STATE OF MICHIGAN

COURT OF APPEALS

H.F. CAMPBELL COMPANY,

Plaintiff/Counterdefendant-Appellee,

v

COUNTRY BUILDERS, INC., and BURTON K. ARBUCKLE,

Defendants/Counterplaintiffs-Appellants,

and

H. F. CAMPBELL,

Counterdefendant-Appellee.

UNPUBLISHED
December 18, 2001

No. 224735
Wayne Circuit Court
LC No. 97-737033-CH

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendants-appellants Country Builders, Inc. and Burton K. Arbuckle (defendants) appeal as of right the trial court's order granting appellees H. F. Campbell and H. F. Campbell Company summary disposition of their counterclaim for unjust enrichment. We reverse and remand.

Appellees moved for summary disposition of the unjust enrichment claim on the ground that the parties had an express contract covering the subject matter. The parties' contract specifically limited any available damages to the amount of the earnest money deposit, which was one dollar for each agreement. The trial court agreed that the provision providing for liquidated damages of one dollar per lot precluded recovery of additional sums under an unjust enrichment theory and, therefore, granted appellees' motion for summary disposition.

We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Defendants relied on a theory of unjust enrichment to recover for the labor and materials they provided during construction on the two lots.

> The process of imposing a "contract-in-law" or a quasi-contract to prevent unjust enrichment is an activity which should be approached with some caution. The essential elements of such a claim are: (1) receipt of a benefit by the defendant from the plaintiff and, (2) which benefit it is inequitable that the defendant retain. [*Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991), quoting *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619, 638; 425 NW2d 480 (1988).]

As the trial court observed, a court will not apply unjust enrichment to grant a party relief where there is an express contract covering the same subject matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). However, where the parties have included a liquidated damages provision in their agreement, as a matter of policy and equity, a court will award actual damages for a breach and ignore the liquidated damages clause if the parties' agreement on damages is clearly unjust and unconscionable. *Worley v McCarty*, 354 Mich 599, 604-606; 93 NW2d 269 (1958); *Curran v Williams*, 352 Mich 278, 282-283; 89 NW2d 602 (1958); *Jaquith v Hudson*, 5 Mich 123, 133 (1858). Stipulations on damages will be disregarded as penalties where the amount previously agreed upon is unreasonable and clearly out of proportion to the total amounts involved. *Curran, supra* at 282-283; *Wilkinson v Lanterman*, 314 Mich 568, 576-577; 22 NW2d 827 (1946).

We find that the liquidated damages provision, providing for damages of one dollar for each lot, is unconscionable and disproportionate to any possible injury that could have been suffered from a breach of these contracts. Compare *UAW-GM Human Resources Center v KSL Recreation Corp*, 228 Mich App 486, 508-509; 579 NW2d 411 (1998). Because the liquidated damages provision in each of the contracts amounted to a penalty and was invalid and unenforceable as a matter of law, the trial court erred in granting appellees summary disposition in reliance on the provision. *Moore v St Clair Co*, 120 Mich App 335, 339-341; 328 NW2d 47 (1982).

In light of our disposition of this case, we need not consider defendants' remaining arguments on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey