STATE OF CONNECTICUT

DOCKET NO. FBT-CV-21-6103177-S		SUPERIOR COURT
VAZ QUALITY WORKS, LLC		JUDICIAL DISTRICT OF BRIDGEPORT
v.	:	AT BRIDGEPORT
TOWN OF TRUMBULL	:	JUNE 7, 2024

MEMORANDUM OF DECISION
RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (#134.00)

I. PROCEDURAL HISTORY AND FACTS

On January 14, 2021, the plaintiff, Vaz Quality Works, LLC, filed a three-count complaint against the defendant, Town of Trumbull. Count one alleges breach of contract. Count two alleges unjust enrichment. Count three alleged negligence. The facts underlying the complaint are well articulated in the respective pleadings of the parties. In summary, the defendant issued a request for proposals related to a road restoration. The plaintiff responded to the request by submitting a proposal to perform the work. The plaintiff received a notice to proceed with the work and commenced work. Thereafter, a notice of award was signed by the parties which included the scope of work and price. While the plaintiff was paid for much of the work performed certain delays in the project occurred which resulted in a dispute between the parties and this litigation. The plaintiff seeks payment under the contract in count one and through alternative claims in counts two and three. The defendant denies any breach of contract per the terms.

Notice sent to all
Counsel & RJD.
6/7/24 B Pierce Asst. Clerk

The defendant now files this motion for summary judgment on each count and asserts that there are no genuine issues of material fact, and the defendant is entitled to judgment as a matter of law as follows: (1) The defendant is entitled to summary judgment as to count one sounding in breach of contract because the contract documents are clear and unambiguous and the defendant did not breach any of the terms of the contract documents; (2) The defendant is entitled to summary judgment as to count two sounding in unjust enrichment because unjust enrichment is not a legally viable claim where an express contract exists; and (3) the defendant is entitled to summary judgment as to count three sounding in negligence because the negligence claims against the defendant are barred by the doctrine of governmental immunity to which no exception is applicable.

The plaintiff opposes the motion for summary judgment. With respect to count one the plaintiff claims that there are genuine issues of material fact related to the delays, who was at fault for such delays, and the applicability of the contract terms related to payment. With respect to the second count, the plaintiff asserts that the count is a proper claim in the alternative to count one. Finally, with respect to the third count, the plaintiff asserts that there are genuine issues of material fact whether the governmental immunity defense bars the negligence claim and that exceptions to governmental immunity apply. As such, the plaintiff asserts that all three counts should survive this motion and be permitted to be decided by the trier of fact.

On 2-26-24 the court heard oral argument on the record related to this summary judgment (#134.00) and the opposition thereto. The court has considered the arguments of counsel, reviewed all relevant pleadings and applicable law. Based on that review the motion is DENIED as to counts one and two and GRANTED as to count three.

II. LEGAL DISCUSSION AND ANALYSIS

Summary judgment is an appropriate remedy when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. The procedure of summary judgment is designed to expedite a litigation proceeding and eliminate delay and expense where there is no real issue to be tried. See *Wilson* v. *New Haven,* 213 Conn. 277, 567 A.2d 829 (1989). "However, since the litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard of demonstrating [its] entitlement to summary judgment." (Citations omitted; internal quotation marks omitted.) *Kakadelis* v. *DeFabritis,* 191 Conn. 276, 282, 464 A.2d. 57 (1983). Both the moving party and the party in opposition may rely on pleadings, affidavits and discovery materials, and the moving party shall, and the opposing party may, file appropriate memoranda of law. See Practice Book §§ 11-19, 17-45 and 17-46. The party seeking summary judgment has the burden of showing that no issue of material fact exists, and the party opposing the motion must substantiate its claim that a material fact issue exists. See *Home Insurance Co.* v. *Aetna Life & Casualty,* 235 Conn. 185, 663 A.2d 1001 (1995). In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation,* 330 Conn. 400, 414-15, 195 A.3d 664 (2018).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the

movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent...." *Zielinski v. Kotsoris*, 279 Conn. 312, 318, 901 A.2d 1207 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: "it is then 'incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.'" *Iacurci v. Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251, 571 A.2d 116 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of "showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact." *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

A. <u>Count One Breach of Contract</u>

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Ibar v. Stratek Plastic Ltd.*, 145 Conn. App. 401, 410, 76 A.3d 202, cert. denied, 310 Conn. 938, 79 A.3d 891 (2013). "The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence . . . In order for an enforceable contract to exist, the court must find that the parties' minds had truly met . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds

have never met, no contract has been entered into by them [*11] and the court will not make for them a contract which they themselves did not make." (Emphasis added; internal quotation marks omitted.) *Summerhill, LLC v. Meriden*, 162 Conn. App. 469, 474-75, 131 A.3d 1225 (2016); see also *Frechette v. John Meyer of Norwich, Inc.*, 164 Conn. 559, 560, 325 A.2d 286 (1973) (whether defendant had made oral agreement with plaintiff was for the trial court to determine issues of fact). "Absent specific contract language, whether there was a contract, and the terms of that contract, are questions of fact." (Citations omitted; internal quotation marks omitted.) *Burns v. RBS Securities, Inc.*, 151 Conn. App. 451, 457, 96 A.3d 566, cert. denied, 314 Conn. 920, 100 A.3d 851 (2014). "In breach of contract claims involving a municipality, the plaintiff has the additional burden of proving that the government official entering into the contract had the authority to do so. . . . This power flows from the municipal charter." (Citation omitted; internal quotation marks omitted.) *Bellsite Development, LLC v. Monroe*, 155 Conn. App. 131, 139-40, 107 A.3d 1028, cert denied, 318 Conn. 901, 122 A.3d 1279 (2015). *Reed v. Town of Clinton*, 2024 Conn. Super. LEXIS 56, *10-11, 2024 WL 164972

In this case the defendant relies on the contract between the parties for its defense of the claim. Essentially, the defendant asserts that the clear and unambiguous contract terms with respect to any delay, the obligations of the parties, and how payment is made or not made related thereto control. As such, the defendant argues that there is no genuine issue of material fact due to the clear and unambiguous contract terms controlling as a matter of law.

The plaintiff cites to several facts and circumstances related to this job which it believes raise questions of fact with regard to the contract and the circumstances at play with this project. The plaintiff claims that the contract was breached through a delayed notice to commence work which was months after that date articulated in the bid documents that the plaintiff responded.

Based on the facts presented by the defendant in its motion, there appear to be other circumstance that resulted in delays, including but not limited to an employee of the plaintiff being struck by a vehicle, which per the plaintiff, caused a delay in the work.

The court finds that the nature of the agreement and the surrounding circumstances create questions of fact which are not resolved by the alleged clear and unambiguous language. Rather, the context of the engagement between the parties and their respective actions are relevant and necessary to resolve the core question presented of whether a breach of contract occurred. As such, because there are questions of fact as to this core material issue the motion as to count one is DENIED.

B. Count Two Unjust Enrichment

In count two, the plaintiff has plead an alternative claim of unjust enrichment. The defendant asks the court for summary judgment on the basis that a claim of unjust enrichment is not viable when there is a breach of contract claim. The court agrees with the plaintiff.

"As the [Appellate] Court has acknowledged, plaintiffs are permitted to plead alternative counts alleging breach of contract and unjust enrichment." (Internal quotation marks omitted.) *Piccolo v. American Auto Sales, LLC*, 195 Conn. App. 486, 498, 225 A.3d 961 (2020). "Parties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of these alternative claims. . . . Under this typical belt and suspenders approach, the equitable claim is brought in an alternative count to ensure that the plaintiff receives some recovery in the event that the contract claim fails." (Citations omitted.) *Stein v. Horton*, 99 Conn. App. 477, 485, 914 A.2d 606 (2007). Moreover, there is a distinction between alleging the existence of a contract and alleging its breach. "[U]njust enrichment relates to a benefit of

money or property . . . and applies when no remedy [*6] is available based on the contract. . . . The lack of a remedy under a contract is a precondition to recovery based on unjust enrichment. . . . It would be contrary to equity and fairness to allow a defendant to retain a benefit at the expense of the plaintiff." (Citations omitted.) *United Coastal Industries, Inc. v. Clearheart Construction Co.*, 71 Conn. App. 506, 512-13, 802 A.2d 901 (2002). *Jakubowski v. Zaminski*, 2024 Conn. Super. LEXIS 472, *5-6, 2024 WL 1068947

"The plaintiff is entitled to plead in the alternative both breach of contract and unjust enrichment. *United Coastal Industries, Inc. v. Clearheart Construction Company, Inc.*, 71 Conn.App. 506, 511, 802 A.2d 901 (2002). The Special Defense alleges there [*5] is contract and therefore unjust enrichment cannot be awarded as the relief. This is a correct statement of the law. It is not a correct statement of Connecticut's alternative pleading practice. Pleading in the alternative is permitted by Connecticut procedure. *Bolmer v. Kocet*, 6 Conn.App. 595, 612, 507 A.2d 129 (1986). If at trial, the plaintiff is successful in obtaining relief on the breach of contract First Count, a decision must be rendered in favor of the defendants on the unjust enrichment Second Count. *Cecio Brothers, Inc. v. Greenwich*, 156 Conn. 561, 564, 244 A.2d 404 (1968). That issue would be decided at the time of trial. It is inappropriate for that issue to be decided at the summary judgment stage since the plaintiff is entitled to plead in the alternative." *Plant v. Hopper*, 2018 Conn. Super. LEXIS 1283, *4-5

The Motion for Summary Judgment addressed to the alternative pleading of the Second Count is DENIED.

C. <u>Count Three Negligence</u>

In count three the plaintiff asserts claims of negligence. The defendant seeks summary judgment claiming that these allegations are barred by the doctrine of governmental immunity.

The court agrees with the defendant. The claims raised in count three contest discretionary acts of the defendant and no exception applies.

"Functions of a municipal corporation fall into two classes, those of a governmental nature, where it acts merely as the agent [*12] or representative of the state in carrying out its public purposes, and those of a proprietary nature, where it carries on activities for the particular benefit of its inhabitants. *Winchester v. Cox*, 129 Conn. 106, 109, 26 A.2d 592 (1942). If the activity falls within the latter category, then the municipality "is not clothed with [the state's] immunities and is liable to be sued for injuries inflicted through its negligence in the performance of such an act." *Hourigan v. Norwich*, 77 Conn. 358, 364-65, 59 A. 487 (1904). Thus, a municipality's immunity from liability for injuries applies only when it "is engaged in the performance of a public duty for the public benefit, and not for its own corporate profit..." *Richmond v. Norwich*, 96 Conn. App. 582, 588, 115 A.11 (1921). *Torra v. Town of Greenwich*, 2024 Conn. Super. LEXIS 752, *11-12, 2024 WL 1812655

Based on the facts presented in this case, the court finds that the road work and paving that was the subject of the request for proposals are governmental in nature and a public duty for the public benefit. There is no evidence that the proposed work was for the purpose of any profit, revenue, corporate benefit, or proprietary element. As such, the relevant consideration for the court is whether the alleged conduct of the defendant was discretionary or ministerial?

"Section 52-557n (a) (1) sets forth the circumstances under which a municipality will be held liable for damages to a complainant. The statute provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages [***29] to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his

employment or official duties . . . ." General Statutes § 52-557n (a) (1). The statute also specifies two exceptions to the statutory abrogation of governmental immunity. The exception relevant to this appeal provides: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." General Statutes § 52-557n (a) (2). "In contrast, municipal [*655] officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Coley v. Hartford*, 312 Conn. 150, 162, 95 A.3d 480 (2014). *Brusby v. Metro. Dist.*, 160 Conn. App. 638, 654-655, 127 A.3d 257, 270, 2015 Conn. App. LEXIS 393, *28-29

"Our superior courts have looked to higher courts' reasoning regarding the distinction between a discretionary and ministerial duty. "[F]or the purposes of §52-557n, municipal acts that [*11] would otherwise be considered discretionary will only be deemed ministerial if a policy or rule limiting discretion in the completion of such acts exists." *Benedict v. Norfolk*, 296 Conn. 518, 520 n.4, 997 A.2d 449 (2010). "Generally, evidence of a ministerial duty is provided by an explicit statutory provision, town charter, rule, ordinance, or some other written directive." (Citation omitted.) *Wisniewski v. Darien*, 135 Conn.App. 364, 374, 42 A.3d 436 (2012)." *Lopez v. Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV-15-6051932 (June 30, 2017, Bellis, J.) (64 Conn. L. Rptr. 795, 2017 Conn. Super. LEXIS 3903). *Reed v. Town of Clinton*, 2022 Conn. Super. LEXIS 127, *10-11, 2022 WL 490382

"For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that "[t]here is a difference between laws that impose general duties on officials and

those that mandate a particular response to [***18] specific conditions." *Bonington v. Westport*, 297 Conn. 297, 308, 999 A.2d 700 (2010). "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done."7 (Internal quotation marks omitted.) *Blake v. Mason*, 82 Conn. 324, 327, 73 A. 782 (1909); see also *Benedict v. Norfolk*, 296 Conn. 518, 520 n.4, 997 A.2d 449 (2010) (municipal acts are "deemed ministerial if a policy or rule limiting discretion in the completion of such acts exists"); *Pluhowsky v. New Haven*, 151 Conn. 337, 347, 197 A.2d 645 (1964) (describing ministerial acts in similar terms). In contrast, when an official has a general duty to perform [*170] a certain act, but there is no "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner," the duty is deemed discretionary." *Violano v. Fernandez*, supra, 280 Conn. 323. *Northrup v. Witkowski*, 332 Conn. 158, 169-170, 210 A.3d 29, 37, 2019 Conn. LEXIS 183, *17-18, 2019 WL 2720605

The facts alleged in this case center around the defendant's alleged conduct in soliciting requests for proposals, accepting a proposal through an order to proceed with the work, and the supervision and payment for the work performed related the proposal that was approved. The court finds the actions of the defendant's agents in these regards to be discretionary in nature. The record contains no allegation or presented fact of a specific statute, ordinance, policy, or directive that mandated the manner in which the defendant would engage in the conduct alleged in the complaint. Rather, based on the record and facts presented, the court finds that such conduct is entirely left to the discretion of the defendant and its agents/employees, particularly the Town Engineer.

"This court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three [*313] requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 230-31. "[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues material to the applicability of the defense . . . [where] resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) *Purzycki v. Fairfield*, 244 Conn. 101, 107-108, 708 A.2d 937 (1998). *Haynes v. City of Middletown*, 314 Conn. 303, 312-313, 101 A.3d 249, 255, 2014 Conn. LEXIS 333, *18

"[t]he proper standard for [*323] determining whether [**261] a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes v. City of Middletown*, 314 Conn. 303, 322-323, 101 A.3d 249, 260-261, 2014 Conn. LEXIS 333, *33

The plaintiff's complaint is lacking any language that any harm or dangerous condition that they allege was of an imminent nature. The court finds that no imminent harm, as defined by our courts, existed. Further, plaintiff has not an cannot identify a public official to whom it was apparent that his or her conduct was likely to subject any harm or danger to plaintiff. The damages sought are financial and related to an alleged contract and scope of work. There is no

allegation of a specific danger or imminent risk of injury to person or person in the complaint. The court finds no support for that proposition that alleged imminent harm can be extended to alleged contractual losses which are better addressed through a breach of contract or unjust enrichment claim as the plaintiff has done here in counts one and two. An alleged fiscal loss under a purported breach of contract cannot provide the means divest the defendant of its otherwise applicable statutory immunity.

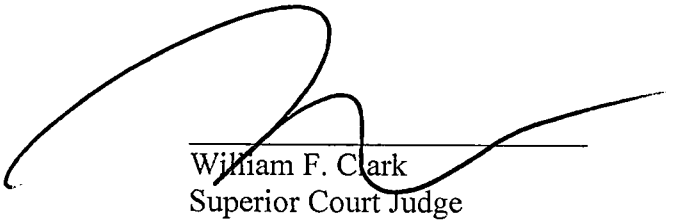
As such, there is no genuine issue of material fact that no exception applies to bar the defendant's statutory governmental immunity, and the defendant is entitled to summary judgment as to count three of plaintiff's complaint.

III. CONCLUSION

For all the reasons stated herein, the court finds that there are genuine issues of material fact as to count one and that the plaintiff may plead in the alternative in count two. Therefore, the motion for summary judgment filed by the defendants (#134.00) is DENIED as to counts one and two.

The court finds that defendant Town of Trumbull is entitled to summary judgment as a matter of law as to count three. Therefore, the motion for summary judgment filed by the defendants (#134.00) is GRANTED as to count three.

BY THE COURT,



William F. Clark
Superior Court Judge