COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00175-CV

LUCIA POWER — APPELLANT

V.

GSE CONSULTING, LP — APPELLEE

FROM THE 348TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 348-284170-16

MEMORANDUM OPINION[1]

I. INTRODUCTION

In this appeal from a final judgment rendered on a jury verdict, Appellant Lucia Power argues in a single issue that the trial court reversibly erred by refusing to submit a jury question on her claim for quantum meruit. We will affirm.

[1]*See* Tex. R. App. P. 47.4.

II. BACKGROUND

Appellee GSE Consulting, LP brokered agreements between energy-consuming commercial entities and energy-supplying retail energy providers (REPs). After GSE closed a deal and an REP started supplying energy to a consumer, the consumer paid the REP, the REP paid GSE pursuant to its agreement with GSE and based on the volume of energy that had flowed to the consumer, and only then did GSE pay a commission to the energy consultant who had brokered the deal between the consumer and the REP.

Power began working for GSE in June 2004 as a business-development representative (BDR). BDRs contacted commercial entities with the hope of scheduling a meeting between the entity and a GSE energy consultant. If successful, the energy consultant would make a sales presentation and handle the remainder of the transaction, if any.[2]

In July 2004, GSE and Power entered into a written employment agreement that outlined the terms of Power's employment as a BDR. One provision provided that Power was eligible to earn a sales commission (2–3% for deals that she originated), but another provision prohibited Power from receiving a sales commission if her employment had been terminated.

[2]Power described an energy consultant as "the customer's advocate"—the REPs were competing for the customer, and the energy consultant "gather[ed] a host of bids on behalf of any given client to find the best match for that client."

Sometime around March 2005, and after closing her first deal, GSE promoted Power to the position of energy consultant. According to Power, around the same time, one of GSE's owners, Jeremiah Collins, presented her with an employment agreement and instructed her to review it, sign it, and return it to him, which Power did. In addition to other terms, including provisions for both a car and a cell-phone allowance, the 2005 employment agreement provided that Power was eligible to receive a 20% sales commission on deals that she had closed but that were originated by a BDR and a 25% sales commission on deals that she had both originated and closed. At some point, GSE began paying Power a 30% sales commission. Over the next approximately six years, GSE paid Power as an energy consultant, consistent with the terms of the 2005 employment agreement, with the exception of the 30% sales commission rate.

Significantly, the 2005 employment agreement expressly conditioned GSE's obligation to pay Power a sales commission on GSE's first being paid its fee from the REP. According to Justin Helms, one of GSE's owners, GSE's policy of paying a commission only after GSE had been paid by an REP was not intended as a punitive contractual measure but was instead necessary from a financial perspective.[3] In light of GSE's commission-payment policy, its energy

[3]For several apparent reasons, it makes little business sense to pay a commission before receiving the corresponding revenue.

consultants accumulated "backlog" sales commissions from deals that they had already closed but for which GSE had not yet been paid.[4]

On October 31, 2011, GSE sold its assets to World Energy Solutions, Inc. (WES). Power negotiated with WES for an employment contract that contained more favorable terms than her 2005 employment contract with GSE but ultimately rejected WES's employment offer.[5] At the time of the sale, Power had backlog sales commissions, as did GSE's other energy consultants, but GSE did not pay Power any of them. Power later sued GSE for breaching its obligation to pay her sales commissions. She also alleged a claim for quantum meruit and sued WES. Power settled with WES but proceeded to trial against GSE.

At trial, Power confirmed that she was "suing on" the 2005 employment agreement. She testified that GSE had failed to comply with the 2005 employment agreement by failing to pay her approximately $201,000 in backlog sales commissions that existed as of October 31, 2011—the date that WES

[4]Helms testified, "A backlog commission, I would define it as if you signed up a five-year deal and you're into month one, then months . . . 2 through 60, those are the backlog. So it's an amount that we haven't been paid yet."

