STATE OF MICHIGAN

COURT OF APPEALS

BROOKLYN PLUMBING HEATING & AIR CONDITIONING, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED April 1, 2010
v ROSEMARY AIELLO, JOSEPH AIELLO, CHRISTOPHER AIELLO, and STEVEN AIELLO, Defendant/Counter-Plaintiffs-Appellants.	No. 283894 Hillsdale Circuit Court LC No. 07-000222-CK

Before: OWENS, P.J. AND SAWYER AND O'CONNELL, JJ.

PER CURIAM.

In this construction lien and equity case, defendants appeal as of right from the judgment entered by the trial court in favor of plaintiff. The trial court awarded plaintiff $7,347.89 plus interest ($1,847.97) and costs ($533.72) and ordered a public sale of defendants' real property at issue in this case. The trial court also awarded plaintiff $11,655 in attorney fees. We affirm in part, and reverse in part and vacate the award of attorney fees.

I. Facts

Defendants are Rosemary Aiello and her sons, Joseph, Christopher, and Steven Aiello. Plaintiff, Brooklyn Plumbing, Heating & Air Conditioning, Inc., is a state-licensed heating, ventilation, plumbing and air conditioning (HVAC) contractor. In 2006, defendants purchased a modular home for use as a cottage. One month later, defendants began experiencing problems with the HVAC system. They contacted Kurt Causie, vice president at Brooklyn, and complained that they weren't getting enough air throughout the house and that the furnace wasn't doing the job it was supposed to do. Causie suggested that defendants replace the furnace. Plaintiff replaced the furnace and added a humidifier, then sent defendants an invoice for the work performed in the amount of $2,000.

Shortly after this work was completed, Joseph Aiello called plaintiff again and complained that the house was not getting sufficient air flow. Plaintiff returned to the residence

and discovered that some portions of the ducts were "squashed" or "flattened." Causie suggested that the best solution was to replace the duct work in stages, in order to see if improvement in air flow could be achieved. Plaintiff then replaced the exposed and accessible portions of the duct work and sent defendants an invoice in the amount of $1,768.64.

Again, defendants contacted plaintiff complaining that the house was not cooling quickly enough. Defendants emailed plaintiff and requested that plaintiff replace the air conditioning unit. Plaintiff replaced the air conditioning unit and, sent a bill for $1,800 to defendants. Following all of these repairs, defendants still complained that their home was not cooling properly, and terminated plaintiff's services and refused to pay for the work that had been performed to the furnace, humidifier, duct work and air conditioner.

On March 26, 2007 plaintiff filed a complaint including counts for foreclosure of construction lien, breach of contract, unjust enrichment and quantum meruit. Plaintiffs filed a counterclaim alleging fraud/misrepresentation, negligence, breach of contract, and violation of the Michigan Consumer Protection Act. They sought unspecified damages for repairs to drywall damaged during plaintiff's work. After a bench trial, the trial court entered a judgment in favor of plaintiff on all counts and also awarded plaintiff attorney fees. Defendants were not awarded any damages on their counterclaim.

Following trial, defendants filed a motion for a new trial pursuant to MCR 2.611(A)(1)(f) based upon a January 4, 2008 inspection of the HVAC system by the Hillsdale County Inspection Department. The trial court denied the motion, concluding that this was not new evidence and that this inspection could have been completed prior to trial. Defendants now appeal.

II. Summary Disposition

Defendants argue that the trial court erred in determining that plaintiff complied with the Construction Lien Act (CLA), MCL 570.1101, *et seq*. While we agree that plaintiff was not in compliance with the CLA, we nonetheless find that plaintiff's motion for summary disposition was properly granted under the theories of quantum meruit and unjust enrichment.

A. Standard of Review

"[A] claim of quantum meruit is equitable in nature." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 199; 729 NW2d 898 (2006). "Equitable decisions are reviewed de novo, but the findings of fact supporting those decisions are reviewed for clear error." *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009). Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

B. Analysis

Although the trial court in this case granted summary disposition under the CLA, which we find was not correct[1], it also granted summary disposition on plaintiff's quantum meruit and unjust enrichment claims without discussing these causes of action. We may affirm a trial court's decision where the correct result was reached, even if doing so requires other reasoning. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 136-137; 676 NW2d 633 (2003); see also *Taylor v Laban*, 241 Mich App 449, 457-458; 616 NW2d 229 (2000).

The more general equitable doctrine of unjust enrichment is based on the principle that a party should not be allowed to profit at another's expense. *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952). "The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006).

Recovery on a claim of quantum meruit is appropriate: (1) if the evidence establishes that the defendants received a benefit from the plaintiff; and (2) an inequity resulted to the plaintiff "because of the retention of the benefit by the defendant[s]." See *Morris Pumps*, 273 Mich App at 195. Here, defendants acknowledge that they received some benefit from plaintiff. They are now in possession of a new furnace, new humidifier, new air conditioner, and some new duct work. Although they concede that they should be responsible for a portion of their outstanding bill, they contend that the amount should be set-off by the damages caused by plaintiff to their drywall, and by some amount to compensate them for what they contend is a less than ideally functioning heating and cooling system. However, the trial court record is devoid of any information that would help this Court to arrive at such a figure. Defendants argue that they would have presented this evidence, but that their expert witnesses were precluded from offering this testimony by the trial court. As we will discuss further, *infra*, the trial court correctly excluded this testimony. Thus, based upon the record before us, there is no genuine issue of material fact as to the amount of damages suffered by plaintiff. We find that plaintiff was entitled to summary disposition, not under the CLA, but under the theories of quantum meruit and unjust enrichment. Therefore, we reverse the trial court's determination that plaintiff complied with the CLA, but affirm the grant of summary disposition.

We note that the trial court awarded plaintiff $11,655 in attorney fees under the CLA (MCL 570.1118(2)). Given our conclusion that plaintiff did not comply with the CLA, such fees are no longer appropriate and we vacate the trial court's award of attorney fees.

III. Exclusion of North Report

Defendants argue that the trial court erred in excluding a document from the record prepared by the William North Company. We disagree.

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[1] Plaintiff failed to provide defendants with sworn statements as required by the CLA in MCL 570.1110.

A. Standard of Review

A mixed standard of review is applied when considering evidentiary challenges based on questions of law:

> The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion. However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. [*People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003) (citations omitted)].

B. Analysis

At trial, defendants attempted to introduce an invoice with notes regarding an inspection of the HVAC system. Defendants tried to lay a foundation for the document through the testimony of business owner, Thomas North. However, the trial court refused to allow the document to be admitted because North did not remember preparing it. Defendants' attorney then attempted to lay the foundation for the document as a business record. North stated that the report had been prepared in the ordinary course of business and that it was maintained in his file. The trial court disagreed and stated that the report was not done in the ordinary course of business, but was prepared for a specific purpose and that the report was possibly prepared by someone else.

MRE 803(5) is the recorded recollection exception to the hearsay rule. It provides:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

There are three requirements for admission of evidence under MRE 803(5): first, the document must pertain to matters which the declarant once had knowledge; second, the declarant must now have insufficient memory of the matters; and third, the declarant must have made the document or examined it for accuracy when the matters remained fresh in the declarant's memory. *People v Daniels,* 192 Mich App 658, 667-668; 482 NW2d 176 (1992).

North testified that his mechanic went to defendants' residence, made the investigation, and relayed the information to North, who then prepared the report. Thus, it is unclear, and was unclear to the trial court, whether North himself ever actually had the knowledge required to prepare the report, or whether the report was based upon the mechanic's knowledge. Furthermore, North could not even affirmatively state that he was the one who had prepared the report. He merely stated that he "typically" is the one who writes the reports. This lack of clarity about whether the document was ever within the scope of North's knowledge was a proper basis for the trial court to have excluded the testimony under MRE 803(5). North stated

that the mechanic in question was still employed by his company, and thus, presumably, could have been available to testify.

Defendants also attempted to have the record admitted under MRE 803(6), which provides an additional exception to the hearsay rule, and is commonly called the "business records exception." MRE 803(6) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [MRE 803(6)].

Under MRE 803(6), a business record is admissible where the record was made at or near the time in question by, or from information transmitted by, a person with knowledge, in the course of a regularly conducted business activity, proven by the testimony of the custodian of the record or other qualified person. See, generally, *Solomon v Shuell*, 435 Mich 104, 114-129; 457 NW2d 669 (1990). Moreover, the rule provides that records kept in the course of a regularly conducted business activity are not to be excluded unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness. MRE 803(6); *Price v Long Realty, Inc*, 199 Mich App 461, 467; 502 NW2d 337 (1993).

As our Supreme Court clarified:

> Not every statement contained within the document is admissible merely because the document as a whole is one kept in the regular course of business. Where, as here, the document contains a contested hearsay statement, a separate justification must exist for its admission, i.e., it must qualify under an exception to the hearsay rule or be properly admissible as nonhearsay. [*Merrow v Bofferding*, 458 Mich 617, 627; 581 NW2d 696 (1998)].

MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802; *People v Eady*, 409 Mich 356; 294 NW2d 202 (1980).

Here, just as in *Merrow*, the document kept in the regular course of business also contained observations and conclusions made by the mechanic. These statements constituted hearsay, and were not properly admissible because defendants never demonstrated that the mechanic was unavailable to testify. Therefore, the trial court properly excluded the report and properly concluded that it did not fall within the business records exception to the hearsay rule.

IV. Exclusion of Expert Witness

Defendants argue that the trial court abused its discretion in excluding the testimony of Nicola Sciortino as an expert witness. We disagree.

A. Standard of Review

A trial court's decision on whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). The trial court abuses its discretion if its decision is outside the range of principled outcomes. *Morales v State Farm Mut Auto Ins Co,* 279 Mich App 720, 729; 761 NW2d 454 (2008). "Moreover, even if a court abuses its discretion in admitting or excluding evidence, the error will not merit reversal unless a substantial right of a party is affected, MRE 103(a), and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice, MCR 2.613(A)." Morales, 279 Mich App at 729.

B. Analysis

The trial court's exercise of its "gatekeeper" role under MRE 702, the purpose of which is to ensure the admission of only reliable scientific evidence, is only a threshold inquiry into the "principles and methodology" behind the expert's conclusion, not the truth thereof. *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 594-595; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-783; 685 NW2d 391 (2004). MRE 702 governs the admissibility of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 requires that the witness be an expert, that there be facts in evidence that require or are subject to examination and analysis by a competent expert, and the knowledge sought from the expert is "in a particular area that belongs more to an expert than to the common man." *Surman v Surman,* 277 Mich App 287, 308; 745 NW2d 82 (2007).

The trial court questioned Sciortino about whether he installs, designs, or determines sizes of furnaces, or installs duct work. He responded, "no." The trial court asked Sciortino what he actually does when it comes to HVAC systems and Sciortino replied, "as far as the physical work, nothing, but I work in tandem with heating and plumbing." Regarding Sciortino's qualifications, the trial court concluded that Sciortino is:

> a general contractor and he's been in the field for a very long time. But he does not deal with HVAC. He hires somebody to do it. HVAC guy comes in and says, yeah, this is what I need, I want you to build this, this and that so I can put in the system that will house the air flow that's required and the other requirements for

> HVAC. He doesn't install it. He deals with the subcontractors, as he does with electricians and everything else, but he's no expert in the field.

Defendants argue that Sciortino was qualified as an expert in this area based upon his work, in tandem, with HVAC professionals "informing them where the duct work goes, getting the correct air flow and properly sizing the duct work." The trial court excluded Sciortino as an expert in this area. While it is true that possession of a license is not a prerequisite for the qualification of an expert, simply spending time as a general contractor, and working alongside HVAC experts, would not give one the knowledge and expertise necessary to instruct the trial court in this area.

V. Great Weight of the Evidence

Defendants argue that the trial court's decision was against the great weight of the evidence. We disagree.

A. Standard of Review

The trial court's factual findings at a bench trial are reviewed for clear error. MCR 2.613(C). A finding of fact is clearly erroneous, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made, giving due regard to the trial court's special opportunity to observe the witnesses and judge their credibility.

B. Analysis

Here, the evidence supported the trial court's decision. Plaintiff presented testimony that it provided a new furnace, new air conditioner, new humidifier, and new duct work to defendants. Defendants complained that the house was not cooling quickly enough; however, defendants failed to present a qualified HVAC expert to support their conclusion that the rate at which the home was cooling was below industry standards. Furthermore, plaintiff offered testimony that its work was guaranteed for a year after installation and that defendants fired plaintiff without giving plaintiff the opportunity to correct any of the problems of which defendants now complain. Furthermore, there is no dispute that defendants are now in possession of a brand new furnace and air conditioning, which presumably are much more valuable than the former models that were over twenty years old.

Defendants also failed to introduce evidence at trial that the work done by plaintiff was not up to code. Defendants presented no documentary evidence at trial to support their alleged counterclaim for damages. Aside from expressing their personal opinions as engineers in unrelated fields, and expressing their dissatisfaction with plaintiff's work, defendants offered no expert testimony to support their personal observations that the home was not cooling quickly enough. Even if the trial court believed all of their testimony, and believed that their home was not cooling to their standards, this is not grounds for finding in their favor. Defendants agreed to allow plaintiff to perform the repairs to their heating and cooling system, and they received some benefit from the repairs. Their contention that "quite simply, the HVAC system does not work" is unsupported by expert testimony, whereas plaintiff's assertion that it does work is supported by testimony of their HVAC expert.

