RENDERED: NOVEMBER 18, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001977-MR

KAY & KAY CONTRACTING, LLC — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 13-CI-00922

VANHOOK ENTERPRISES, INC. — APPELLEE

OPINION
AFFIRMING IN PART, AND REVERSING
AND REMANDING IN PART

** ** ** ** **

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This appeal concerns a contract dispute between two construction companies which built the Cumberland Bridge Street Bridge in Cumberland, Kentucky. This United States Army Corps of Engineers project was reserved for small businesses only. Kay & Kay Contracting, LLC ("Kay & Kay") wanted to work on the project but did not qualify as a small business. Vanhook

Enterprises, Inc. ("Vanhook") did qualify as a small business, so Vanhook and Kay & Kay entered into a Team Agreement. The Team Agreement, dated July 7, 2010, provided that Vanhook would bid on the project, and if it received the bid, then it would subcontract Kay & Kay to perform up to 75 percent of the work.

Vanhook bid and received the contract, which contained 43 bid items, including mobilization (item number 0001) and construction of the Bridge Street Bridge (item number 0010). On January 13, 2011, Vanhook and Kay & Kay executed a written, subcontract agreement whereby Vanhook agreed to pay Kay & Kay $37,500 for mobilization and $410,000 for materials, labor, equipment, and applicable taxes for the Bridge Street Bridge construction. The agreement expressly stated that the $410,000 "lump-sum item shall include all costs associated with the construction of the bridge that are not otherwise identified as being paid separately." The agreement stated the lump-sum included: removal and disposal of the existing bridge; foundation excavation; formwork; steel reinforcement; cast in place concrete; pedestrian railing; armored edges; expansion joint assemblies; dowel bars; dowel sleeves; all required quality control inspection and testing; "and any other ancillary items required to provide a complete bridge structure."

The subcontract agreement also included an "entire agreement" clause:

> This Subcontract represents the entire and integrated agreement between the Contractor and Subcontractor and *supercedes all prior negotiations, representations, or*

> *agreements*, either written or oral, and shall not be altered, modified, or amended in any manner whatsoever, unless the same shall be in writing and signed by the parties hereto.

Subcontract Agreement, p. 8, cl. XXV (emphasis added).

Notwithstanding this express contract provision, Kay & Kay maintains that there was a "primary" or "first" agreement that was created after the team agreement and before the subcontract agreement. Kay & Kay argues that the alleged first agreement "provided that Kay & Kay would perform work on [all] 43 items in the Project's scope of work with Vanhook serving as the Project's general contractor and that Kay & Kay would retain 95% of the approved pay estimates while Vanhook would retain 5%." Aplt's Brf. at 1. Kay & Kay argues that the subcontract agreement was the second agreement and covered only two of the 43 bid items included in the alleged first agreement. Kay & Kay asserts its total work performed outside the subcontract agreement totaled $326,024.12. It claims it performed 76% of the project's total work, or $785,814.16 of the $1,029,394.20 total contract price.

Vanhook, on the other hand, maintains there was no "first" or "primary" agreement. Instead, Vanhook alleges that there was only the team agreement, the subcontract agreement, and one additional agreement, which was created after work on the project had begun. The additional agreement provided that Kay & Kay would rent equipment to Vanhook for $12,290.04. It is undisputed

that Vanhook paid this amount plus the subcontract agreement amount for a total payment of $459,790.04.

Based on these allegations, in its second-amended complaint Kay & Kay raised three claims: breach of contract; quantum meruit/unjust enrichment; and a violation of the Kentucky Fairness in Construction Act. Vanhook then filed a motion for judgment on the pleadings. Kay & Kay filed a motion for summary judgment on its quantum meruit/unjust enrichment claim.

The trial court denied Kay & Kay's motion for summary judgment and granted Vanhook's motion. In its order, the trial court concluded that whether a "first" or "primary" agreement existed is not a genuine issue of material fact, as the subcontract agreement "expressly superseded all prior agreements." Order, p. 5. Furthermore, evidence that there was an additional agreement "that no one can produce, is barred, as a matter of substantive law, by the parol evidence rule." *Id*. at 6.

The trial court also rejected Kay & Kay's claim that they provided labor and materials in excess of the terms of the subcontract agreement. "The Court concludes that the January 13, 2011 Subcontract Agreement covered those items of work claimed by Kay & Kay Contracting, LLC." *Id*. Because the subcontract agreement covered "all costs associated with the construction of the bridge that are not otherwise identified as being paid separately[,]" its express terms controlled and the work that Kay & Kay completed was paid in full by Vanhook remitting an undisputed $459,790.04 to Kay & Kay.

Finally, the trial court rejected the quantum meruit/unjust enrichment claim because it found the subcontract agreement related to the same subject matter as the items for which Kay & Kay sought equitable relief. Because a contract covered these items, the trial court concluded, Kay & Kay could not obtain equitable relief.

Kay & Kay timely appealed the order. This appeal follows.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure ("CR") 12.03 permits a party to move for judgment on the pleadings. The rule expedites terminating a controversy when the controlling facts are not disputed. *Schultz v. General Elec. Healthcare Financial Services, Inc.*, 360 S.W.3d 171, 176 (Ky. 2012) (citing *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003)). The rule allows a trial court to dispose of a case when the allegations in the pleadings are admitted and only a question of law is presented. *Id*. The moving party admits both the truth of the non-moving party's allegations of fact and fair inferences therefrom, and the untruth of the moving party's own allegations that have been denied by the non-moving party. *Id*. (citing *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727 (Ky. 1963)). "'The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief.'" *Schultz*, 360 S.W.3d at 176 (quoting *City of Pioneer Village*, 104 S.W.3d at 759).

Motions for judgment on the pleadings may be treated as motions "for summary judgment and disposed of in that manner." *Hoke v. Cullinan*, 914 S.W.2d 335, 338 (Ky. 1995). When affidavits or evidence outside the pleadings are considered, the motion is properly addressed under the summary judgment standard. *Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994).

A trial court considering the summary judgment motion must view "[t]he record . . . in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Society, Inc*., 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id*.

Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to

the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS OF ISSUES

Kay & Kay raises multiple issues, and Vanhook raises some issues in response. We have consolidated these issues for purpose of clarity as we affirm in part and reverse and remand in part.

I. Kay & Kay's breach of contract claim.

The first issue in this case involves whether Vanhook breached an express contract with Kay & Kay. Kay & Kay maintains that a "first" or "primary" agreement existed that covered the 43-bid items. In response, Vanhook argues that no such agreement existed, but even if it did it was superseded by the subcontract agreement's "entire agreement" clause. Vanhook further notes that it has paid Kay & Kay in full according to the subcontract agreement's terms. The trial court agreed with Vanhook that there was no breach of contract on the subcontract agreement.

Having reviewed the record and applicable law, we agree that no breach of contract occurred. However, we note that the analysis on this issue intersects in some respects the analysis on the quantum meruit/unjust enrichment issue. Namely, the breach of contract claim hinges on whether the subcontract

agreement's "entire agreement" clause prevented parol or extrinsic evidence from being used to prove a "first" or "primary" agreement existed. If the "entire agreement" clause is unambiguous and causes the subcontract agreement to supersede any prior agreements, then Kay & Kay cannot maintain a breach of contract claim as it has already been paid in full according to the subcontract agreement's terms.

The quantum meruit/unjust enrichment claim, on the other hand, hinges on whether the work performed by Kay & Kay was pursuant to the express terms of the subcontract agreement. If Kay & Kay provided labor and materials on items in addition to those covered by the subcontract agreement, and if other factors discussed in Issue II, *infra*, are proven, then Kay & Kay may maintain a quantum meruit/unjust enrichment claim. Thus, the interpretation of two clauses in the subcontract agreement are critical: the "entire agreement" clause; and the definition of the work to be performed. To the extent the parties have intertwined the two clauses in their arguments, we will attempt to untangle them in the proceeding analysis.

Regarding the breach of contract claim, Kay & Kay first argues the trial court erred in a factual finding. Specifically, it claims the trial court erroneously found that Kay & Kay did not perform work outside the scope of the subcontract agreement. The trial court's order on this issue states as follows:

> 17. Kay & Kay Contracting, LLC has submitted, with the affidavits of Ron Pfaff and Mike Merida, documents which it alleges show that it provided labor and materials

> in excess of the items included in the Subcontract Agreement. The affidavit of Richard Vanhook disputes that additional work or materials were provided, and contends that the documents relate to the work that was included in the subcontract agreement. The Court concludes that the January 13, 2011 Subcontract Agreement covered those items of work claimed by Kay & Kay Contracting, LLC. The items are for work that was to be included as part of the January 13, 2011 Subcontract Agreement, for which Kay & Kay Contracting, LLC had agreed to deliver and perform in exchange for the total payment of $447,500. Those documents submitted by Kay & Kay Contracting, LLC, relate to the very items which Kay & Kay Contracting, LLC agreed to provide in the January 13, 2011 Subcontract Agreement, which by its express terms stated that it covered "all costs associated with the construction of the bridge that are not otherwise identified as being paid separately" and which included formwork, steel, concrete, railing, edges, expansion joint assemblies, dowel bars, dowel sleeves, inspection, testing, "and any other ancillary items required to provide a complete bridge structure." There is no issue of fact regarding whether Vanhook Enterprises Inc. paid Kay & Kay Contracting for that work, as is shown by the affidavit of Richard Vanhook, and as shown by the sworn affidavit of Ron Pfaff, which attests that Kay & Kay Contracting, LLC, **was paid in full**. That further negates any claim as to unjust enrichment or quantum meruit.

Order, pp. 6-7 (emphasis in original).

Kay & Kay claims the trial court's factual finding is clearly erroneous and should be set aside. We find this argument misses the mark on summary judgment claims. We do not review factual findings by a trial court on summary judgment claims, as the standard of review views the evidence in a light most favorable to the non-moving party and asks whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of

law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "There is no requirement that the appellate court defer to the trial court since **factual findings are not at issue**." *Id*. (emphasis added) (citing *Goldsmith v. Allied Building Components, Inc*., 883 S.W.2d 378, 381 (Ky. 1992)).

Here, the trial court erred by making a factual finding. As discussed more thoroughly in Issue II, *infra*, the trial court concluded that all of the work performed by Kay & Kay was within the scope of the subcontract agreement. However, the subcontract agreement's terms are ambiguous regarding the metes and bounds of the work to be completed. Thus, a factual question remains regarding whether Kay & Kay performed work outside the scope of the subcontract agreement.

However, simply because there is a fact question does not mean that there is a genuine issue of material fact for summary judgment purposes on the breach of contract claim. The breach of contract claim asks whether the purported "first" or "primary" agreement existed and, if so, whether Vanhook breached that contract and owes Kay & Kay damages. On this claim we agree with the trial court that summary judgment was appropriate because the subcontract agreement is the only enforceable, express contract.

The subcontract agreement contained an "entire agreement" provision that provided:

> This Subcontract represents the entire and integrated agreement between the Contractor and Subcontractor and *supercedes all prior negotiations, representations, or*

> *agreements*, either written or oral, and shall not be altered, modified, or amended in any manner whatsoever, unless the same shall be in writing and signed by the parties hereto.

Subcontract Agreement, p. 8, cl. XXV (emphasis added).

"It is well settled that the interpretation of contracts is an issue of law for the court to decide." *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006) (citing *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992)). To interpret a contract, a court must look solely at the four corners of the agreement. *Smith v. Crimson Ridge Development, LLC*, 410 S.W.3d 619, 621 (Ky. App. 2013). "Unambiguous terms contained within the contract are interpreted in accordance with their ordinary meaning, 'without resort to extrinsic evidence.'" *Id.* (quoting *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003)).

This subcontract agreement is unambiguous inasmuch as it purports to be the "entire and integrated agreement" that supersedes all prior negotiations or agreements. But even if the contract did not contain the clause, "[i]t is presumed that the written agreement is final and complete and that all prior negotiations between the parties have either been abandoned or incorporated into the final written instrument." *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009). Thus, though it is almost an exercise in asinine futility to include the "entire agreement" provision given that the law presumes the prior agreement is incorporated into the final written agreement, here we have double evidence that

whatever Kay & Kay purports was the "first" or "primary" agreement was been incorporated into, and superseded by, the subcontract agreement.

Furthermore, because the "entire agreement" provision exists and permits the subcontract agreement to supersede any prior agreement, the trial court properly held that the parol evidence rule bars introduction of evidence of the alleged first agreement. Fundamental principles of contract formation provide that if there is no ambiguity in the contract's terms, only the four corners of the document are reviewed for the parties' intentions and no extrinsic evidence is utilized. *Wehr Constructors, Inc. v. Assurance Company of America,* 384 S.W.3d 680, 687 (Ky. 2012), *3D Enterprises Contracting Corporation v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 448 (Ky. 2005). Furthermore, "[u]nder the parol evidence rule, when parties reduce their agreement to a clear, unambiguous, and duly executed writing, all prior negotiations, understandings, and agreements merge into the instrument, and a contract as written cannot be modified or changed by prior parol evidence, except in certain circumstances such as fraud or mistake." *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009) (citing *Childers and Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970)). "Kentucky courts have long recognized that oral agreements made prior to a written contract merge into the written contract." *New Life Cleaners*, 292 S.W.3d at 322 (citing *Prudential Life Ins. Co. of America v. Bowling*, 237 Ky. 290, 35 S.W.2d 322, 323 (1931)).

Accordingly, if there had been a first or primary contract that the parties orally agreed to, it was superseded by the subcontract agreement. There is no ambiguity in the subcontract agreement concerning whether it constitutes the full and complete agreement between the parties. To that end, the only written and binding contract was the subcontract agreement, and there is no material issue of fact concerning whether Kay & Kay was paid pursuant to the terms of the subcontract agreement. Moreover, the trial court's interpretation of the lien waiver and release as establishing that the subcontract agreement was paid in full is not erroneous, as the parties do not dispute that the subcontract agreement's payment terms were satisfied.

Thus, there was no breach of contract and no damages on the express contract. To the extent that the trial court found Vanhook was entitled to summary judgment on a breach of contract claim, we affirm the trial court's order. However, we do not reach the same conclusion for the quantum meruit/unjust enrichment claims.

II. Kay & Kay's quantum meruit/unjust enrichment claim.

We next turn to Kay & Kay's argument that the trial court erroneously granted summary judgment on its quantum meruit/unjust enrichment claim. This claim is based on Kay & Kay's assertion that it performed work in addition to the two bid items listed in the subcontract agreement. Vanhook argues the trial court properly found that Kay & Kay could not maintain a quantum meruit/unjust enrichment claim when an express contract covered the materials and labor that

were provided. Kay & Kay argues it provided additional materials and labor that were not covered by the express contract. The trial court found that all of the work Kay & Kay performed was pursuant to the subcontract agreement, thus Kay & Kay could not recover under equitable theories. Accordingly, to resolve this issue we must first determine when equitable remedies are available, and, if they are available, determine whether Kay & Kay has presented a genuine issue of material fact in this case to survive summary judgment.

It is well-settled jurisprudence in Kentucky that "[t]he doctrine of unjust enrichment has no application in a situation where there is an explicit contract which has been performed." *Codell Const. Co. v. Com.*, 566 S.W.2d 161, 165 (Ky. App. 1977). *See also Fruit Growers Exp. Co. v. Citizens Ice & Fuel Co.*, 271 Ky. 330, 112 S.W.2d 54, 56 (1937) ("[T]here can be no implied contract or presumed agreement where there is an express one between the parties in reference to the same subject matter."). "If there is an express written contract covering the transaction, its terms are controlling and the parties are bound by it and their rights are to be measured by it." *Fruit Growers*, 271 Ky. 330, 112 S.W.2d at 56 (citing 13 C.J. 243; *Pringle v. Samuel*, 4 Ky. (1 Bibb) 172; *Morford v. Ambrose*, 26 Ky. (3 J.J. Marsh.) 688; *Bates v. Starkey*, 212 Ky. 347, 279 S.W. 348; *Damron v. Stewart & Weir*, 253 Ky. 394, 69 S.W.2d 685). However, where there is no express contract covering the parties' actions, implied contracts and equitable relief are available. *Quadrille Business Systems v. Kentucky Cattlemen's Association, Inc.*, 242 S.W.3d 359 (Ky. 2007).

Thus, it is necessary to resolve whether the parties had an express contract covering the materials and labor provided by Kay & Kay. The subcontract agreement stated the work to be performed was "Mobilization" and item 03-31-10, the construction of the Bridge Street Bridge, which included:

> Removal and disposal of the existing bridge, foundation excavation, formwork, steel reinforcement, cast in place concrete, pedestrian railing, armored edges, expansion joint assemblies, dowel bars, dowel sleeves, all required quality control inspection and testing, and any other ancillary items required to provide a complete bridge structure.

In contrast to the subcontract agreement covering only two items of work, the Bidding Schedule provided for 43 items of work to be performed on the entire project. *See, e.g., Codell Const. Co. v. Com.*, 566 S.W.2d 161, 163 (Ky. App. 1977) ("In addition to ninety-one other items of work, the project involved a bid item of 2,122,718 cubic yards of unclassified roadway excavation in the construction of approximately eight miles of interstate highway."). Only two of the 43 items in the Bidding Schedule were the Mobilization and the Bridge Street Bridge, items 0001 and 0010:

Item No.	Description and Specs. Section
0001	Mobilization and Preparatory Work (01-00-00)
0002	Temporary Stream Crossing (01-00-00)
0003	Maintenance and Control of Traffic (01-55-26)
0004	Silt Fence (01-57-13)
0005	Clean Silt Fence (01-57-13)

0006 Clearing, Grubbing and Site Demolition (02-41-01)

0007 Pavement Removal (02-41-01)

0008 Removing Curb and gutter (02-41-01)

0009 Removing Concrete Sidewalk (02-41-01)

0010 Bridge Street Bridge Over the Poor Fork of the Cumberland River (03-31-10)

0011 Geotextile Fabric, Type I (31-05-19)

0012 Structure Excavation, Common (31-23-16)

0013 Structure Granular Backfill (31-23-16)

0014 Embankment-In-Place (includes roadway Excavation) (31-24-13)

0015 Test Piles – Steel H-Piles (31-62-16)

0016 Piles – Steel H-Piles (31-62-16)

0017 Test Borings – Cored (31-62-16)

0018 Pile Points (31-62-16)

0019 Asphalt Surface Class 1, 0.38D PG 64-22 (32-10-00)

0020 Asphalt Base Class 1, 0.75D PG 64-22 (32-10-00)

0021 Pavement Striping (32-10-00)

0022 Traffic Bound Base (Crushed Aggregate Size No. 3) (32-11-23)

0023 DGA Base (32-11-23)

0024 Standard Curb and Gutter Mod (32-16-13)

0025 Sidewalk, 4-inch (32-16-13)

0026 Concrete Entrance Pavement (32-16-13)

0027 Seeding and Protection (32-92-19)

0028 Temporary Seeding and Protection (32-92-19)

0029 Erosion Control Blanket (32-92-19)

0030 12-Inch steel Encasement Pipe (33-11-13)

0031 Gate Valve and Box (33-11-13)

0032 Connection Tie-ins (33-11-13)

0033 Cap and Abandon Existing Waterline (33-11-13)

0034 Re-Connect Existing Water Service Connections (33-11-13)

0035 Ductile-Iron Pipe (33-11-13)

0036 6” PE Directional Bore Creek Crossing (33-11-13)

0037 6” Leak Detection Valve Arrangement (33-11-13)

0038 10-inch Steel Encasement Pipe (33-31-13)

0039 Combination Sewage Air and Air/Vacuum Release Valve (33-31-13)

0040 Storm Sewer Pipe, 15-inch Concrete Pipe (33-40-01)

0041 Curb Box Inlet, Type B (33-44-00)

0042 Headwalls (33-44-00)

0043 Riprap Slope Protection (35-31-20)

Kay & Kay maintains that it performed work on more items than just 0001 and 0010, thus placing the extra work outside of an express contract. Indeed, Kay & Kay proffered substantial evidence to support their claim. In the "Contractors Quality Control Report Daily Log of Construction" (hereinafter "Daily Log"), it lists numerous schedule items being performed on days that Kay & Kay was expending labor hours on site. For example, on April 5, 2011, schedule item 0004 was completed, and the only labor hours reported were by Kay & Kay. On April 26, 2011, schedule item 0039 was completed, and the only labor hours reported were by Kay & Kay. And on April 25, 2011, and April 27, 2011, labor hours by Kay & Kay are recorded while schedule item 0002, the temporary stream crossing, was completed. Furthermore, Kay & Kay submitted invoices and receipts showing it potentially purchased materials and completed work on multiple schedule items other than 0001 and 0010.

In spite of this evidence, the trial court considered all of Kay & Kay's work, even the work that appears to be expended on schedule items other than Mobilization (0001) and the Bridge (0010), to be part of the "any other ancillary items required to provide a complete bridge structure" in the subcontract agreement. "The Court concludes that the January 13, 2011 Subcontract Agreement covered those items of work claimed by Kay & Kay Contracting, LLC." Order, p.6.

The trial court's interpretation of a contract and its determination whether terms are ambiguous are matters of law that are subject to *de novo* review.

Hazard Coal Corp. v. Knight, 325 S.W.3d 290, 298 (Ky. 2010), *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007). If a contract is unambiguous, it is strictly enforced according to its terms, which are given their ordinary meaning without resorting to extrinsic evidence. *Hazard Coal Corp.*, 325 S.W.3d at 298 (citing *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003)). A term is ambiguous "if a reasonable person would find it susceptible to different or inconsistent interpretations." *Id.* (quoting *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002)). When a term is ambiguous, "a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Cantrell Supply, Inc.,* 94 S.W.3d at 385. "However, once a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract becomes subject to resolution by the fact-finder." *Id.*

Thus, the threshold question for Kay & Kay's quantum meruit/unjust enrichment claim is whether the phrase "any other ancillary items required to provide a complete bridge structure" in the subcontract agreement is ambiguous. If it is not, then no parol or extrinsic evidence may be considered, the term will be strictly enforced, and Kay & Kay will be barred from claiming equitable relief. If it is ambiguous, then parol or extrinsic evidence may be considered, and the case must be remanded for a fact-finder to determine whether the labor and materials

were included in the contract, thus barring Kay & Kay from equitable relief, or whether the labor and materials were outside of the contract, thus permitting Kay & Kay to pursue equitable relief.

We hold that the terms are ambiguous. The subcontract agreement expressly states that it covers only two of the 43 schedule items. However, it broadly defines schedule item 0010, the Bridge, to include "any other ancillary items required to provide a complete bridge structure." Whether the parties intended this language to include any of the 41 other schedule items cannot be determined from the contract's face. It is just as reasonable to interpret this language as covering additional bid items as it is to interpret it as just covering the single bid item. Thus, because "a reasonable person would find it susceptible to different or inconsistent interpretations[,]" the language is ambiguous and the case must be remanded for a fact-finder to determine whether the work was covered by this provision. *Hazard Coal Corp.*, 325 S.W.3d at 298. Parol and extrinsic evidence are admissible to make that fact finding. *Cantrell Supply*, 94 S.W.3d at 385.

That finding of fact is necessary because it determines whether Kay & Kay's quantum meruit/unjust enrichment claims are viable. To recover under quantum meruit, a party must establish the following elements: (1) valuable services were rendered or materials furnished; (2) to the entity from which recovery is sought; (3) the entity that received the materials or services accepted or received them, or they were rendered with the knowledge and consent of the entity;

and (4) the circumstances were such that the receiving entity was reasonably notified that the plaintiff expected to be paid. *Quadrille Business Systems v. Kentucky Cattlemen's Association, Inc.*, 242 S.W.3d 359, 366 (Ky. App. 2007) (citing 66 Am.Jur.2d *Restitution and Implied Contracts* § 38 (2001)). The test for recovery under a theory of unjust enrichment is similar: (1) a benefit is conferred upon the defendant at the plaintiff's expense; (2) there is a resulting appreciation of the benefit by the defendant; and (3) there is an inequitable retention of benefit without payment for its value. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009) (citing *Guarantee Electric Co. v. Big Rivers Electric Corp*., 669 F.Supp. 1371, 1380-81 (W.D.Ky. 1987)). The main difference between the two theories is that quantum meruit does not appear to require an actual conferment of benefit, just that the producing party render its services or materials with the knowledge and consent of the other entity. Unjust enrichment, on the other hand, requires a retention of benefit.

Here, should the fact-finder determine the work Kay & Kay performed was not included in the "any other ancillary items required to provide a complete bridge structure" provision, then Kay & Kay has presented colorable claims of quantum meruit and unjust enrichment theories of recovery for the work performed outside of the contract. At minimum they have presented sufficient evidence to survive a motion for summary judgment, as genuine issues of material fact would exist regarding the elements of those theories. Accordingly, we reverse

and remand the portion of the trial court's order that grants summary judgment on the quantum meruit/unjust enrichment theories of recovery.

Finally, Vanhook argues that even if an unjust enrichment/quantum meruit claim survives, it should be barred by the doctrine of unclean hands. Vanhook notes that federal law prohibits more than fifty percent of the amount paid on these small-business "HUBZone" contracts from being paid to subcontractors. 15 U.S.C.A. § 657a. Violating these sections subjects one to penalties ranging from fines to prison time. 15 U.S.C.A. § 657a(c)(4), 18 U.S.C.A. § 1001, 31 U.S.C.A. § 3729-3733. Thus, one or both parties could have defrauded the government if Kay & Kay is entitled to recover more than fifty percent of the full contract price through quantum meruit or unjust enrichment.

Kay & Kay asserts that Vanhook did not raise this issue before the trial court and should be prohibited from doing the same here, and, alternatively, that *Javier Steel Corp. v. Central Bridge Co., LLC*, 353 S.W.3d 356 (Ky. App. 2011) controls and prohibits Vanhook from asserting the doctrine of unclean hands. We need not resolve whether the issue is properly before this court, as *Javier* is on point and necessitates that we deny Vanhook's unclean hands claim.

Therefore, for the reasons announced above, we reverse and remand for further proceedings on Kay & Kay's quantum meruit/unjust enrichment claim.

CONCLUSION

The trial court's order granting summary judgment is affirmed on the breach of contract claim. The subcontract agreement superseded any alleged first

or primary agreement. The agreement is not ambiguous on the "entire agreement" clause, and Kay & Kay was fully paid pursuant to this agreement. Furthermore, the parol evidence rule prohibits any extrinsic evidence regarding the existence of an alleged first or primary agreement. As Kay & Kay has been fully paid for its work pursuant to the subcontract agreement, there was no breach of contract as a matter of law. Their assertion otherwise must fail.

The trial court's order granting summary judgment is reversed and remanded on Kay & Kay's quantum meruit/unjust enrichment claim. The subcontract agreement's term regarding the scope of the work to be performed on the Bridge Street Bridge is ambiguous and subject to reasonable disagreement. This genuine issue of material fact – whether the work Kay & Kay performed on the project was encompassed by the subcontract agreement's term – must be determined by a fact finder. Should the fact finder determine the work was outside the scope of the subcontract agreement, Kay & Kay's claim for quantum meruit/unjust enrichment would next need to be determined. Should the fact finder determine the work was contained within the scope of the subcontract agreement, then as a matter of law the quantum meruit/unjust enrichment claim would fail as one cannot recover in equity for work covered by an express contract.

Therefore, we affirm in part and reverse and remand in part for proceedings consistent with this opinion.

JONES, JUDGE, CONCURS.

NICKELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, DISSENTING: Respectfully, I dissent. I agree the trial court's order grant of summary judgment on the breach of contract claim should be affirmed, but would also affirm summary judgment on the *quantum meruit*/unjust enrichment claim. I agree with the trial court's determination that the subcontract agreement was unambiguous and the phrase "any other ancillary items required to provide a complete bridge structure" should be broadly applied and strictly enforced, without introduction of parol evidence and the potential for equitable relief. Further, if the project was reserved by the United States Army Corps of Engineers for small businesses and federal law prohibits more than fifty percent of the full contract price to be paid to subcontractors under such small business "HUBZone" contracts, Kay & Kay—having unclean hands—should be barred from seeking enforcement of an illegal contract under any theory of equitable relief.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Darren J. Duzyk Lexington, Kentucky	Larry F. Sword Somerset, Kentucky