[5]Power asked for a salary of $50,000; GSE had been paying her a salary of $35,000 (or $40,000, according to Power). Power asked for a 50% sales commission on deals closed after October 31, 2011; GSE had been paying her either a 20%, 25%, or 30% sales commission. Power asked that she be paid backlog sales commissions regardless of whether her employment is terminated; GSE's policy was the opposite. Power asked for a $50,000 signing bonus; GSE, not WES, offered to pay her $10,000. Power asked that her employment agreement contain a clause identifying Texas as the venue for any legal proceedings.

purchased GSE's assets. Power also sought an additional approximately $141,000 in underpaid sales commissions, which she calculated by cross-referencing 413 "deal sheets" with seven-and-a-half years of sales-commission statements.

Helms, Collins, and Byron Biggs, another GSE owner, each testified that although Power had been an energy consultant and had largely been paid in accordance with the terms of the 2005 employment agreement, her 2004 employment agreement was the operative contract at the time of the sale to WES because GSE did not have a signed copy of the 2005 employment agreement on file.[6] Notwithstanding the difference of opinion over which employment contract was operative, Helms, Collins, and Biggs each testified that GSE had no obligation to pay Power her backlog sales commissions because under the 2005 employment agreement, GSE's obligation to pay Power's sales commissions was conditioned on GSE's first being paid by an REP, and after GSE sold its assets to WES, the REPs quit paying GSE and began paying WES.[7]

GSE instead maintained that WES was responsible for paying Power's backlog sales commissions. As part of the transaction between GSE and WES, GSE assigned its employee agreements to WES, and WES assumed GSE's

[6]Collins denied giving Power the 2005 employment contract.

[7]Power acknowledged that if the 2004 employment agreement somehow controlled, her employment terminated when WES purchased GSE, thus prohibiting her from receiving backlog sales commissions.

contractual obligations under the agreements. Both Helms and Collins testified that in purchasing GSE's assets, including its ongoing business, WES had discounted the value that it had attributed to GSE's outstanding future cash flows, reflecting an expectation that WES was responsible for paying the energy consultants' backlog commissions. Power acknowledged that during her employment negotiations with WES, its CEO clarified that she would forfeit her right to any backlog sales commissions if she did not accept WES's employment offer.

As for Power's claim for underpaid sales commissions, Helms testified that to accurately verify whether Power had been underpaid, one would have to compare the commissions that she had been paid against the relevant supplier statements, which reflected the actual amounts that the REPs had paid GSE, not against the deal sheets, which only estimated what an REP would pay GSE on a particular deal, as Power had done.

The trial court rejected Power's request for a jury question on her claim for quantum meruit. Jury question number one asked, "Did GSE Consulting, LP fail to comply with the agreement, if any, to pay Lucia Power pre-sale commissions?" The jury answered, "No." Jury question number two asked, "Did GSE Consulting, LP fail to comply with the agreement, if any, to pay Lucia Power post-sale commissions?" The jury answered, "No." The trial court denied Power's motion for new trial, and this appeal followed.

III. QUANTUM MERUIT JURY QUESTION

In her only issue, Power argues that the trial court erred by failing to submit a jury question on her claim for quantum meruit because she pleaded the claim and submitted evidence to support it. GSE responds that the trial court properly refused to submit the question because Power was precluded from recovering in quantum meruit as a matter of law. Power disagrees and alternatively argues that an exception applies to the rule relied upon by GSE.

We review a trial court's decision to submit or refuse a jury question or instruction for an abuse of discretion. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). Although a trial court is generally obligated to submit a theory of recovery when it is raised by the written pleadings and the evidence, *see* Tex. R. Civ. P. 278, the trial court here could not have abused its discretion by refusing to submit a jury question on Power's claim for quantum meruit if her recovery on that claim was barred as a matter of law. *See Powell Elec. Sys., Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 123 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("A trial court errs by submitting to the jury theories of liability that are not legally viable . . . ."); *UMLIC VP LLC v. T & M Sales & Envtl. Sys., Inc.*, 176 S.W.3d 595, 608 (Tex. App.—Corpus Christi 2005, pet. denied) ("An issue that involves the determination of a matter of law should not be submitted to the jury.").

Quantum meruit is an equitable remedy. *Houston Med. Testing Servs., Inc. v. Mintzer*, 417 S.W.3d 691, 695 (Tex. App.—Houston [14th Dist.] 2013, no pet.). It "implies a contract in circumstances where the parties neglected to form

one, but equity nonetheless requires payment for beneficial services rendered and knowingly accepted." *Id.* It has long been the law, however, that "where an adequate and complete remedy at law is provided, our courts, though clothed with equitable jurisdiction, will not grant equitable relief." *Rogers v. Daniel Oil & Royalty Co.*, 130 Tex. 386, 392, 110 S.W.2d 891, 894 (1937). Thus, "[a] party generally cannot recover under quantum meruit where there is a valid contract covering the services or material furnished." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) (orig. proceeding) (italics removed). When a written contract unambiguously covers the subject matter of the parties' dispute, "there [is] no issue for the jury to decide"; the express-contract rule bars recovery in quantum meruit as a matter of law. *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 683–84 (Tex. 2000); *see Christus Health v. Quality Infusion Care, Inc.*, 359 S.W.3d 719, 725 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (op. on reh'g) (holding that express-contract rule barred quantum-meruit recovery as a matter of law).

A. The Express-Contract Bar Applies

Throughout her testimony, in one way or another, Power repeatedly confirmed that she was relying on the 2005 employment agreement to support her claim for recovery of unpaid sales commissions, including backlog sales commissions. The 2005 employment agreement provided that Power was eligible to receive "performance commissions," that she was eligible for a 20% sales commission on deals that she had closed but that were originated by a

BDR, that she was eligible for a 25% sales commission on deals that she had both originated and closed, that a penalty could be assessed against her sales commissions if she failed to meet her monthly sales quota, that she could receive withheld sales commissions if her cumulative revenue "generation" exceeded her cumulative quota, and that she was not entitled to receive a sales commission until GSE was paid its fee by the REP. The 2005 employment agreement expressly covered Power's entitlement to sales commissions—the very subject of her dispute with GSE.

Power nevertheless argues that she was not barred from recovering in quantum meruit because "neither party identified any express language in either the 2004 Contract or the 2005 Contract that addressed the parties' rights and obligations in the event GSE sold its assets." The supreme court previously rejected a similarly styled argument.

In *Fortune*, four natural gas producers sued Conoco after a dispute arose between the parties involving the prices that Conoco had paid the producers over a five-year period. 52 S.W.3d at 673. One of the disputes concerned the producers' claims that they were entitled to recover the value for their share of field liquids that collected in Conoco's pipeline system after Conoco had taken delivery of and title to the producers' gas but before the gas stream had reached Conoco's processing plants. *Id.* at 673, 683. Conoco had previously compensated the producers for liquid hydrocarbons based on the proceeds that it had received for all liquids, including field liquids, which were collected and

separately sold, but at some point, Conoco quit accounting for the proceeds that it had received for field liquids when calculating the amounts owed under its contracts with the producers. *Id.* at 675. The supreme court ultimately concluded that two of the producers, and one producer before its contract with Conoco had expired, were barred from recovering under a theory of unjust enrichment because their written, unambiguous contracts with Conoco covered the subject matter of the producers' unjust-enrichment claims. *Id.* at 684–85. Specifically,

> The written contracts that Conoco had with Fortune, Tucker, and Hankamer dealt with the sale of the entire stream of gas produced by those plaintiffs' wells. The term "gas" was defined by the contracts as "all elements and compounds and mixtures thereof comprising the effluent vapor stream as produced from each lease or well." The contracts further provided that Conoco took title to "the gas and all components" at specified delivery points. Those delivery points were upstream from the point at which field condensate formed, which meant that the field liquids separated out of the gas stream after Conoco had taken delivery of the gas. The contracts specify what Conoco was obligated to pay for "gas delivered," which was in turn contractually defined as the entire gas stream that was delivered at the delivery points. *The fact that the pricing formula does not specifically reference field liquids does not mean that the contracts did not cover those liquids. . . . [T]he contract governs the parties' respective rights and obligations with regard to the entire stream of gas. The subject matter of the written contracts is the entire gas stream. The subject matter of the unjust enrichment claims is field liquids, a part of that gas stream*.