VI. Motion for a New Trial

Defendants argue that the trial court erred in refusing to grant their motion for a new trial under MCR 2.611(A)(1)(f). We disagree.

A. Standard of Review

We review this issue for an abuse of discretion. *Kroll v Crest Plastics, Inc,* 142 Mich App 284, 291; 369 NW2d 487 (1985). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo,* 478 Mich 151, 158; 732 NW2d 472.

B. Analysis

Under MCR 2.611(A)(1)(f), a court may grant a new trial "on all or some of the issues, whenever" a party's "substantial rights are materially affected" by "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." The moving party must establish that "(1) that the evidence itself and not merely its materiality is newly discovered; (2) that it is not merely cumulative; (3) that it is such as renders a different result probable on retrial; and (4) that the party could not with reasonable diligence have discovered and produced it at trial." *Hoven v Hoven,* 9 Mich App 168, 173; 156 NW2d 65 (1967).

It has long been held that Michigan courts will not favorably view a motion for new trial citing newly discovered evidence because parties ought to act with "care, diligence, and vigilance in securing and presenting evidence." *Garazewski v Wurm,* 204 Mich 227, 235-236; 169 NW 871 (1918) (internal quotation omitted); see also *Kroll,* 142 Mich App at 291. A court should deny a motion for new trial alleging newly discovered evidence where the moving party by exercising ordinary "reasonable diligence" would have known these facts at the time of trial. *Second Michigan Coop Housing Ass'n v First Michigan Coop Housing Ass'n,* 362 Mich 460, 463-464; 107 NW2d 905 (1961). A new trial will not be granted where the purported newly discovered evidence consists of public records. *Mexicott v Prudential Ins Co of America,* 263 Mich 420, 425; 248 NW 856 (1933) (moving party did not exercise reasonable diligence where the newly discovered evidence consisted of public probate court records); *Harrison Granite Co v Grand Trunk R Sys,* 175 Mich 144, 155; 141 NW 642 (1913) (moving party did not exercise reasonable diligence where the newly discovered evidence appeared in public inquest motion papers).

At trial, the trial court emphasized that there was a lack of evidence that the HVAC system was not working properly. On December 12, 2007, the trial court stated:

> I don't have the building inspector in here in front of me by either side to tell me that this system is wrong, it doesn't meet acceptable industry standards, it doesn't work, I condemned it, it should be replaced. There's no testimony from the building inspector to any of that. In fact, the only testimony so far that I have is that it was inspected and approved.

The Hillsdale County Inspection Department issued its report on January 22, 2008. This report concluded that defendants' residence in question did not comply with building code

requirements. In denying defendants' motion to admit this new evidence, the trial court concluded:

> It's clear this is not something new. This work was done, according to the complaint, I believe June through August 2006. Complaint was filed in March 2007. Scheduling order went out May of 2007 setting this matter for trial in December. This Court never received any motion to adjourn. In fact, as I recall the testimony, I asked repeatedly of the Aiellos, did you have the building inspector out? Why didn't—what did he say? Why didn't he inspect the premises: And they were baffled, dumbfounded about even the mention of building inspector, like they didn't even know what the Court was talking about. All of this information could have been followed up clearly from June to August of '06, up to December of 2007. This is not something new.
>
> I have no motion before the Court indicating that the building inspector refused to do their [sic] job and requesting a motion to compel to enforce the building inspector to do an inspection. There was nothing of that nature.

We agree with the trial court's conclusion that defendants are not entitled to a new trial based upon this evidence. Even though the evidence could be considered "newly discovered," it is not cumulative, and it could have lead to a different result at trial, defendants have failed to demonstrate that they "could not with reasonable diligence have discovered and produced it at trial." *Hoven,* 9 Mich App at 173.

As the trial court noted, there is nothing in the record that would indicate that defendants had even tried to have the home inspected by the Hillsdale County Inspection Department in time for trial. As the trial court noted, defendants had the option of filing a motion to compel the inspection, or of asking for a continuance in order to wait for the inspection, neither of which they did. Therefore, the trial court properly denied defendants' motion for a new trial.

Affirmed in part and reversed in part. The trial court's grant of attorney fees is vacated. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell