RENDERED: MAY 6, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000267-MR
AND
NO. 2010-CA-000299-MR

JP WHITE, LLC, D/B/A
CONTAG!OUS — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 07-CI-006363

POE COMPANIES, LLC — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING APPEAL NO. 2010-CA-000267-MR,
AND
AFFIRMING CROSS-APPEAL NO. 2010-CA-000299-MR

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: JP White, LLC, d/b/a Contag!ous, (Contag!ous) brings Appeal No. 2010-CA-000267-MR and Poe Companies, LLC, brings Cross-Appeal No. 2010-CA-000299-MR from a January 8, 2010, Judgment upon a directed

verdict dismissing Contag!ous's claims against Poe Companies, LLC (Poe). We affirm in part, reverse in part, and remand Appeal No. 2010-CA-000267-MR and affirm Cross-Appeal No. 2010-CA-000299-MR.

Poe is a real estate development company with various projects located throughout the United States. Poe was planning to publicly unveil a real estate development known as Museum Plaza, in Louisville, Kentucky. The date set for Poe's public announcement was February 9, 2006. To maximize upon public exposure, Poe determined that it needed a company website.

Contag!ous is an advertising and marketing company based in Louisville, Kentucky. Poe and Contag!ous met concerning the prospect of Contag!ous designing and developing a company website for Poe.[1] The events that subsequently transpired between the parties are subject to much dispute. Contag!ous claims that it was hired by Poe to develop and design two websites, one specifically for Poe and the other for Museum Plaza. Conversely, Poe denies hiring Contag!ous and insists that Contag!ous merely "pitched" website designs to it. Poe ultimately refused to compensate Contag!ous for any services. The parties were unable to resolve their dispute, and Contag!ous filed a complaint against Poe.

In the complaint, Contag!ous alleged entitlement to reimbursement for services rendered to Poe in the design and development of two websites – one for Poe and one for Museum Plaza. Contag!ous specifically claimed breach of contract, unjust enrichment, and *quantum meruit*. A trial by jury ensued. After the

[1] The website for Poe Companies, LLC, was to be known as "poecompanies.com."

close of Contag!ous's case, Poe moved for directed verdict upon all claims. The trial court granted the directed verdict and dismissed Contag!ous's complaint in its entirety. This appeal and cross-appeal follow. We address each appeal seriatim.

APPEAL NO. 2010-CA-000267-MR

Contag!ous contends that the trial court committed error by rendering a directed verdict. Kentucky Rules of Civil Procedure 50.01. Contag!ous maintains that it submitted a *prima facie* case upon its claim for breach of contract, unjust enrichment, and *quantum meruit*.

To begin, a directed verdict is proper only when considering the evidence as a whole reasonable men could not have found in favor of the nonmoving party. *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963). And, the trial court must consider the evidence in a light most favorable to the nonmoving party. *Zapp v. CSX Transp., Inc.*, 300 S.W.3d 219 (Ky. App. 2009). With the foregoing in mind, we now consider whether directed verdict was proper and shall separately analyze each independent theory of relief raised by Contag!ous in its complaint.

The Breach of Contract Claim

As hereinbefore pointed out, we must consider the evidence most favorable to the nonmoving party when reviewing a directed verdict. We, therefore, review the evidence presented at trial upon the breach of contract claim in a light most favorable to Contag!ous.

At trial, Contag!ous maintained that a valid contract existed between it and Poe. The chief executive officer for Contag!ous, Jim White, testified at great

length concerning an alleged oral contract consummated on January 25, 2006. According to White, he entered into negotiations in January 2006 with two employees of Poe, Julie Tinnell (chief financial officer) and Shelly Grigutis (director of communications). Both White and Grigutis testified that the deadline for an operational website for Poe was February 8, one day before the public unveiling of the Museum Plaza project. White stated that on January 25 Contag!ous submitted a proposal/estimate to Poe and attached it to an email sent to Grigutis. The email read, in part, that "[a]t the conclusion of phase 1 (February 8), you will have a Poe Companies website design, five pages of links/copy that will introduce the company, launch the Museum Plaza project and list/feature the other developments. . . . The agency uses billable hours to estimate project costs and we bill at a rate of $150.00/hour." The project proposal/estimate set forth Contag!ous's compensation as $27,200.

White testified that Contag!ous received oral acceptance from Poe of the proposal/estimate on the evening of January 25; however, White pointed out that Poe wished to eliminate "branding" costs associated therewith. Without branding costs, the total proposal/estimate amounted to $21,000.

Immediately upon receiving Poe's acceptance on January 25, White testified that Contag!ous began working on Poe's website. White explained that Contag!ous was working under an extremely tight time-line as the website had to be designed and developed by February 8. White recounted daily meetings, phone

calls, and email exchanges between Poe employees and Contag!ous employees during such time period.

During development of the Poe website, White explained that the parameters of the website were changed by Poe. Specifically, White testified that Contag!ous eventually developed a more elaborate website for Poe well beyond the simple five-page website as agreed on January 25. White insisted that such divergence was undertaken per Tinnell and Grigutis' directions.

White also testified that Contag!ous was asked to design and develop a separate website for Museum Plaza. According to White, development of the Museum Plaza website was not part of the January 25 oral agreement. In her direct testimony, Grigutis admitted requesting that Contag!ous design a separate website for Museum Plaza. Nevertheless, both White and Grigutis acknowledged that no additional oral or written agreements were reached between Contag!ous and Poe after the January 25 oral agreement.

In the trial court's directed verdict, the court focused upon "mutual assent" between the parties. The trial court believed the evidence failed to demonstrate that the parties had reached mutual assent sufficient to support a valid contract. We disagree.

It is well-established that mutual assent or a meeting of the minds is a necessary prerequisite to a valid and enforceable contract.[2] Yet, the manifestations of mutual assent vary depending upon the type of contract involved. Contracts

[2] *See generally* Restatement (Second) of Contracts §§ 18, 19, 22 (1981).

may be express or implied; likewise, the manifestations of mutual assent may be either express or implied.

As to the breach of the contract claim, we are primarily concerned with a specific type of express contract – an oral contract – and a specific type of implied contract – an implied-in-fact contract. An oral contract is a contract that is expressed by the spoken word or by both the spoken and written word. 17 C.J.S. *Contracts* § 72 (1999). As to its written characteristics, an oral contract may be evidenced by either a writing, such as a memorandum or letter reflecting the parties' oral agreement or by a written agreement expressing a portion of the parties' entire agreement. *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99 (Ky. 2003). In an oral contract, mutual assent may also be manifested by either the spoken word or by the written word. And, an oral contract is as legally binding as a written contract in the absence of a statute providing otherwise. *Waddle v. Galen of Ky., Inc.*, 131 S.W.3d 361 (Ky. App. 2004); *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99 (Ky. 2003); *Skaggs v. Wood Mosaic Corp.*, 428 S.W.2d 617 (Ky. 1968); *John King Co. v. Louisville & N.R. Co.*, 114 S.W. 308 (Ky. 1908).

An implied-in-fact contract is a contract where one or more of the terms are inferred from the conduct of the parties. It is a contract that is based partly or wholly upon the parties' conduct. *Dorton v. Ashland Oil & Refining Co.*, 303 Ky. 279, 197 S.W.2d 274 (1946). Explained differently, an implied-in-fact contract is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light

of the surrounding circumstances, their tacit understanding." *Baltimore & O.R. Co. v. United States*, 261 U.S. 592, 597, 43 S. Ct. 425, 67 L. Ed. 816 (1923). With an implied-in-fact contract, mutual assent is manifested by the parties' conduct. The foundation of an implied contract is the recognition "[w]ords are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise." *Israel's Adm'r v. Rice*, 295 Ky. 360, 174 S.W.2d 517, 518-519 (1943); *see also*, Restatement (Second) of Contracts § 22 (1981).

Considering the evidence in a light most favorable to Contag!ous, we think it was sufficient to present a *prima facie* case that an oral contract and an implied-in-fact contract existed between Poe and Contag!ous. As to the oral contract, its terms are partly reflected by the January 25, 2006, email and proposal/estimate. Indeed, the evidence was sufficient to reflect that Poe assented to the essential terms of the January 25 email and project proposal. White also testified at great length as to communications with Tinnell and Grigutis concerning terms of the oral contract for a simple five-page website in exchange for $21,000. In short, the evidence was sufficient to demonstrate the existence of an oral contract wherein Contag!ous promised to deliver to Poe a company website consisting of five pages by February 8, and, in return, Poe promised to pay Contag!ous the sum of $21,000 (hereinafter referred to as the January 25 oral contract).

As to the implied-in-fact contract, White testified that Poe requested a more extensive website for its company and also requested a separate website for Museum Plaza, which marked a deviation from the January 25 oral contract. White testified that Contag!ous acquiesced to both requests and ultimately produced an extensive website for Poe and a separate website for Museum Plaza. No oral or written agreement existed between the parties; however, evidence of the parties' conduct is sufficient to establish a prima facie case that an implied-in-fact contract existed between Poe and Contag!ous.

In reaching this decision, we view as pivotal the fact that evidence was introduced demonstrating that Poe requested Contag!ous to perform additional work on the company's website and to design a separate website for Museum Plaza. Both requests had the effect of soliciting services from Contag!ous that were not within the ambit of the January 25 oral contract. Considering the circumstances herein, a reasonable person would infer that Poe expected to pay and Contag!ous expected to receive some type of compensation for these services. Stated more eloquently:

> Closely related to the notion that assent may be effectively, though unintentionally, manifested, is the notion that an offer or acceptance may be implied from the parties' conduct. An offer clearly need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act or a requested promise by the offeree amounts to an offer. The most common illustration of this principle is where performance of work or services is requested. If the request is for performance as a favor, no offer to contract

> is made, and performance of the work or services will not create a contract. But if the request is made under such circumstances that a reasonable person would infer an intent to pay for the performance, the request amounts to an offer and a contract is created by the performance of the work. In all of these cases, it will be a question of fact whether the circumstances justify the inference of an intent to pay. (Footnotes omitted.)

1 Williston on Contracts §4:20 (4th ed. 2010).

Accordingly, we hold that sufficient evidence was introduced to create a *prima facie* case upon whether an oral contract and/or an implied-in-fact contract existed between Contag!ous and Poe. We, thus, conclude that the trial court erred by rendering a directed verdict upon Contag!ous's claim for breach of contract.

***QUANTUM MERUIT* AND UNJUST ENRICHMENT**

Contag!ous further argues that the trial court erred by directing a verdict dismissing its claim for restitutionary relief upon the bases of *quantum meruit* and unjust enrichment. For the reasons hereinafter discussed, we conclude that the directed verdict upon *quantum meruit* was improperly granted but the directed verdict upon unjust enrichment was properly granted.

To prevail upon a theory of *quantum meruit*, it must be demonstrated:

> 1. [T]hat valuable services were rendered, or materials furnished;
>
> 2. to the person from whom recovery is sought;
>
> 3. which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and

> 4. under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person.

Quadrille Bus. Sys. v. Ky. Cattlemen's Ass'n, Inc., 242 S.W.3d 359, 366 (Ky. App. 2007). *Quantum meruit* literally means "as much as he has deserved." BLACK'S LAW DICTIONARY 1255 (7th ed. 1999). In like manner, the damages thereunder are based upon a legal fiction implying an obligation to pay reasonable compensation for services rendered. 66 Am. Jur. 2d *Restitution and Implied Contracts* §§ 6, 37 (2010); 1 *Williston on Contracts* §§ 1:6, 68:1 (4th ed. 2010). Although never specifically enunciated in this Commonwealth, it has been recognized that recovery under *quantum meruit* does not depend upon the conferment or retention of a benefit, as such is not absolutely necessary for recovery. *Linquist Ford, Inc. v. Middleton Motors, Inc.*, 557 F.3d 469 (7th Cir. 2009). We are convinced that this is a correct statement of law.[3]

By contrast, unjust enrichment is a distinct theory of restitutionary relief wherein damages are based directly upon the benefit conferred and retained.[4] To prevail upon an unjust enrichment claim, it must be demonstrated: "(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of

[3] Particularly, under the third element of *quantum meruit*, services must have been either: (1) accepted, (2) received, or (3) rendered with knowledge and consent. Thus, the services may have resulted in a 'benefit" when accepted or received but may not have resulted in a benefit when merely performed with knowledge and consent. Simply put, a benefit may be conferred and retained under *quantum meruit*; however, same is not necessary to recover under *quantum meruit*.

[4] An excellent discussion of the differences between the theories of *quantum meruit* and unjust enrichment is found in *Ramsey v. Ellis*, 168 Wis. 2d 779, 484 N.W.2d 331 (1992).

benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009). Unlike *quantum meruit*, a benefit must be conferred and retained before one may recover under unjust enrichment.

In the case at hand, the trial court believed that Contag!ous failed to demonstrate that it conferred a "benefit" upon Poe. The undisputed facts proved that Poe did not receive its website or the Museum Plaza website. Thus, we agree with the trial court that any benefit conferred upon Poe is merely too speculative and cannot support recovery under unjust enrichment. As such, a directed verdict was proper upon unjust enrichment.

Nevertheless, we think that Contag!ous did set forth a *prima facie* case upon *quantum meruit*. Contag!ous presented evidence that it supplied valuable services with the knowledge and consent of Poe and under circumstances to reasonably inform Poe that Contag!ous expected payment thereof. *See Quadrille Bus. Sys.*, 242 S.W.3d 359. Hence, Contag!ous demonstrated sufficient evidence to submit the theory of *quantum meruit* to the jury, and the trial court erred by directing a verdict.

SUMMARY

In sum, we conclude that the trial court properly granted a directed verdict upon the theory of unjust enrichment. As to Contag!ous's claims for damages under breach of contract and restitutionary relief under *quantum meruit*, we are of the opinion that the trial court erred by rendering a directed verdict

dismissing same. Upon remand, Contag!ous is entitled to a jury trial upon both its breach of contract claim for damages and its restitution claim under the theory of *quantum meruit*.[5]

CROSS-APPEAL NO. 2010-CA-000299-MR

Poe contends that the trial court erred by failing to award it attorney's fees and costs. As Contag!ous's claims were dismissed by directed verdict, Poe argues that there existed "a complete absence of proof" sufficient to support Contag!ous's claims, thus mandating recovery of attorney's fees and costs. Considering the resolution of Appeal No. 2010-CA-000267-MR and our remand for a new trial, we conclude that this issue has been rendered moot.

For the foregoing reasons the January 8, 2010, Judgment of the Jefferson Circuit Court in Appeal No. 2010-CA-000267-MR is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion and in Cross-Appeal No. 2010-CA-000299-MR is affirmed.

ALL CONCUR.

[5] We note that an action for restitutionary relief based upon *quantum meruit* must be an alternative remedy to an action for damages upon breach of contract. If Contag!ous recovers upon breach of contract, it may not recover upon *quantum meruit*. *See Fruit Growers Express Co. v. Citizens Ice & Fuel Co.*, 271 Ky. 330, 112 S.W.2d 54 (1937); *Sparks Milling Co. v. Powell*, 283 Ky. 669, 143 S.W.2d 75 (1940).

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