STATE OF MICHIGAN

COURT OF APPEALS

BRISTOL MANUFACTURING, INC., Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED April 10, 2008
v	No. 272006 Genesee Circuit Court
JENNINGS GENERAL MAINTENANCE, INC., Defendant/Counter-Plaintiff-Appellee.	LC No. 04-079609-PD

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment, following a bench trial, awarding plaintiff net damages of $11,361.82. We remand for further proceedings regarding plaintiff's breach of contract claim in Count VII of its amended complaint, but we affirm in all other respects.

I. Facts

Plaintiff filed this action in August 2004, alleging claims arising out of defendant's alleged lease from plaintiff of a Mini-Rigger Special Forklift (MRS Forklift) in August 2003. Plaintiff sought both monetary damages and a return of the forklift under theories of claim and delivery, breach of contract, and quantum meruit or unjust enrichment. In October 2005, defendant filed a counterclaim alleging that it purchased the forklift in January 2002, under an installment sales contract. Defendant sought monetary damages for a period in 2003 when it allegedly gave plaintiff possession of the forklift so that plaintiff could rent it to customers and apply the proceeds to the amount due under the contract. Defendant also pleaded claims for a share of storage fees allegedly received by plaintiff from Troy Design and Manufacturing (Troy Design), under a contract obtained by defendant, and for commissions allegedly owed by plaintiff for a different matter. In November 2005, plaintiff filed an amended complaint adding a claim of conversion with respect to the MRS Forklift. Plaintiff also added claims seeking recovery of storage fees that Troy Design allegedly paid to defendant and seeking $2,157.49 for other equipment allegedly leased to defendant. Plaintiff also pleaded claims with respect to a "man-lift" or "scissors lift" that was allegedly loaned to defendant, but not returned.

Following a bench trial in March 2006, the trial court awarded plaintiff a net judgment of $11,361.82 with respect to the parties' dispute concerning the MRS Forklift. Relying on payments made by defendant while this case was pending, the trial court determined that defendant overpaid the amount owed under the installment sales contract by $3,618.18, but it awarded plaintiff attorney fees of $15,000, resulting in a net judgment for plaintiff of $11,361.82. The trial court denied relief with respect to the parties' other claims, but ordered defendant to return the scissors lift to plaintiff.

II. Plaintiff's Alleged Waiver of Issues

On appeal, defendant claims that plaintiff's failure to challenge certain of the trial court's findings or decisions in a post-judgment motion precludes review of plaintiff's issues. Defendant's argument is misplaced. Indeed, when a bench trial is held, a party need not take exception to the trial court's findings or decisions. MCR 2.517(A)(7); *Morris v Clawson Tank Co*, 459 Mich 256, 275 n 13; 587 NW2d 253 (1998).

We do note, however, that the trial court did not specifically rule on plaintiff's claim that it cancelled the installment sales contract.[1] Under MCR 2.517(A)(1), a trial court must find the facts specifically and state separately its conclusions of law, although "[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient . . . ." MCR 2.517(A)(2); see also *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). Ordinarily, an issue is not properly preserved for appeal unless it was raised before and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, a party should not be punished for a trial court's failure to rule on a properly raised issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Because the issue in question is essentially one of law for which the necessary facts have been presented, we shall consider plaintiff's argument. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

III. Standards of Review

Findings of fact made by the trial court are reviewed under the clearly erroneous standard, with due regard given to the special opportunity of the court to judge the credibility of witnesses who appear before it. MCR 2.613(C). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). To the extent that the trial court's factual findings at a bench trial may have been influenced by an incorrect view of the law, this Court's review is not limited to clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). The trial court's conclusions of law are reviewed de novo. *Alan Custom Homes*, *supra* at 512.

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[1] The trial court also did not rule on an issue regarding certain rental equipment. Because that issue necessitates factual findings, we remand this case for further findings concerning it, as discussed in section IX of this opinion.

IV. Plaintiff's Attempted Repossession of the MRS Forklift

Regarding plaintiff's challenge to the trial court's decision to restrain it from repossessing the MRS Forklift, we reject plaintiff's claim that defendant waived its argument that plaintiff did not properly repossess the MRS Forklift by failing to plead the Uniform Commercial Code (UCC) as an affirmative defense.

MCR 2.111(F) requires a party to plead affirmative defenses that go beyond rebutting the plaintiff's prima facie case, other than a lack of subject-matter jurisdiction and failure to state a claim. *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). Here, however, plaintiff has not established the relevance of Article 9 of the UCC, MCL 440.9101 *et seq*., to the claims alleged in its amended complaint. Each claim arose from plaintiff's allegation that defendant acquired possession of the MRS Forklift in August 2003 pursuant to a lease. Indeed, the claim and delivery count specifically alleged the existence of an express lease agreement that required defendant to pay $3,420 a month. Defendant's answer to the amended complaint and affirmative defenses gave plaintiff notice that it was claiming ownership of the forklift under the terms of an installment sales contract.

The trial record indicates that plaintiff abandoned its lease theory and instead sought relief under a theory that it acquired possessory rights to the forklift by repossessing it pursuant to its July 14, 2003, letter to defendant, and then loaned the forklift back to defendant, at no charge, for a limited period of time. At best, this record raises a question regarding whether the pleadings should be amended to conform to the evidence at trial that plaintiff's claims were predicated not on a lease but on its alleged repossession of the forklift under the terms of the installment sales contract. MCR 2.118(C). Thus, we find no merit to plaintiff's claim that defendant violated MCR 2.111(F) by not pleading a UCC violation as an affirmative defense.

Further, plaintiff has not established any basis for disturbing the trial court's finding that it did not proceed in accordance with Article 9 of the UCC in its repossession or attempted repossession of the MRS Forklift, or in looking to MCL 440.9625 to determine the appropriate remedy. Plaintiff's reliance on MCL 440.9626 is misplaced because this statute is plainly limited to "an action arising from a transaction . . . in which the amount of a deficiency or surplus is at issue." MCL 440.9626(1). When interpreting a statute, we must give effect to the legislative intent expressed in the statutory language. *Vanderlaan v Tri-County Community Hosp*, 209 Mich App 328, 332; 530 NW2d 186 (1995).

Here, the trial court found that plaintiff did not dispose of the MRS Forklift in accordance with MCL 440.9610 or satisfy the requirements for a secured party to accept collateral in satisfaction of an obligation under MCL 440.9620. Further, the trial court considered the good-faith requirement imposed on secured parties and, in particular, found that plaintiff did not act in a commercially reasonable manner. See MCL 440.1203 (every contract within the UCC imposes an obligation of good faith in its performance or enforcement); see also MCL 440.9102(1)(qq) ("'[g]ood faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing"). We find no clear error with respect to the trial court's findings, and, because there was no transaction in which the amount of a deficiency or surplus was at issue, MCL 440.9626 did not apply. We reject plaintiff's claim that the trial court applied the wrong statute to preclude it from repossessing the MRS Forklift.

V. The $3,638.18 Overpayment

Plaintiff claims that the trial court erred in finding that defendant obtained possession of the MRS Forklift pursuant to an installment sales contract, which it overpaid by $3,638.18. Plaintiff argues that defendant could not overpay what was owed because the installment sales contract was cancelled under MCL 440.2106. We disagree.

First, plaintiff's reliance on the definitions in MCL 440.2106 in arguing that defendant could not overpay the installment sales contract is unavailing. Under this provision, "termination" and "cancellation" have distinct meanings. "Termination" requires a power created by agreement or law to end a contract for a reason other than a breach. MCL 440.2106(3). "Cancellation" occurs when either party puts an end to the contract for breach. MCL 440.2106(4). However, the statute is merely a definitional provision to be applied in Article 2 or to specific parts therein. MCL 440.2103(2). Because plaintiff does not cite any provision of Article 2 that applies to the controversy in this case, we conclude that the trial court did not err in failing to consider it.

In any event, MCL 440.2106(4) does not state how a party can put an end to a contract for breach. It merely allows for the discharge of executory obligations and the retention of "any remedy for breach of the whole contract or any unperformed balance." MCL 440.2106(4). Further, principles of law and equity supplement UCC provisions unless displaced by the UCC's particular provisions. MCL 440.1103; *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 131; 602 NW2d 390 (1999). The primary goal in interpreting a contract is to honor the parties' intent. *Id*. at 132.

In this case, the "default in remedies" section of the installment sales contract contained the parties' agreement with respect to how the parties should proceed in the event that defendant were to default on its payment obligation. Among plaintiff's remedies was the right to accelerate the amount owed and exercise "any and all rights and remedies provided by the Uniform Commercial Code as in effect from time to time under applicable law." The trial court awarded plaintiff monetary damages measured by defendant's obligation under the installment sales contract, and plaintiff does not challenge the trial court's computation of damages under this approach.

To the extent that plaintiff suggests that a "cancellation" of a contract works a rescission and that it accomplished this result in its July 14, 2003, letter to defendant, we disagree. A rescission is different from a breach of contract. *Flamm v Scherer*, 40 Mich App 1, 8; 198 NW2d 702 (1972). A recession requires that parties be restored to the status quo. *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938). There is nothing in Raymond Oliver's July 14, 2003, letter advising that "[w]e have no recourse other than keeping this forklift and considering our agreement terminated" that had the effect of rescinding the installment sales contract. The material question is whether the trial court should have given effect to plaintiff's attempted repossession of the MRS Forklift pursuant to the July 14, 2003, letter such as to confer upon plaintiff the possessory rights that it sought for purposes of pursuing its claim and delivery, breach of contract, unjust enrichment, and conversion claims against defendant, using a measure of damages different than the remedies prescribed in the installment sales contract. As discussed in section IV of this opinion, plaintiff has not established that the court erred in precluding plaintiff from repossessing the forklift.

VI. Attorney Fees

Plaintiff argues that the trial court erred in awarding only $15,000 as reasonable attorney fees. We disagree. Although, as noted earlier, we review a trial court's findings of fact under the clearly erroneous standard, MCR 2.613(C), the reasonableness of an award of attorney fees is reviewed for an abuse of discretion. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982); *Jordan v Transnational Motors*, 212 Mich App 94, 97; 537 NW2d 471 (1995). In general, an abuse of discretion occurs when the trial court's "decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

"Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, or common-law exception, or where provided by contract of the parties." *Grace v Grace*, 253 Mich App 357, 370; 655 NW2d 595 (2002). The party requesting attorney fees has the burden of proving that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005).

Here, plaintiff was only entitled to attorney fees under the provision of the installment sales contract for the MRS Forklift. Further, the trial court considered appropriate factors in its decision. See *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The trial court was not required to detail its findings regarding each factor considered. *Wood*, *supra* at 588. Examining the trial court's decision in light of the minimal evidence offered by plaintiff to establish its attorney fees, we find no support for plaintiff's claim on appeal that the award was unreasonably low. Plaintiff has not demonstrated any basis for modifying the trial court's award of $15,000.

Plaintiff argues that the trial court erred when it offset the $15,000 award for attorney fees by $3,638.18. We disagree. The $15,000 award for attorney fees and defendant's overpayment of $3,638.18 were both based on the installment sales contract for the MRS Forklift. In light of plaintiff's failure to show any error by the trial court in applying the installment sales contract, we affirm its decision to offset the overpayment against the attorney fees.

VII. Storage Fees

Plaintiff, relying on a theory of quantum meruit or unjust enrichment, argues that the trial court erred in denying its request for damages for the storage fees paid by Troy Design to defendant. We disagree. In general, factual issues in civil cases are determined under the preponderance of the evidence standard, with the burden of persuasion placed on the party asserting the claim. *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 89; 367 NW2d 1 (1985). "Proof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Id*.

Again, we review a trial court's findings of fact for clear error, MCR 2.613(C), but we review its dispositional rulings on equitable matters de novo, *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). A claim of quantum meruit or unjust enrichment is equitable in nature. See *Morris Pumps v Centerline Piping, Inc*, 273 Mich App

187, 195; 729 NW2d 898 (2006). A claim of this type requires proof of "(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). The law implies a contract to prevent unjust enrichment. *Id*. However, a contract will be implied only if there is no express contract covering the same subject matter between the same parties. *Morris Pumps*, *supra* at 194-195.

Here, there was evidence that the parties had an express agreement that Troy Design would use a building on plaintiff's property for storage, but the evidence raised a question regarding how much defendant should be paid for procuring the contract. Although a valid contract requires a meeting of the minds on all essential terms, *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992), a court may supply details of performance by construction if the parties define the essential terms, *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941); see also *J W Knapp Co v Sinas*, 19 Mich App 427, 431; 172 NW2d 867 (1969) (where a price is indefinite, a reasonable price may be required in an appropriate case).

Because there was evidence of an express agreement, we conclude that plaintiff has not established that the doctrine of unjust enrichment could be invoked. However, even assuming there was no valid contract, the trial court would still be left with the task of determining how to allocate the storage fees between the parties in light of the evidence that both parties collected storage fees. The trial court could reasonably conclude that plaintiff's proofs were unpersuasive with regard to its claim for storage fees, under a theory of unjust enrichment, because plaintiff did not account for the benefit that it received from defendant's undertaking to procure the contract from Troy Design.

Further, plaintiff has failed to explain why it would be unjust or inequitable for defendant to retain the transportation or unloading charges that it collected from Troy Design. It is not enough that a plaintiff establish that the defendant received a benefit. To establish a claim of unjust enrichment, the plaintiff must show that the defendant was unjustly or inequitably enriched at the plaintiff's expense. *Morris Pumps*, *supra* at 195. Giving due deference to the trial court's factual findings, we are not persuaded that it erred in determining that neither party proved entitlement to monetary relief.

VIII. Scissors Lift

Plaintiff argues that the trial court erred in denying its quantum meruit or unjust enrichment claim for damages with respect to a scissors lift that defendant possessed. We disagree. The trial court found that both parties' proofs were unpersuasive regarding how and why defendant possessed the scissors lift. Giving deference to the trial court's superior opportunity to judge the credibility of the witnesses who appeared at trial, MCR 2.613(C), we are not persuaded that the trial court erred in concluding that plaintiff's claim for damages should be denied. The burden of persuasion to establish the claim rested with plaintiff. *Blue Cross & Blue Shield of Michigan*, *supra* at 89.

The only material question raised by the trial court's ruling is whether it properly ordered defendant to return the scissors lift to plaintiff. However, because that question is not before us,

we do not consider this issue further. Limiting our review to plaintiff's claim for damages, plaintiff has not established any basis for disturbing the trial court's decision to deny the claim.

IX. Rental Equipment

Finally, plaintiff argues that the trial court erred by failing to rule on its breach of contract claim concerning rental equipment as set forth in Count VII of the amended complaint. Because plaintiff pursued this claim at trial, we shall consider plaintiff's argument. *Peterman*, *supra* at 183.

We reject plaintiff's request for entry of a judgment for $3,982. Plaintiff's amended complaint sought only $2,157.49 for defendant's alleged breach of the rental agreement. We also note that evidence introduced by plaintiff at trial – a statement of account showing a balance of $2,157.49 – was consistent with this claim, although plaintiff also relied on separate invoice documents to compute its request for $3,982 at trial. In any event, we decline to consider whether plaintiff's proofs established that defendant breached any rental agreement and, if so, the amount of plaintiff's damages, because the trial court did not rule on this claim.

Because the trial court failed to make any factual findings regarding this claim, it did not comply with MCR 2.517(A). See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489; 608 NW2d 531 (2000), and *Triple E Produce Corp*, *supra* at 176. Therefore, we remand this case to the trial court for findings of fact and conclusions of law regarding plaintiff's claim for $2,157.49 as alleged in Count VII of the amended complaint. *City of Jackson*, *supra* at 489.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher