In the Missouri Court of Appeals
Western District

TWEHOUS EXCAVATING, INC.,	)	
Respondent,	)	**WD83547**
v.	)	
	)	
JEFFERSON CITY RETIREMENT, LLC.,	)	**FILED: November 24, 2020**
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
THE HONORABLE DANIEL R. GREEN, JUDGE

BEFORE DIVISION TWO: LISA WHITE HARDWICK, PRESIDING JUDGE, THOMAS H. NEWTON AND KAREN KING MITCHELL, JUDGES

Jefferson City Retirement, LLC, ("JCR") appeals from the circuit court's judgment in favor of Twehous Excavating, Inc., ("Twehous") on Twehous's claims for breach of contract and quantum meruit. JCR contends that the court erred in granting Twehous relief on both claims because the claims were mutually exclusive and inconsistent as a matter of law, and the court's judgment allowed Twehous a double recovery. JCR further asserts that the court's judgment misapplied the law and was against the weight of the evidence. For reasons explained herein, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In 2013, JCR began building a retirement and assisted living community on property it owns in Jefferson City. JCR hired Omni Construction Company, Inc., ("Omni") as the general contractor on the project. Omni entered into a subcontract agreement with Twehous to provide excavation work under Omni's direction and supervision. JCR was not involved in negotiating or executing the subcontract agreement. The agreement provided that Omni would pay Twehous $827,800.00 for the work done pursuant to the agreement. Subsequent change orders increased this amount.

The subcontract agreement provided that each month, Twehous was to submit to Omni a progress pay application. The agreement further provided that Omni was to then submit pay applications to JCR for review and payment. When Omni submitted the pay applications, JCR was to review them and remit payment to Omni for the amount of the pay applications, less ten percent in retainage. "Retainage" is an amount withheld from pay applications to ensure that the job is completed, and it is paid at the end of the job. Within fifteen days after Omni received payment from JCR, Omni was to pay Twehous.

In November 2014, JCR terminated Omni as the general contractor for this project. When JCR terminated Omni, $91,663.50 in retainage had been withheld from Twehous under the first nine pay applications that Twehous had submitted to Omni. JCR, in turn, had withheld $487,127.44 in retainage from Omni. JCR never paid this retainage amount to Omni.

After JCR terminated Omni as the general contractor on the project, two representatives of JCR, one of whom was Joe Hawkins, JCR's Director of Construction, met with Randall Twehous ("Randall"), the Vice-President of Twehous, to discuss the amounts that Omni owed Twehous and to ask Twehous to complete the work due under the subcontract agreement. JCR also asked Twehous to perform additional work on the project beyond the work provided for in the subcontract agreement. For the additional work, JCR would pay Twehous on a time and material basis, less ten percent in retainage.

At that time, there was an outstanding pay application on work Twehous had performed under the subcontract agreement. JCR agreed to pay the outstanding pay application, less $6,887.16 in retainage. JCR's representatives also told Randall that JCR would make Twehous "whole" on the project and pay Twehous everything it was due, if Twehous stayed on the job. Randall interpreted this to mean that JCR would pay all of the retainage Twehous was owed on the work performed under the subcontract agreement. According to Randall, if JCR's representatives had told him up front that Twehous was not going to receive that retainage, he would have left the project because "[t]here was no point in me continuing if I knew I was going to be screwed out of that money." Twehous agreed to finish the work provided for in the subcontract agreement and to perform additional work as directed by JCR on a time and material basis.

After Twehous agreed to stay on the project, Randall sent an email to Hawkins setting forth the pricing terms for the work Twehous would do on a time

and material basis. Hawkins accepted the terms. Twehous performed the work, and JCR paid the amounts billed on a time and material basis, less retainage.

On October 1, 2015, Randall emailed JCR and asked when Twehous could expect final payment on the project. On October 8, 2015, JCR paid $41,310.00 in retainage withheld for the work done on a time and material basis. On October 14, 2015, Randall thanked JCR for the partial payment and made demand for the remainder of the retainage owed to Twehous, which was $98,550.65. This total consisted of the $91,663.50 in retainage that JCR withheld from Omni on pay applications that Twehous submitted to Omni for the subcontract work, plus the $6,887.16 in retainage that JCR withheld from Twehous on the outstanding pay application that Twehous submitted to JCR for the subcontract work after Omni was terminated. One month later, Hawkins responded to Randall's demand. In an email, Hawkins told Randall that JCR was undergoing arbitration with Omni and that JCR's "resources for money have been tapped out until we recoup costs from Omni."

Twehous subsequently filed a petition against JCR for breach of contract and quantum meruit. Twehous alleged that, under either theory, it was entitled to payment of the $98,550.65 in retainage. Twehous also asserted that it was entitled to attorney fees and interest under Section 431.180, RSMo 2016.[1] A bench trial was held. At trial, it was undisputed that Twehous performed all of the work

[1] All statutory references are to the Revised Statutes of Missouri 2016.

in the pay applications it submitted to Omni and JCR, and JCR accepted all of Twehous's work without complaint about quantity or quality. Likewise, there was no dispute that $98,550.65 was the amount that Twehous was owed in retainage for the work it performed. The dispute concerned who owed Twehous this amount. JCR contended that it paid the retainage to Omni and that Omni owed the retainage to Twehous, while Twehous argued that JCR withheld the retainage from Omni and, therefore, JCR owed the retainage to Twehous.

The court found in favor of Twehous on both its breach of contract and quantum meruit claims. The court found that, under either theory of recovery, the principal amount owed was $98,550.65. On the last page of its judgment, the court stated:

> IT IS HEREBY ORDERED that on Count I of Plaintiff's Petition for Breach of Contract, the Court renders judgment in favor of Plaintiff. The Court awards Plaintiff $98,550.65, plus interest at the statutory rate of one and one-half percent (1.5%) per month, commencing October 14, 2015, which will continue to accrue at the rate of $1,478.26 per month until paid in full. In addition, the Court hereby awards Plaintiff its attorney fees in the amount of $13,485.25.
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> In regard to Count II of Plaintiff's Petition [the quantum meruit claim], the Court hereby finds in favor of Plaintiff Twehous in the sum of $98,550.65, plus interest at the rate of one and one-half percent (1.5%) per month commencing October 14, 2015 and reasonable attorney fees in the sum of $13,485.25.

JCR filed a motion to amend the judgment and a motion for new trial, which the court denied. JCR appeals.

STANDARD OF REVIEW

In this bench-tried case, we will affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

In Point II, JCR contends the judgment was against the weight of the evidence. "Appellate courts act with caution in exercising the power to set aside a decree or judgment on the ground that it is against the weight of the evidence." *Ivie v. Smith*, 439 S.W.3d 189, 205 (Mo. banc 2014). An against-the-weight-of-the-evidence claim "presupposes that there is sufficient evidence to support the judgment." *Id*. (citation omitted). Thus, in reviewing such a claim, we will reverse on appeal "only in rare cases," when we have "a firm belief that the decree or judgment is wrong." *Id*. at 206. When reviewing the record in an against-the-weight-of-the-evidence challenge, we defer "to the circuit court's findings of fact when the factual issues are contested and when the facts as found by the circuit court depend on credibility determinations." *Id*. We recognize "that the circuit court is free to believe all, some, or none of the evidence offered to prove a contested fact," and we "will not re-find facts based on credibility determinations through [our] own perspective." *Id*.

ANALYSIS

In Point I, JCR contends the circuit court erred in granting Twehous relief under both its breach of contract and quantum meruit claims. JCR argues that the

two claims are mutually exclusive and inconsistent as a matter of law, and Twehous was required to elect its theory of recovery.

The doctrine requiring election of inconsistent theories of recovery provides:

> [A] party must elect between theories of recovery that are inconsistent, even though pled together as permitted by Rule 55.10, before submitting the case to the trier of fact. If two counts are so inconsistent that proof of one necessarily negates, repudiates, and disproves the other, it is error to submit them together. The determination of when two theories are inconsistent is heavily dependent upon the facts of the case. Theories are inconsistent and require an election only if, in all circumstances, one theory factually disproves the other.

Joseph F. Wagner, Jr. Revocable Tr. U/A v. Thomson, 586 S.W.3d 273, 278 (Mo. App. 2019) (quoting *Trimble v. Pracna*, 167 S.W.3d 706, 711 (Mo. banc 2005)). "A plaintiff is only entitled to be made whole once," so the election of theories doctrine prevents the plaintiff "from recovering more than one full recovery for the same harm." *Trimble*, 167 S.W.3d at 711. "The election of theories doctrine primarily applies in cases where the jury is asked to draw diametrically opposite inferences from a *single set of facts*." *Joseph F. Wagner, Jr. Revocable Tr. U/A*, 586 S.W.3d at 278 (internal quotation marks and citations omitted). However, when "there is independent and conflicting evidence to support either of two factual scenarios which would make a submissible case or defense, submission of both theories is routinely approved." *Id*.

In *Joseph F. Wagner, Jr. Revocable Trust U/A*, 586 S.W.3d at 278-80, this court found no instructional error when the circuit court submitted instructions on

breach of contract and unjust enrichment claims, and the jury found in favor of the plaintiff on both claims. We found that "the evidence lent itself to various factual scenarios that supported both contract and implied contract theories," and submission of both theories did not cause the jury to reach an inconsistent result. *Id*. at 279-80. Specifically, we explained that, "[a]lthough unjust enrichment implies a contract where none exists, the nonexistence of a contract is not an actual element of unjust enrichment; the elements of unjust enrichment include a benefit given, appreciated, and unjustly retained." *Id*. at 280. "Hence, the existence of a contract does not negate, repudiate, or disprove that a benefit was conferred, recognized, and unjustly retained." *Id*. Because the defendants disputed the contract's existence and the evidence allowed the jury to agree with defendants on that issue but still find that the defendants were unjustly enriched at the plaintiff's expense, we concluded that it was not improper to submit both breach of contract and unjust enrichment claims to the jury. *Id*.

The same principles apply in this case. Twehous presented evidence that an oral contract was formed when JCR asked Twehous to stay on the job after Omni was fired, Twehous agreed to stay and complete the work due under the subcontract agreement and to do additional work on a time and material basis, and JCR promised Twehous that it would be compensated in full for all of its work. JCR disputed the existence of this contract. Thus, Twehous also presented evidence that JCR received the benefit of its work, accepted its work, and did not pay Twehous for all of its work. Here, as in *Joseph F. Wagner, Jr. Revocable*

Trusts U/A, the evidence supported both theories, and the existence of a contract did not negate, repudiate, or disprove the elements of a quantum meruit claim. Twehous was not required to elect its theory of recovery, and it properly submitted both claims to the court. *Id*.

JCR argues that the court's finding in favor of Twehous on both claims and its finding that Twehous was entitled to the same damages on both claims allowed Twehous a double recovery. JCR is correct that a party "is not entitled to be made more than whole or receive more than one full recovery for the same harm." *Davis v. Cleary Bldg. Corp.,* 143 S.W.3d 659, 670 (Mo. App. 2004) (internal quotation marks and citations omitted). Consequently, "if the damages for two causes of action are the same, then the damage award merges." *Id*. (internal quotation marks and citations omitted). In its judgment, the court stated that the damages under the two theories of recovery were the same. Therefore, the damages merged into one award. *Id*. That the court recognized the damages merged into one award is evident from the language it used on the last page of the judgment. While the court found Twehous was entitled to the same amount of damages, interest, and attorney fees under both claims, the court actually "awarded" them only one time. The circuit court did not allow Twehous a double recovery.[2] Point I is denied.

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[2] JCR's reliance on *KC Excavating and Grading, Inc. v. Crane Construction Company*, 141 S.W.3d 401, 409 (Mo. App. 2004), to support its contention that the court's judgment allowed a double recovery is misplaced. In *KC Excavating*, the court entered judgment against the general contractor for breach of contract and the property owners for a mechanic's lien. *Id*. We held that this was improper, because allowing the plaintiff to collect both judgments against the two

In Point II, JCR contends the circuit court's finding in favor of Twehous on its breach of contract claim misapplied the law and was against the weight of the evidence. JCR argues that it was not a party to Twehous's subcontract agreement with Omni or in privity and that it did not execute any documents by which it agreed to assume Omni's obligations under the subcontract. Therefore, JCR insists that it was not a proper party to any claim by Twehous for breach of the subcontract agreement.

Twehous's breach of contract claim was not based on a breach of the subcontract agreement; rather, it was based on JCR's breach of the oral contract it made with Twehous after JCR terminated Omni. To succeed on its claim that JCR breached this oral contract, Twehous had to prove: "(1) the existence of a valid contract; (2) the rights and obligations of the respective parties; (3) a breach; and (4) damages." *Howard Constr. Co. v. Bentley Trucking, Inc.*, 186 S.W.3d 837, 844 (Mo. App. 2006) (citation omitted).

Viewed in the light most favorable to the verdict, the evidence established that, after JCR terminated Omni as general contractor on the project, Twehous and JCR entered into an oral contract pursuant to which Twehous agreed to finish the work under the subcontract agreement and to perform additional work for JCR on a time and material basis. In return, JCR agreed to make Twehous "whole" on the project by paying Twehous "everything" that it was owed. Twehous further

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defendants would allow it to recover at least a portion of its damages twice. *Id.* Here, there was only one defendant, and the damages for the two claims against that defendant merged into one award.

established that, although it performed all the work agreed upon and JCR accepted such work, JCR did not pay Twehous the $98,550.65 in retainage that Twehous was owed.

While JCR offered testimony from Hawkins that JCR did not retain any funds owed to any subcontractor, including Twehous, the circuit court expressly stated that it did not find this testimony credible. In rejecting this testimony, the court noted that the documents that JCR introduced showed that retainage was withheld from Omni for ten percent of the pay applications, and Omni withheld ten percent in retainage from Twehous. The court also noted that JCR's interrogatory answers confirmed that JCR withheld $487,127.44 in retainage from Omni that was never paid to Omni. We defer to the circuit court's credibility determinations and its decision to accept Twehous's evidence on this issue over JCR's. *Ivie*, 439 S.W.3d at 206. The circuit court did not misapply the law in finding that JCR breached its oral contract with Twehous, and this finding was not against the weight of the evidence. Point II is denied.

Having found no error in the court's entering judgment in favor of Twehous on its breach of contract claim, we need not address JCR's Points III and IV, which allege error in the court's judgment in favor of Twehous on its quantum meruit claim. Affirming the breach of contract claim alone supports affirming the judgment.

In Point V, JCR contends the circuit court misapplied the law in awarding Twehous attorney fees and interest under Section 431.180.[3] Section 431.180.1 states that "[a]ll persons who enter into a contract for private design or construction work after August 28, 1995, shall make all scheduled payments pursuant to the terms of the contract." Section 431.180.2 provides that "[a]ny person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay." Section 431.180.2 further provides that, in addition to damages, the court may award the prevailing party interest, "at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees."

JCR argues that Twehous was not entitled to attorney fees and interest under this statute because Twehous did not present any evidence of an express contract entered into by Twehous and JCR, and JCR did not execute any written agreements to assume the obligations of Omni under the subcontract agreement. We disagree.

[3] In its point relied on, JCR challenges only the attorney fees awarded under Section 431.180. In its argument, JCR expands its challenge to include the interest awarded under this section. The basis of JCR's challenge to the attorney fees award – that Section 431.180 is not applicable due to the lack of a contractual agreement containing a schedule of payments – fairly encompasses a challenge to the interest award, because the statute either allowed the court to award both attorney fees and interest, or it allowed the court to award neither. Therefore, we will include JCR's challenge to the interest award in our discussion. *See, e.g., Green v. Plaza in Clayton Condo. Ass'n*, 410 S.W.3d 272, 278-79 (Mo. App. 2013) (addressing an issue raised only in the argument under a point because the point fairly encompassed the issue).

As we found in Point II, *supra*, Twehous and JCR did, in fact, enter into an oral contract for construction work after JCR terminated Omni from the project. Nothing in Section 431.180.1 requires that the construction contract be in writing. Pursuant to the terms of the oral contract, JCR agreed to pay Twehous everything it was owed after Twehous completed the work. Although Section 431.180.1 refers to plural scheduled payments, "when a statute uses a plural number, any single matter also is included." *Vance Bros., Inc. v. Obermiller Constr. Servs., Inc.*, 181 S.W.3d 562, 564 n.4 (Mo. banc 2006) (citing § 1.030). Hence, "[m]ultiple payments are not necessary to invoke section 431.180"; a lump-sum or single payment is sufficient. *Id*. The circuit court found that, on October 14, 2015, Twehous made demand for the remaining $98,550.65 in retainage that JCR was supposed to pay it upon completion of the work. JCR failed to pay this amount and presented no viable defense for non-payment. Therefore, the circuit court did not misapply the law in ordering JCR to pay attorney fees and interest to Twehous under Section 431.180. Point V is denied.[4]

CONCLUSION

The judgment is affirmed.

LISA WHITE HARDWICK, JUDGE

ALL CONCUR.

[4] In the argument section under this point, JCR notes that the court's authority to award attorney fees and interest under Section 431.180 is discretionary, and it asserts several reasons why it believes the court should have exercised its discretion *not* to award attorney fees and interest in this case. JCR's point relied on does not fairly encompass this claim; therefore, it will not be addressed. *See, e.g., Richard v. Wells Fargo Bank, N.A.*, 418 S.W.3d 468, 475 (Mo. App. 2013).