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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/10/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHOENIX COMPOSITES, INC., an) 1 CA-CV 10-0887
Arizona corporation,)
) DEPARTMENT B
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
PAUL ROTHWEILER and ELIZABETH) Civil Appellate Procedure)
ROTHWEILER, husband and wife,)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-033215

The Honorable Robert H. Oberbillig, Judge

AFFIRMED

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Phoenix

S W A N N, Judge

¶1 Paul and Elizabeth Rothweiler retained Phoenix Composites, Inc., to help build a kit airplane, but the Rothweilers stopped paying for the help. Phoenix Composites brought an action against the Rothweilers based primarily on an open account theory. On appeal, the Rothweilers challenge the judgment entered in favor of Phoenix Composites as well as the award of attorney's fees the company received. Because we find sufficient evidentiary support for liability on an open account theory, we affirm the trial court's judgment. In addition, we uphold the trial court's award of attorney's fees under A.R.S. § 12-341.01(A). We also award Phoenix Composites fees on appeal.

FACTS AND PROCEDURAL HISTORY

¶2 Paul Rothweiler ("Paul") is the owner of a partially built Lancair 320 experimental kit aircraft (the "Aircraft"). Paul initially worked on the Aircraft himself.

¶3 Phoenix Composites is in the business of maintaining, repairing, and helping to build experimental aircraft. During 2006, Paul met with Heath L'Hoste, the shop foreman and lead mechanic at Phoenix Composites, and Rob Huntington, the company's sales and marketing representative, to discuss the Aircraft's condition and whether Phoenix Composites could provide assistance.

¶4 Paul received an e-mail from Huntington on January 5, 2006; it stated that Huntington was reviewing Paul's "Christmas

wish list" with L'Hoste and that they would try to give Paul an estimate of the time it would take to get the Aircraft flying. In May 2007, Paul delivered the Aircraft to Phoenix Composites so that the company could render it airworthy. He also requested the installation of extra items, such as co-pilot rudder pedals and brakes.

¶15 The Rothweilers and Phoenix Composites did not enter into a written contract. Instead, Phoenix Composites billed Paul on a time and materials basis. According to Phoenix Composites' owner and president, Robert Dace Kirk, it was impossible to calculate an "accurate completion total" because so many variables are involved in building a kit aircraft.

¶16 Phoenix Composites received full payment from Paul for the Aircraft bodywork and primer charges reflected on the June 2007 invoice. Meanwhile, Phoenix Composites continued work on the Aircraft's co-pilot rudder pedals and brakes, the avionics, and other systems that were either incomplete or required modification.

¶17 Phoenix Composites prepared additional billing statements each month from July to December 2007. It sent them to Paul, along with occasional "kit logs" outlining the work performed. Paul received those billing statements and paid the charges. He also received billing statements in January, March,

and April of 2008, but did not pay them. This left Phoenix Composites with a claimed balance of \$25,009.54.

¶18 Phoenix Composites stopped working on the Aircraft on February 25, 2008, and stored it in a rented hangar. During a March 2008 visit to the hangar, Paul advised Phoenix Composites that he could not continue the project due to financial constraints. He had paid Phoenix Composites only \$26,426.12 of the \$51,435.66 billed. Phoenix Composites obtained a lien on the Aircraft for goods and services provided.

¶19 On December 31, 2008, Phoenix Composites filed a complaint against the Rothweilers asserting claims of (1) open account, (2) unjust enrichment, and (3) lien foreclosure. The Rothweilers answered and filed a counterclaim, alleging that unauthorized work on the Aircraft had diminished its value.

¶10 After a one-day bench trial, the trial court found the Rothweilers liable on all claims and ruled that Phoenix Composites was entitled to fees under A.R.S. § 12-341.01(A). On October 21, 2010, it filed a formal judgment awarding Phoenix Composites the balance of \$25,009.54; prejudgment interest of \$6,129.49; attorney's fees of \$16,705.00; and costs of \$1,697.85. The Rothweilers took nothing on their counterclaim. This appeal followed.

STANDARD OF REVIEW

¶11 On appeal, we review questions of law de novo, but we will not disturb the trial court's findings of fact unless they are clearly erroneous. *Spaulding v. Pouliot*, 218 Ariz. 196, 199, ¶ 8, 181 P.3d 243, 246 (App. 2008). Here, our review is constrained by the parties' failure to request findings of fact and conclusions of law pursuant to Ariz. R. Civ. P. 52(a). We must assume that the trial court found every fact necessary to sustain its judgment. *Berryhill v. Moore*, 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App. 1994). We must affirm that judgment if any reasonable construction of the evidence justifies it. *Id.*

DISCUSSION

I. The Evidence Supports the Trial Court's Finding of Liability on the Open Account Claim.

¶12 The Rothweilers challenge the judgment in favor of Phoenix Composites on an open account theory. They argue that there was insufficient evidence to support the trial court's judgment.

