STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL CITY BANK,

Plaintiff-Appellant,

v

YOLANDA E. WALKER,

Defendant-Appellee.

UNPUBLISHED
April 22, 2004

No. 246700
Berrien Circuit Court
LC No. 02-003552-PD

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing its cause of action pursuant to MCR 2.504(B)(2). We reverse and remand.

Defendant purchased a 1999 Ford Expedition using the value of her trade-in vehicle as the down payment and financed the remaining balance through plaintiff. The financing paperwork was forwarded by the dealership to plaintiff, but was subsequently returned to the dealership because some forms were missing. During this time defendant contacted plaintiff to inquire about her payment book. Because the loan had not been processed, plaintiff had no record of the loan and informed defendant of this. As a result, plaintiff released its lien on the Expedition. When the completed paperwork was received by plaintiff from the dealership, plaintiff realized its error and attempted to collect payment from defendant. Defendant claimed that she had no liability.

Plaintiff then instituted this action. The trial court stated that based on the proofs at trial plaintiff possibly had grounds for relief based on a theory of unjust enrichment, but because defendant had failed to plead such a theory the trial court dismissed the case. Plaintiff's only argument on appeal is that the trial court erred in dismissing its case. We agree.

In cases tried without a jury, the appropriate motion for a defendant to bring at the close of the plaintiff's case is a motion for involuntary dismissal pursuant to MCR 2.504(B)(2). *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 235 n 2; 615 NW2d 241 (2000). Involuntary dismissal is only appropriate if the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that, on the facts and the law, the plaintiff is not entitled to relief. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). In reviewing a motion for involuntary dismissal, this Court reviews the trial court's legal rulings de novo and reviews any factual findings for clear error. *Id*. A trial court's finding of fact is clearly

erroneous when this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

Plaintiff asserts that despite not specifically pleading unjust enrichment, the trial court should have made its decision based on the evidence presented at trial. MCR 2.118(C)(1) states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

Under this rule plaintiff is not required to show lack of prejudice. *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002). The record clearly shows that defendant did not object to evidence of defendant's unjust enrichment. The question is whether this failure to object to plaintiff's line of questioning constituted an implied consent to litigate the issue of unjust enrichment. We find that it does.

The elements of unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). A contract is implied in law to prevent unjust enrichment where no express contract exists on the subject matter. *Id*. Count II (Money Judgment) of plaintiff's complaint alleged that defendant had received the vehicle in exchange for valuable consideration, being the financing contract and security agreement, and that plaintiff was entitled to the full amount due and owing under the contract. At trial, defendant testified that she "bought" the vehicle from a dealership in April 2001, financed the majority of the cost of the vehicle through plaintiff, never made any payments on the loan, never attempted to return the vehicle, and continued to have use and enjoyment of the vehicle at the time of trial. Defendant did not object at trial to the substance of the questions that elicited these admissions. Given these facts, we find that defendant impliedly consented to litigate the issue of unjust enrichment. *Leavenworth v Michigan Nat'l Bank*, 59 Mich App 309, 314-315; 229 NW2d 429 (1975).

Therefore, pursuant to MCR 2.118(C)(1), we hold that the court should have considered the issue as if it had been raised in the pleadings and erred in failing to do so, notwithstanding the fact that plaintiff failed to move to amend its pleadings. *Carpenter v Mumby*, 86 Mich App 739, 745-746; 273 NW2d 605 (1978). On remand, the trial court is to give plaintiff an opportunity to amend its pleadings to conform to the evidence and then is to consider the merits of plaintiff's theory of unjust enrichment in light of the evidence presented at trial.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski