolition, sub drainage, exterior ductile waterline, and sewer collection work," as well as work on the North Colonnade, on additional concessions, and on "Masonry Column Wraps." Exhibits at 328. After the Project's completion, Boyer sought additional compensation totaling $129,808, and on May 12, 2008, after it was not compensated as requested, Boyer recorded a Mechanic's Lien on the stadium. Due to the extensive nature of the underlying facts, in each part below we will discuss the facts relevant thereto, and in our review, such facts will be viewed in a light most favorable to the judgment.

On October 8, 2008, Ball State filed a "Complaint for Declaratory Judgment, to Quiet Title, and Slander of Title, and Abuse of Process," alleging that "[o]n May 23, 2008, Boyer filed a 'Notice of Intention to Hold Mechanic's Lien' ('the Notice') with the

Delaware County Recorder . . . ." Appellant's Appendix at 747-748. On March 13, 2009, Boyer filed an Answer, a Counter Claim (the "Third Party Complaint"), and a motion to join additional party requesting that Shook be joined as a third party defendant. On March 16, 2009, the court granted Boyer's motion to join Shook and ordered the Third Party Complaint be served on Shook.

On May 15, 2009, Ball State filed its answer to the Third Party Complaint as well as a Motion for Summary Judgment on Its Claim and Motion to Dismiss, or in the Alternative, Motion for Summary Judgment on Boyer's Third Party Complaint. On June 22, 2009, Boyer filed a memorandum in opposition to Ball State's motion and designation of materials in support, and the court held a hearing on July 9, 2009. On August 4, 2009, the court entered an order granting Ball State's motion for summary judgment on the issue of Boyer's mechanic's lien and denied summary judgment on Boyer's reliance damages claim in its Third Party Complaint. On April 21, 2010, Ball State's counsel filed a motion to withdraw, noting that "counsel for . . . Shook has agreed to undertake the defense of [Ball State] as to Boyer's claims," and the court granted Ball State's motion on April 29, 2010. Id. at 820.

On May 10 and 11, 2010, the court held a bench trial in which evidence was presented on a number of factual and legal issues. At the conclusion of trial, the court requested that the parties file briefs and prepare proposed findings of fact and conclusions of law, and on June 11, 2010, it issued its Findings of Fact and Conclusions of Law and Order (the "June 11, 2010 Order") and awarded Boyer damages against Shook totaling

$17,436.88. The court also entered "judgment in favor of [Ball State] and against Boyer Corp. Excavating." Id. at 32.

The issue is whether the court's June 11, 2010 Order was clearly erroneous. The trial court entered findings of fact and conclusions of law pursuant to Ind. Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh'g denied. In our review, we first consider whether the evidence supports the factual findings. Id. Second, we consider whether the findings support the judgment. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, 726 N.E.2d at 1210. We give due regard to the trial court's ability to assess the credibility of witnesses. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed *de novo*. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005) (citing Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002); Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000); Menard, Inc., 726 N.E.2d at 1210). Where cases present mixed issues of fact and law, we have described the review as applying an abuse of discretion standard. Id. (citing Fobar, 771 N.E.2d at 59

("Although this is in some sense an issue of law, it is highly fact sensitive and is subject to an abuse of discretion standard.")). In the event the trial court mischaracterizes findings as conclusions or vice versa, we look past these labels to the substance of the judgment. Id. (citing Beam v. Wausau Ins. Co., 765 N.E.2d 524, 528 (Ind. 2002), reh'g denied; State v. Van Cleave, 674 N.E.2d 1293, 1296 (Ind. 1996), on reh'g in part, 681 N.E.2d 181 (Ind. 1997), cert. denied, 522 U.S. 1119, 118 S. Ct. 1060). "In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made." Id. (quoting Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind.1997)).

Boyer presents argument on a number of grounds including: (A) whether the evidence supported the court's findings; (B) whether Shook waived its right to enforce certain contractual provisions; (C) whether the court misinterpreted certain provisions in the contract; (D) whether Ball State was unjustly enriched by Boyer's labor; and (E) whether the court should have applied the doctrine of promissory estoppel in favor of Boyer. We address each of Boyer's arguments separately.

A. Evidentiary Support for the Court's Findings

Boyer argues that certain "testimony in support of Boyer's claims" was "uncontested." Appellant's Brief at 13. Boyer asserts that "there was certain evidence which was not tendered in support of the back charges being claimed by Shook," and points specifically to Shook's numerous claims of damage to the property by Boyer, work performed by E & B Paving, Inc., alleged "supervision time" of Boyer performed by Devon Kellum, who was Shook's Superintendent on the Project, and "work performed by

Shook which was the subject of the Boyer contract." Id. Additionally, Boyer argues that "there was no evidence presented as to why an insurance claim was not presented to Boyer's carrier," and that Shook acknowledged "that Boyer should be paid for one of the extras that Shook had denied, i.e. digging out the concrete installed by E & B . . . ."[1] Id. at 13-14.

The Appellees argue that Boyer's "factual statements [which] it contends support Boyer's claims" do not "identify whether these statements are offered" as support for an argument that the evidence did not support the findings, that the findings did not support the judgment, "or in support of one of the enumerated legal issues it raised on appeal, leaving [the Appellees] in the position of having to guess the purpose for which these factual statements are offered."[2] Appellees' Brief at 18. To that end, the Appellees claim that "Boyer's failure to present cogent legal argument in this regard operates as waiver." Id.

The Appellees in the alternative respond to Boyer's arguments referenced above as challenges to the "factual support for the trial court's findings and conclusions relating to these statements." Id. at 19. First, the Appellees argue that "[s]tipulated Exhibit Y contains change orders from Shook" which relate to Shook's "claim for back charges

[1] Boyer also argues in this section of its brief that "there was testimony from both Shook and Boyer that the change order process provided for in the contract was not uniformly followed . . ." and that "it was undisputed that Ball State representatives . . . made request[s] directly to Boyer requesting the performance of certain work outside the contract, i.e. the relocation of the foot path and the installation of the irrigation lines." Appellant's Brief at 13. However, because these arguments are repeated in subsequent sections of Boyer's brief, which are addressed in parts (B) and (D) below, respectively, we will address these contentions by Boyer at that time.

[2] We note that the arguments of Boyer referenced by the Appellees appear under a heading in Boyer's brief which states: "*The standard review in the case at bar is a two prong standard as the Court entered Findings of Fact and Conclusions of Law and Order.*" Appellant's Brief at 12.

regarding work performed by E & B," that the record contains testimony from employees of Shook that Shook "had to pay E&B Paving to come in and finish a sub base under the asphalt that Boyer should have done" and that accordingly Boyer's challenge to the court's findings regarding the back charge claimed by Shook to E & B Paving is without merit. Id. Second, the Appellees argue that Kellum "testified that he *did* speak to Boyer's insurance agent . . . but that Boyer's insurance agent did not want to file a claim," and also that this argument "is irrelevant" because the court did not make factual findings on this issue, nor is it "material to any of the trial court's conclusions of law." Id. at 20. In so arguing, the Appellees note that Shook did not have "any obligation to make a claim against Boyer's insurance," and that "[i]f Boyer wanted to make a claim, [it] was free to do so . . . ." Id. Third, regarding Boyer's contention that Shook acknowledged that Boyer should be paid for "digging out the concrete installed by E & B," the Appellees argue that "the extra charge at issue [] has nothing to do with E&B. It involves Irving Materials," and that "[i]t may well be that Boyer should be paid, but–as everyone had agreed prior to trial, during the trial, and after the trial–that payment will come from Irving Materials, not Shook." Id. at 21. The Appellees also argue that "even if the evidence supported Boyer's argument, he waived it by not presenting this claim to the trial court." Id.

To the extent that Boyer fails to make cogent argument regarding its various challenges, we note that Boyer has waived those arguments. See Masonic Temple Ass'n of Crawfordsville v. Ind. Farmers Mut. Ins., 837 N.E.2d 1032, 1037 (Ind. Ct. App. 2005) (noting that "[a]n appellant's argument must contain his contentions on the issues

presented, supported by cogent reasoning, and each contention must be supported by citations to the authorities, statutes, and the appendix or parts of the record relied on," and that "[a] party waives any issue for which it fails to provide argument and citations") (citing Ind. Appellate Rule 46(A)(8)(a)), reh'g denied; Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied.

Waiver notwithstanding, we address Boyer's challenges to the back charges found by the court in its June 11, 2010 Order. At the outset, we note that Boyer mentions in its brief that it "acknowledged" two of the back charges for property damage as proper, and while it does not specifically delineate which back charges it is referencing, the court in its June 11, 2010 Order notes that Boyer acknowledged that back charges for repairing the "Southwest restroom masonry wall" and "conduits under the west grandstands" were acknowledged by Boyer as proper.[3] Appellant's Appendix at 22-23. The court made additional findings related to back charges as follows:[4]

> 85. The Subcontract amount is subject to a proper backcharge in the amount of $1,781.35 related to repairs of 6" conduits for Telecast & Musco lights under the east bleachers damaged by Boyer. (Exhibit Y).
>
> 86. The Subcontract amount is subject to a proper backcharge in the amount of $761.30 related to repairs made to conduits running east-west from the ticket booth to the bleachers damaged by Boyer. (Exhibit Y).
>
> * * * * *

[3] These findings appear as Findings 83, 84, 87, and 88.

[4] The court lists additional back charges which Boyer does not dispute. These back charges are discussed in Findings 81, 82, 92, and 93. Accordingly, we need not examine these back charges.

89. The Subcontract amount is subject to a proper backcharge in the amount of $2,807.15 related to repairs made to gutters damaged by Boyer. (Exhibit Y).

90. The Subcontract amount is subject to a proper backcharge in the amount of $23,709.55 related to payments made by Shook to E&B Paving, Inc. to complete work on the Project that was supposed to have been completed by Boyer under the Subcontract. (Exhibit Y).

91. The Subcontract amount is subject to a proper backcharge in the amount of $1,035.00 related to repairs made to a limestone cap damaged by Boyer. (Exhibit Y).

* * * * *

94. The Subcontract amount is subject to a proper backcharge in the amount of $18,317.00 related to labor and material costs incurred by Shook to repair damages on the Project resulting from Boyer's excavation operations. (Exhibit Y).

95. The Subcontract amount is subject to a proper backcharge in the amount of $12,420.00 related to Shook's labor costs for additional supervision incurred by Shook that were necessary to oversee Boyer's work on the Project. (Exhibit Y).

Id. at 22-24.

Thus, the court relied on a "back charges document," admitted into evidence as Exhibit Y, for the back charges it identified as proper in its June 11, 2010 Order. Transcript at 171. This document contains entries regarding the back charges and amounts as found by the trial court, and it notes the change orders from which they derive. Also, Devon Kellum, Shook's Superintendent on the Project, testified regarding the back charges and discussed Exhibit Y at trial. Evidence was presented to support the relevant Findings of Fact, and therefore we cannot say that the court's findings on the back charges were clearly erroneous.[5]

[5] To the extent Boyer argues that it is entitled to additional funds based upon "acknowledgement

B. Waiver of Shook's Right to Enforce Contractual Provisions

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by Shook that Boyer should be paid for one of the extras that Shook had denied, i.e. digging out the concrete installed by E & B which was determined to be the wrong contract [sic]," Appellant's Brief at 13-14, we note that the extent of Boyer's citation to the record for this proposition is from the testimony of Kellum as follows:

> Q All right. Then this last one, number fifteen . . . can you explain to me what that is about?
>
> A Yea. What happened there was we were pouring a ramp, an access ramp and Irving Materials who we purchased some concrete from and they brought the wrong concrete mix out and Boyer excavating came over in their Bobcat and removed the wrong concrete that they – we initially placed, got it off the area where it was.
>
> Q All right. So Shook is the one that contracted with Irving to deliver this concrete mix, correct?
>
> A Yes.
>
> * * * * *
>
> Q Why is that a cost Boyer should eat, sounds like it's a Shook problem?
>
> A It was at that time – all I know is like I said, Boyer's guys cleaned that material out with the Bobcat.
>
> Q Somebody had to clean it out, true?
>
> A Yes.
>
> Q Why should they not get compensated for that?
>
> A I'm not saying they shouldn't.

Transcript at 281-282.

As noted by the Appellees in their brief, however, at the direction of the court Boyer filed a post-trial brief containing an attached exhibit listing the additional compensation to which it claimed it was entitled, and that exhibit does not include a claim for compensation for this concrete removal. Moreover, the Appellees direct our attention to Exhibit O, which notes that Boyer is to "negotiate directly with IMI" for charges related to the wrong concrete mix and for trucking the "wash" out, as well as to Exhibit U, which notes the same. Exhibits at 357-358. The Appellees also direct us to a letter written by Brad Boyer on December 13, 2007, in which he states that he "faxed Neal from IMI two invoices for repairing a sanitary sewer that they filled with concrete and another for removing and regrading of sidewalk area where they poured the wrong mix," and that "[t]hese two invoices total $5,750.00 leaving a balance of $418.53." Id. at 418.

At trial, the parties presented evidence regarding requests for additional compensation made by Boyer for performance of soil removal work, soil remediation work, and trench box rentals, as well as on a number of miscellaneous claims. Boyer claimed that these requests were based upon the fact that each was either not a part of the base Subcontract or that the Subcontract did not properly compensate Boyer for the work actually performed, and therefore it was entitled to additional compensation. The court, in its June 11, 2010 Order, sided with Shook's position, finding that although some of Boyer's requests were proper, many of its requests were either untimely or were otherwise improper. The court ordered that, after Shook's back charges were accounted for, Shook owed Boyer $17,436.88.

Boyer argues that "the Court failed to consider Boyer's claims that Shook had waived its right to enforce the specific contractual provisions as related to the timing of the submission of change orders," and notes that "[t]his issue was asserted by [Brad Boyer] in his testimony" and that Shook acknowledged that the contract provisions pertaining to change orders "were not routinely followed" over the course of the project. Appellant's Brief at 14.

The Appellees argue that the court correctly found that Boyer was owed a total of $733,267.14 and that "the final amount due and owing to Boyer was $17,436.88–an amount Shook had tendered to Boyer many months earlier, but Boyer refused to accept." Appellees' Brief at 22. The Appellees argue that the cases Boyer cites for its waiver argument "provide no direct support for its arguments" and instead "deal with the waiver of arbitration provisions . . . which is not analogous to waiver of change order

requirements." Id. The Appellees also argue that unlike the cases cited by Boyer, "the Subcontract in our case expressly provides that, 'No action or failure by [Shook] shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or an acquiescence in a breach thereunder,'" and that Indiana case law has held that such provisions prevent us from finding waiver under such circumstances. Id. at 22-23.

The Appellees argue that even if Boyer is right that Shook waived its right regarding the change orders, "[t]o the extent that the remaining valid findings and conclusions support the judgment, the erroneous finding and conclusion are superfluous and are not fatal to the judgment." Id. at 23 (quoting Havlin v. Wabash Intern., 787 N.E.2d 379, 383 (Ind. Ct. App. 2003)). The Appellees argue that "[t]he evidence recited in the Statement of Facts supports the substantive merits of every single conclusion of law . . . irrespective of the procedural change order argument, and Boyer has not challenged the rest of these substantive grounds," and that Boyer's citation to conflicting testimony "is of no consequence, as the trial court heard conflicting testimony first hand, found Shook's testimony to be more credible, and this Court can consider only the evidence most favorable to the judgment." Id. The Appellees also argue that "separate and distinct from Boyer's repeated violations of the change order requirements, Boyer's claims for additional compensation are precluded by its failure to submit the claims to Shook until months after the claims deadline had passed." Id. at 24. The Appellees note that "[t]he General Conditions incorporated into the Subcontract provide that 'Claims by either party must be initiated within 21 days after occurrence of the event giving rise to

such Claim" or within twenty-one days of discovering the condition giving rise to the claim, whichever is later, and that "[t]he failure to abide by claim notice provisions in a contract is fatal to a cause of action." Id. at 24, 24 n.5.

The Subcontract contains two provisions which limit the time period in which Boyer could submit a request for additional compensation. First, the Subcontract contains the following provision regarding change orders for extra work (the "Change Order Provision"):

> **ARTICLE IX – EXTRA WORK:** It is expressly understood and agreed that no charge for any additional or extra work or materials will be allowed [Boyer] unless the same has been ordered in writing by [Shook] prior to the date on which said additional or extra work is started or materials are ordered, and the basis upon which the extra work is to be done and paid for, if at all, has agreed upon and is reflected in a written change order. . . . If [Boyer] claims that any instructions, by drawings or otherwise, involve additional or extra work or materials or extra cost to him, he shall give [Shook] written notice thereof within twenty-four (24) hours of having received such instructions, or from the time the cause of the claim begins, and shall not proceed with the work until after he has received written authority from [Shook] to proceed. It is mutually agreed that claims made in any other manner are to be considered void.
>
> * * * * *
>
> An extra work order prepared by [Boyer] and presented to [Shook] for review and signature shall not, if signed, obligate [Shook] to pay any additional compensation to [Boyer]. Rather, [Shook's] execution of a [Boyer] prepared extra work order shall only be an acknowledgement that the work described therein has been performed.

Exhibits at 319-320. Additionally, Article 4, Section 3 of the General Conditions of the prime contract, which was incorporated into the Subcontract,[6] contains the following terms regarding claims and disputes (the "Claim Notice Provision"):

[6] Article 1 of the Subcontract states:

> § 4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. . . . Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.
>
> § 4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

Id. at 155.

Boyer's requests for additional compensation are based on work performed which the court categorized as follows: Soil Remediation Claim, Soil Removal Claim, Sanitary Sewer Claim, and Miscellaneous Claims.[7] We note, however, as highlighted by Shook, that Boyer does not challenge the substance of the Court's findings and conclusions, including the fact that in each instance, Boyer submitted its request for additional compensation after the deadlines outlined by the Change Order Provision and the Claim Notice Provision. Instead, Boyer submits that the court's findings were clearly erroneous in failing to find that Shook waived its ability to enforce certain contract provisions by its conduct.

> All Work shall be performed in strict accordance with and to the extent required by all the Contract Documents binding upon [Shook] . . . which contract is hereby made a part of this Agreement and shall be as binding upon [Boyer] as if re-written herein, insofar as the provisions of the same relate to, or may be applied to, the Work.

Exhibits at 315.

[7] The court also discussed a fifth claim which it titled "Irrigation System Claim," and which concerned the installation of the irrigation system. Appellant's Appendix at 20. However, Boyer challenges the court's findings and conclusions regarding the irrigation system based upon a theory of unjust enrichment, which we discuss in Part D below.

The court's Order contains the following conclusions of law:

12. Based upon the contract documents applicable to the Project, Boyer is not entitled to compensation for the Soil Remediation Work in any amount greater than $92,806.00, which was agreed upon in the approved change order.

* * * * *

14. Based upon Boyer's failure to provide timely written notice of its additional claim related to the Soil Remediation Work as required by the Subcontract, Boyer is not entitled to any such additional compensation for the Soil Remediation Work and the rejection of that claim was proper and the claim is void.

15. Based upon Boyer's failure to provide timely written notice of its additional claim related to the Soil Remediation Work as required by the General Conditions, Boyer is not entitled to any such additional compensation for the Soil Remediation Work and the rejection of that claim was proper.

* * * * *

21. Based upon the contract documents applicable to the Project, Boyer is not entitled to compensation for the Soil Removal Work because that work was never authorized by a written change order.

22. Based upon Boyer's failure to provide timely written notice of its claim related to the Soil Removal Work as required by the Subcontract, Boyer is not entitled to compensation for the Soil Removal Work and the rejection of that claim was proper and the claim is void.

23. Based upon Boyer's failure to provide timely written notice of its additional claim related to the Soil Removal Work as required by the General Conditions, Boyer is not entitled to compensation for the Soil Removal Work and the rejection of that claim was proper.

24. Based upon the contract documents applicable to the Project, Boyer is not entitled to compensation for the trench box rentals [on its Sanitary Sewer Claim] because those costs were never authorized by a written change order.

> 25. Based upon Boyer's failure to provide timely written notice of its claim related to the trench box rentals as required by the Subcontract, Boyer is not entitled to compensation for the trench box rentals and the rejection of that claim was proper and the claim is void.
>
> 26. Based upon Boyer's failure to provide timely written notice of its claim related to the trench box rentals as required by the General Conditions, Boyer is not entitled to compensation for the trench box rentals and the rejection of that claim was proper.
>
> * * * * *
>
> 35. The Miscellaneous Claims were properly rejected in full or in part because Boyer did not provide Shook with any costs or pricing associated with the work, as required by the Subcontract, until October of 2007, which was more than one month after all work including Boyer's work on the Project was completed.

Appellant's Appendix at 26-29 (citations omitted).

We need not engage in a thorough examination into whether the court erred in not concluding that Shook waived its right to assert the Change Order Provision and the Claim Notice Provision, and in concluding that Boyer's claims for additional compensation were therefore untimely, because Boyer agreed in the Subcontract that no action by Shook (or Ball State) shall constitute a waiver of a right. Specifically, Section 13.4.2 of the prime contract (the "No Waiver Provision") states:

> No action or failure to act by [Ball State], Architect or [Shook] shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

Exhibits at 172.

This court has recently analyzed a contract involving the same principal, Ball State University, and identical contract provisions. In Weigand Constr. Co., Inc. v. Stephens

Fabrication, Inc., Ball State University ("BSU") hired Weigand to serve as general contractor on a construction project, who in turn hired Stephens as a subcontractor to perform structural steel construction. 929 N.E.2d 220, 223 (Ind. Ct. App. 2010). As in this case, the contract between Weigand and Stephens contained language imposing the terms and conditions of the prime contract on Stephens. Id. The prime contract between BSU and Weigand contained a claim notice provision consisting of identical language as in the instant case and similarly found in Section 4.3.2 of the contract, as well as an identical no waiver provision. Id. at 223, 228.

In June 2002, the architect made several revisions in the project's design which caused "extra work and expense" for Stephens. Id. at 223. Although Stephens received the revisions from the architect on June 13, 2002, Stephens did not submit a written claim for the extra work until May 28, 2003.[8] Id. In order to keep the project on schedule, "Weigand directed Stephens to comply with its contractual obligations and deliver the structural steel trusses as scheduled," and it "agreed to submit Stephens's claim for extra payment to BSU for resolution while work on the Project progressed, as Weigand was required to do under the terms of its contract with BSU." Id. at 223-224. However, "BSU rejected the claim, determining that it was untimely because it failed to comply with the Claim Provision." Id. at 224. Stephens filed a complaint "for breach of contract, alleging that it was owed $161,124.61 plus interests, attorney fees, and costs for 'extra labor and materials for additional work on the Project.'" Id.

[8] On April 22, 2003, Stephens also orally informed Weigand about the extra work and expense associated with the revisions. Weigand, 929 N.E.2d at 223.

On appeal, Stephens argued that Weigand waived the claim provision when Stephens "informed Weigand of its intent to submit a Claim on April 22, 2003, [and] the Weigand employee involved in the conversation directed Stephens to deliver the materials and maintain the delivery schedule for the Project and that the issue of Stephens's additional costs would be resolved at a later time," and when a "Weigand employee stated that Stephens was required to comply with the Project changes and meet its obligations for the Project or face an action for breach of contract from Weigand." Id. at 228. We held that "even if the record showed undisputed facts that would support a waiver argument—which it does not," the no waiver provisions "would prevent us from finding that Weigand waived its right to enforce the Claim Provision," and therefore found "that Weigand did not, in fact, waive its right to enforce its rights under the contract." Id. at 228-229.

Here, the No Waiver Provision agreed to by Boyer similarly prevents us from finding that Shook waived its right to enforce the Claim Notice Provision or the Change Order Provision. Accordingly, we conclude that the court did not err in concluding that Boyer's challenges requesting additional compensation were untimely.

C. Interpretation of the Contract

Boyer argues that the contract "provided that the top soil removed from the project could be taken to Heath Farm," that "at some point . . . Ball State notified Shook that top soil could no longer be taken to Heath Farm," and that "there were no provisions in the contract as to the amount of top soil which could be taken to Heath Farm." Appellant's Brief at 15. Boyer argues that the contract is ambiguous on this point, that "this provision

should be interpreted against Ball State and Shook," and that "all of the charges incurred in the removal of the soil by taking it to another location and replacement of the soil should properly be awarded to Boyer." Id.

The Appellees argue that "the contractual provision dealing with removal of soil to Heath Farm" and Boyer's "failure to abide by the claim notice provisions" were the reasons given by the trial court "as to why Boyer's additional soil removal claim was properly denied." Appellees' Brief at 25. The Appellees note that "although Boyer was advised in August of 2007 that there would be no additional compensation for the soil removal work, Boyer waited another four months–until December 10, 2007–before providing Shook with a written notice of claim" in the amount of $62,604.00 for soil removal. Id. The Appellees also argue that "Boyer's claim of ambiguity is itself unavailing," because evidence was presented "that the soil materials . . . were *not* top soil but were instead 'unsuitable' soil materials that were never allowed to go to Heath Farm in the first place," and that "[w]hile Boyer disagreed, the trial court was in the best position to assess the credibility of the witnesses" and it "found that Shook's witnesses were more credible . . . ."[9] Id. at 25-26.

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[9] The Appellees also note in their brief:

> After he had sought additional compensation for [soil removal] and it was pointed out that the contract did not allow for what he was requesting, [President Brian Boyer] admitted that the contract was clear on this point when he acknowledged 'As for RCO #077.01 [the Soil Removal Work] it would appear they have me by the ass, using the old addendum trick." Boyer was likewise very candid when he informed the court that he had simply chosen not to read the contract, while conceding that critical terms related to his job and its performance were contained in that contract.

Appellees' Brief at 25-26.

The contract signed by Ball State and Shook contained a term titled "Disposal" which required the removal of "surplus soil material," including "unsuitable topsoil," from Ball State's property. Exhibits at 204. In an addendum, the contract also stated that "[t]opsoil can be stock piled at the Heath Farm site, which is approximately 1/2 mile north of the stadium." Id. at 281. However, in March 2007 Shook and Boyer were informed that Heath Farm could not accommodate further soil material, and thereafter Boyer was forced to haul soil to a location further away from the Project area. Due to this perceived change in the agreement, Boyer submitted a change order requesting additional compensation for soil removal performed in March and April of 2007, and on August 7, 2007, Shook submitted Boyer's request to Ball State. Ball State ultimately rejected Boyer's request, and Shook notified Boyer of this rejection on August 17, 2007. Almost four months later, on December 10, 2007, Boyer submitted a written claim notice to Shook containing requests for additional compensation totaling $234,569.39, in which Item 17 was a request for an additional $62,604 for "Removal and disposal of additional top soil colinaide [sic] area." Id. at 410. Two days later, on December 12, 2007, Shook sent Boyer a response in which it noted that "Line item #17 was rejected by [Ball State]. A letter was sent to your attention without response. Shook and [Ball State] have considered this item to be closed. Authorization was not granted based on the type of materials and the fact we 'overfilled' the farm location." Id. at 331.

In its June 11, 2010 Order, the court made the following conclusions of law:

> 16. The Project Addendum No. 1 that was incorporated into the Subcontract authorized that only topsoil to [sic] be delivered to Heath Farm.

17. The Specifications required Boyer as the site clearing and earthwork subcontractor to "[r]emove surplus soil material, unsuitable topsoil, obstructions, demolished materials, and waste materials including trash and debris, and legally dispose of them off [Ball State's] property."

18. The initial request for compensation for the Soil Removal Work was properly denied because only topsoil was authorized to be taken to Heath Farm.

19. Boyer acknowledged in its April 7, 2009 letter (Exhibit W) that the Project Addendum No. 1 precluded recovery for the Soil Removal Work.

20. The initial request for compensation for the Soil Removal Work was properly denied because surplus soil materials, including topsoil and unsuitable topsoil, were to be legally disposed off of [Ball State's] property by Boyer as the site clearing and earthwork subcontractor.

21. Based upon the contract documents applicable to the Project, Boyer is not entitled to compensation for the Soil Removal Work because that work was never authorized by a written change order.

22. Based upon Boyer's failure to provide timely written notice of its claim related to the Soil Removal Work as required by the Subcontract, Boyer is not entitled to compensation for the Soil Removal Work and the rejection of that claim was proper and the claim is void.

23. Based upon Boyer's failure to provide timely written notice of its additional claim related to the Soil Removal Work as required by the General Conditions, Boyer is not entitled to compensation for the Soil Removal Work and the rejection of that claim was proper.

Appellant's Appendix at 27.

Boyer is effectively postulating that it is entitled to additional compensation for soil removal because its soil removal activities were at one point in the process redirected from Heath Farm, which led to additional costs for Boyer. However, even were we to agree with Boyer's position, as the court recognized and as Shook argues, the Claim

Notice Provision discussed in part B applies here with equal force and precludes Boyer's claim. It is undisputed that Boyer did not provide Shook with a written notice of claim until December 10, 2007, which was well beyond the twenty-one day window stipulated by the contract. Accordingly, we need not address whether the contract provisions as cited by Boyer were misinterpreted, and we conclude that the court did not err in not awarding Boyer additional compensation for its soil removal work.

D. Unjust Enrichment

Boyer argues that it has a valid unjust enrichment claim against Ball State.

> In a dispute between a subcontractor and a property owner, we evaluate four criteria to determine whether the evidence supports a judgment under a theory of unjust enrichment:
>
> > 1) whether the owner impliedly requested the subcontractor to do the work; 2) whether the owner reasonably expected to pay the subcontractor, or the subcontractor reasonably expected to be paid by the owner; 3) whether there was an actual wrong perpetrated by the owner; and 4) whether the owner's conduct was so active and instrumental that the owner "stepped into the shoes" of the contractor.
>
> Encore Const[r]. Corp. v. SC Bodner Const[r]., Inc., 765 N.E.2d 223, 226[-227] (Ind. Ct. App. 2002)[(citing McCorry v. G. Cowser Const[r]., Inc., 636 N.E.2d 1273, 1276 (Ind. Ct. App. 1994), aff'd and adopted 644 N.E.2d 550 (Ind. 1994))]. "The pivotal concept of 'unjust enrichment' is the occurrence of a wrong or something unjust." Savoree v. Indus. Contracting & Erecting, Inc., 789 N.E.2d 1013, 1020 (Ind. Ct. App. 2003).

State v. CCI, LLC, 860 N.E.2d 651, 653 (Ind. Ct. App. 2007), reh'g denied, trans. denied.

Boyer argues that "there is undisputed evidence of two requests made by Ball State for performance of work by Boyer, i.e. the relocation of the foot path and the installation of the irrigation lines." Appellant's Brief at 16. Boyer argues that "when the work was performed, [it] expected to be paid." Id. Boyer argues that "[t]here would

clearly be a wrong perpetrated by the owner in that Ball State would be receiving the fruits of Boyer's labor without compensating Boyer." Id. Boyer suggests that "Ball State stepped into the shoes of the general contractor which was absolutely demonstrated by testimony of Canaday[, who was a representative of Ball State,] as concerns the irrigation system." Id. Boyer also notes that "[t]he theory of recovery for unjust enrichment involves the existence of a quasi contract, also known as a contract implied in law." Id. (quoting Roberts v. ALCOA, Inc., 811 N.E.2d 466, 474-475 (Ind. Ct. App. 2004). Boyer notes that such quasi contracts are a "legal fiction imposed by law" which "arise from reason, law, and natural equity, and are clothed with the semblance of contract for the purpose of a remedy," and that "[n]o action can lie in quasi contract unless one party is [*wrongfully*] enriched at the expense of another." Id. (quoting Roberts, 811 N.E.2d at 475).

The Appellees argue that "[a]s the Boyer President himself acknowledged, neither Canaday nor anyone on behalf of [Ball State], ever promised Boyer that [Ball State] itself would be the entity paying Boyer for work performed on the irrigation system," and that "[i]nstead, as the general contractor on the project, Shook included $13,041.00 to Boyer as payment for his work . . . but Boyer would not accept payment from Shook and instead sued [Ball State] under a theory of unjust enrichment." Appellees' Brief at 27-28. The Appellees argue that "Boyer itself has acknowledged that this was work [that] fell within the scope of work under the Subcontract when Boyer sought the additional compensation . . . from *Shook*," not Ball State, and "[b]ecause there exists a written Subcontract that covers the scope of the unjust enrichment claim, Boyer cannot pursue the unjust

enrichment cause of action." Id. at 28. The Appellees also argue that Ball State has not benefitted from Boyer's labor without paying for it because "Shook charged [Ball State] for this irrigation work as part of a change work order, [Ball State] has paid Shook . . . and Shook attempted to pay Boyer for this work, but Boyer refused to accept payment from Shook." Id. at 28-29. The Appellees also assert that as "this was the only time Canaday or anyone on behalf of [Ball State] directed Boyer to perform any work on the Project," Boyer "cannot establish that [Ball State] has 'stepped in the shoes' of Shook on this project." Id. at 29.

Initially, regarding Boyer's argument that Ball State was unjustly enriched by Boyer's relocation of a foot path, we examine Boyer's statement of facts which notes that "after [it] had originally installed the foot path as provide[d] for in the architect's drawing, it was discovered that the incline of the slope would be too steep with the path in that direction," that "the path was removed and installed further away so as to reduce the slope," and that this work was done at the direction of a Ball State employee. Appellant's Brief at 7. The extent of Boyer's citation to the record for these propositions is from Brad Boyer's testimony, contained in the transcript as follows:

> Q The – then the relocate the foot path [sic] on the north colonnade?
>
> A Yea. What – that kind of goes back to this other one where for the sand, because we had such a severe slope and a matter of fact I think it was Jim Lowe that . . .
>
> Q Slow down. He is a Ball State representative?
>
> A He is a Ball State representative. Came out and took a look at it. The original drawings had a just a severe severe [sic] pitch that they were just going to decorate with flowers, plants, so on so forth but it was such a severe angle that what they did to reduce this angle is we

had a foot path that came around the base of it, and what they did is they kicked this foot path out so it would make the angle less severe.

Q Okay.

A *So we so we already had this foot path put in or ready to be put in and low* [sic] *and behold now we got to kick it out and then (inaudible) fill this in and all kinds of stuff so*.

Transcript at 46-47 (emphasis added).[10] Boyer also cites to testimony from the Shook Superintendent, Devon Kellum, noting that he "testified that the cost determined by *Shook* for relocation of foot paths was based on the number of cubic yards to be removed to make the path," and that the superintendent "believed Boyer was entitled to half of the claimed extra."[11] Appellant's Brief at 9-10 (citing Transcript at 259-260).

Thus, by Boyer's admission, the foot path's installation was within the scope of the Subcontract, and any additional work, including its relocation, would be subject to the attendant change order and claim notice policies contained in the contract and discussed above. Indeed, as this court has stated and as Boyer alludes to in its brief, unjust enrichment involves the existence of a quasi-contract, which "is a legal fiction used to refer to a situation where *no contract actually exists* 'but where justice nevertheless warrants a recovery under the circumstances as though there had been a promise.'" DiMizio v. Romo, 756 N.E.2d 1018, 1024-1025 (Ind. Ct. App. 2001) (emphasis added), trans. denied. Where an enforceable contract exists which governs the dispute, it is improper to base a damages claim on the equitable theory of unjust enrichment. Id. at

[10] Boyer also cites to the transcript for the proposition that he expected to be paid for the work that Lowe directed him to do.

[11] The record reveals that Kellum testified that Boyer requested $1,869 for its work relocating the foot path and that a lesser amount was approved "[b]ecause of the cubic yards of material actually removed," which was sixty-two yards. Transcript at 259-260.

1025. Accordingly, we conclude Boyer is not entitled to unjust enrichment damages for relocating the foot path.

To the extent that Boyer argues that Ball State was unjustly enriched by Boyer's installation of the irrigation lines, we note that in McCorry, we found that the property owner perpetrated an "actual wrong" when it promised to pay a subcontractor "in order to induce [the subcontractor] to complete the installation" of an air conditioner, and the owner subsequently did not pay. 636 N.E.2d at 1277. Here, however, as noted by the Appellees, there was not an actual wrong perpetrated by Ball State because it *approved* this change order in the contract and it *paid* Shook an additional $13,041, and this amount has been accounted for in the court's judgment that Boyer is owed an additional $17,436.88. Indeed, the court in its June 11, 2010 Order concluded that Ball State "was not unjustly enriched by Boyer because [it] has paid Shook in full all amounts due and owing under the Contract between [it] and Shook," and Boyer has not refuted this conclusion of law. Appellant's Appendix at 29.

Specifically, a subcontract modification document, found in the record as Exhibit U, lists various modifications to the Subcontract and contains the text: "BSU Change Order (Pending) – PR-027: Irrigation water lines," and lists a credit to Boyer in the amount of $13,041.[12] Exhibits at 401. The document contains credits to Boyer which, including the $13,041 for the irrigation water line installation, total $35,878.77, and it notes back charges totaling $42,737, for a total modification of $6,858.23 in favor of

[12] We note that Boyer requested a payment of $13,067 for the installation of the irrigation water lines. Boyer, however, does not argue that Ball State was unjustly enriched based upon the twenty-six dollar difference between Boyer's request and Ball State's approved payment of $13,041. Moreover, the court examined the evidence and found that the $13,041 amount was accurate, and we cannot say that the court's finding was clearly erroneous on this point.

Shook. The document also lists the original subcontract price of $690,000, previous changes totaling $45,256.37 due to Boyer, and the full Subcontract price after this modification as $728,398.14. Also, a subsequent subcontract modification, dated October 27, 2008, credits Boyer an additional $4,869, bringing the Subcontract price to $733,267.14. The court, in Finding 97, found this to be the accurate amount owed to Boyer, and in Finding 98 found that Boyer had already accepted payment from Shook in the amount of $715,830.26. Thus, the court ordered Shook to pay Boyer the difference, or $17,436.88.

Ball State has made payment for Boyer's work installing the irrigation water lines and has not committed an actual wrong. Moreover, the court in its June 11, 2010 Order accounted for this payment in ordering Shook to pay Boyer an additional $17,436.88. Accordingly, we conclude that the court did not err in concluding that Ball State was not unjustly enriched by Boyer's labor.

E. Promissory Estoppel

Boyer summarily asserts that "the doctrine of promissory estoppel should have been applied by the Court in that promises were made by Shook to Boyer with instructions to Boyer [to] perform each item of extra work and caused Boyer to believe it would be paid," that "Boyer relied on those representations," and that "the only way to avoid injustice . . . would be to enforce the representations by Shook and compensate Boyer for the work performed." Appellant's Brief at 17.

The Appellees argue that "[p]romissory estoppel is designed to 'permit[] recovery where no contract in fact exists.'" Appellees' Brief at 26 (quoting Hinkel v. Sataria

Distrib. & Packaging, Inc., 920 N.E.2d 766, 771 (Ind. Ct. App. 2010)). The Appellees argue that "[i]n this case, there *is* a contract which governed every aspect of the parties' relationship," and that "[h]ad Boyer complied with those contractual provisions, it would not be in the position it is in today." Id. at 26-27. The Appellees also argue that "Boyer has established no specific 'promise' made by Shook that induced Boyer to work," and that "Brad Boyer's testimony offered only generalities and statements that he never would have performed work if he knew he would not be paid for it." Id. at 27.

As noted by the Appellees, promissory estoppel permits recovery where no contract in fact exists.[13] Hinkel, 920 N.E.2d 766, 771 (Ind. Ct. App. 2010). As has been thoroughly examined above, here there was a contract between Shook and Boyer which specifically delineated the work Boyer was to perform, as well as procedures by which changes to the contract and its price were to be pursued. Accordingly, we conclude that the court did not err in not applying the doctrine of promissory estoppel.[14]

For the foregoing reasons, we affirm the court's June 11, 2010 Order.

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[13] The elements of promissory estoppel are (1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise. Brown v. Branch, 758 N.E.2d 48, 52 (Ind. 2001).

[14] In its brief, Boyer cites to Lyon Metal Products, Inc. v. Hagerman Constr. Corp., 181 Ind. App. 336, 391 N.E.2d 1152 (1979), for the proposition that "[t]he doctrine of promissory estoppel is applicable to a construction contract." Appellant's Brief at 17. In Lyon Metal Products, Hagerman sued Lyon for Lyon's failure to perform in accordance with a bid it submitted to Hagerman, who was the general contractor on a school construction project. 181 Ind. App. at 336, 391 N.E.2d at 1153. The facts in that case were that Hagerman won the general contract to complete the project and used Lyon's bid to install lockers at the school as part of the bid. Id. at 336-337, 391 N.E.2d at 1153-1154. After winning the project bid, Hagerman sent Lyon a letter stating in part that "[t]he formal contracts and purchase orders will be issued after the bond sale and financing is completed . . . and after we receive their contract for the work," and asking Lyon that "[i]f you have not sent us a written confirmation of a telephone bid, send it to us by return mail." Id. at 337-338, 391 N.E.2d at 1154. Lyon did not respond to Hagerman's letter, and Hagerman sent a formal contract to Lyon to a wrong address. Id. at 338, 391 N.E.2d at 1154. Lyon did not ever sign a formal contract, and it subsequently "mailed Hagerman notice that it was withdrawing the bid due to recent price increases." Id. We do not find Lyon Metal Products instructive.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.