¶13 An action to recover on an "open account" arises from "a contract between the parties for work done or material furnished." *Underhill v. Smith*, 23 Ariz. 266, 269, 203 P. 335, 336 (1922). An open account is found "where there are running or concurrent dealings between the parties, which are kept unclosed with the expectation of further transactions." *Krumtum*

v. Burton, 111 Ariz. 448, 450, 532 P.2d 510, 512 (1975) (citation omitted). To recover on an open account claim, the plaintiff must meet its burden to prove "the correctness of the account and each item thereof." *Holt v. W. Farm Servs., Inc.*, 110 Ariz. 276, 278, 517 P.2d 1272, 1274 (1974).

¶14 Here, sufficient evidence supports the Rothweilers' liability on an open account. Phoenix Composites introduced evidence that Paul wanted the Aircraft in airworthy condition. Paul testified during his deposition that "the original contract" required Phoenix Composites to make the Aircraft airworthy. Phoenix Composites provided evidence to show that it had worked toward meeting that goal. The trial court stated on the record that the evidence established the existence of an agreement to provide goods and services to achieve airworthiness.

¶15 The record shows that the court had ample evidence to find that the open account and the billed items were correct. Phoenix Composites submitted supporting invoices as evidence. Those invoices listed the amounts that were billed for the parts and labor that Phoenix Composites used to render the Aircraft airworthy and to make the modifications that Paul had requested. The Rothweilers apparently had no dispute with the items on the invoices that were issued between July and December 2007 -- they paid those in full. As to the 2008 invoices, the Rothweilers do

not dispute that Phoenix Composites completed the work and supplied the parts detailed on them, nor do they question the values the invoices assign to each item.

¶16 Instead, the Rothweilers dispute the total amount owed. They claim that Paul set a \$25,000 limit on all charges. They also assert that at some point Paul told Phoenix Composites to do no more than \$1,300 of work a month. But Paul admitted at trial that he had no e-mails, letters, or any other document to support that claim. And Phoenix Composites representatives denied at trial that Paul ever spoke to them about fitting their work on the Aircraft within any budgeting constraints. Given those disagreements, the trial court specifically noted that it was considering the credibility of the testifying witnesses in concluding that the Rothweilers were liable on an open account. The trial court's assessment of witness credibility is given great deference. *Goats v. A. J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971) ("The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom.").

¶17 We therefore find that sufficient evidentiary support exists for the judgment.

II. The Unjust Enrichment Claim Is Moot.

¶18 The Rothweilers also challenge the grant of relief on the unjust enrichment claim. Under the unjust enrichment doctrine, a court may grant restitution to a plaintiff for the reasonable value of benefits received by the defendant. See *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48, 53-54, 703 P.2d 1197, 1202-03 (1985) (awarding restitution to a company because the objective evidence established that its services were rendered with an expectation of compensation). But an unjust enrichment claim can succeed only in "the absence of a legal remedy." *Trustmark Ins. Co. v. Bank One, Ariz., N.A.*, 202 Ariz. 535, 541, ¶ 31, 48 P.3d 485, 491 (App. 2002). Therefore, the unjust enrichment claim is moot because Phoenix Composites received a remedy based on the open account theory.

III. The Open Account Claim Arises out of a Contract for Purposes of A.R.S. § 12-341.01(A).

¶19 The Rothweilers contend that the trial court misapplied A.R.S. § 12-341.01(A) when it awarded attorney's fees to Phoenix Composites. But they failed to contest the applicability of A.R.S. § 12-341.01(A) in the trial court. And when "a challenge is not raised with specificity and addressed in the trial court, we generally do not consider it on appeal." *Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 177, ¶ 13, 83 P.3d 1114, 1118 (App. 2004).

¶120 Phoenix Composites, however, raises the issue by using A.R.S. § 12-341.01(A) to assert a claim for attorney's fees on appeal. Under A.R.S. § 12-341.01(A), the court may award the successful party reasonable attorney's fees "[i]n any contested action arising out of a contract, express or implied." To determine whether the action arises out of a contract, we look to the "nature of the action and the surrounding circumstances." *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986). And it has long been recognized that an "open account" is tied to "the doing of certain acts in pursuance of a contract." *Underhill*, 23 Ariz. at 269, 203 P. at 336.

¶121 Here, the trial court found "that the parties did agree to the scope of work as being to complete the experimental plane to air worthiness on a time and materials basis." It held the Rothweilers liable for the unpaid time and materials on an open account theory that was predicated on their underlying agreement with Phoenix Composites. The trial court, therefore, was justified in awarding Phoenix Composites attorney's fees under A.R.S. § 12-341.01(A). Under that statute, we likewise award Phoenix Composites its fees on appeal. *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 133, 639 P.2d 321, 323 (1982) (A.R.S. § 12-341.01 applies to appeals as well as trials).

CONCLUSION

¶22 Because the record contains sufficient evidentiary support for the findings and the damages awarded on the open account theory, we affirm the trial court's October 21 judgment. We also affirm the trial court's award of attorney's fees to Phoenix Composites. In the exercise of our discretion, we award Phoenix Composites its reasonable fees on appeal under A.R.S. § 12-341.01(A), subject to its compliance with ARCAP 21(c).

/S/

PETER B. SWANN, Judge

CONCURRING:

/S/

MARGARET H. DOWNIE, Presiding Judge

/S/

DONN KESSLER, Judge