Id. at 684 (emphasis added).

Likewise, here, although the 2005 employment agreement did not specifically reference Power's eligibility for backlog sales commissions if GSE is sold, it did condition GSE's obligation to pay Power a sales commission on GSE

first being paid its fee from the REP, and the evidence was undisputed at trial that after the October 31, 2011 asset sale, the REPs began paying WES instead of GSE. The 2005 employment agreement effectively covered the precise subject matter of Power's dispute with GSE—her eligibility for backlog sales commissions after GSE's sale to WES.

In a similar vein, Power argues that the express-contract rule does not apply because "neither the 2004 contract nor the 2005 contract provided for the payment of 30% commissions, but that is what Plaintiff had been paid." The subject matter of the parties' dispute was not the *rate* at which Power was paid sales commissions but her *eligibility* for backlog sales commissions after GSE's sale to WES. That the parties orally modified Power's rate at some unknown point in time did not render obsolete the otherwise relevant provisions contained in the 2005 employment agreement establishing the very fact that she was entitled to receive sales commissions for her performance of services for GSE.

B. GSE Had No Obligation to Obtain a Jury Finding

Power additionally argues that it was incumbent upon GSE to obtain a jury finding that an express contract covered the parties' dispute because the parties did not agree which agreement, if any, controlled Power's entitlement to backlog sales commissions. According to Power, "The jury's answers do not tell us what the parties' agreement, if any, was. . . . How do we know if the jury answered 'No' to Question 1 and Question 2 because they found that there was not, in fact, any agreement? We don't." We disagree for two reasons.

First, jury question numbers one and two were worded in such a way that by answering "No," the jury could have found that an express contract did exist but that GSE did not fail to comply with it. This is all that is necessary. Power asserts no argument challenging jury question numbers one or two.

Second, and more importantly, no finding was necessary under *Fortune*. There, the trial court rendered judgment for the natural-gas producers on their claims for unjust enrichment, and the court of appeals affirmed, holding that Conoco had waived its defense to the producers' claims for unjust enrichment by failing to secure a jury finding that Conoco's express contracts with the producers governed the treatment of field liquids. *Fortune*, 52 S.W.3d at 675, 683. The supreme court disagreed in part. It held that Conoco had no obligation to obtain a jury finding regarding the existence of an express contract as to Fortune, Tucker, and Hankamer before 1992 because each of the contracts that Conoco had with those producers were written, admitted into evidence, and unambiguously covered the subject matter of the dispute (as we thoroughly explained above). *Id.* at 683. "Under [those] circumstances, there was no issue for the jury to decide. The effect of the written contracts on claims for unjust enrichment is one of law." *Id.*

Conversely, the evidence did not reflect the specific terms of the arrangement that Conoco had with Cox after 1990 or with Hankamer after its 1990 contract expired in 1992—both producers delivered their gas to Conoco, and Conoco paid them without a written agreement. *Id.* at 685. The supreme

court reasoned, "We do not know whether the parties' agreements covered the entire stream of gas or only distinct components of the gas stream." *Id.* Under those circumstances—"[w]hen the existence of or the terms of a contract are in doubt"—it was incumbent upon Conoco to secure a jury finding that an express contract covered the subject matter of the dispute. *Id.*; *see Coker v. Coker*, 650 S.W.2d 391, 393–94 (Tex. 1983) (reasoning that an unambiguous contract is construed as a matter of law but that an ambiguous contract creates a fact issue for the jury's resolution).

Power's 2005 employment agreement with GSE is like the contracts that Conoco had with Fortune, Tucker, and Hankamer. The written terms clearly and unambiguously covered the subject matter of Power's claim for equitable relief, obligating the trial court to construe the agreement as a matter of law and eliminating GSE's obligation to secure a jury finding that an express contract covered Power's claim for quantum meruit.

C. No Exception Applies

For the first time in her reply brief, Power alternatively argues that her claim for quantum meruit was not barred because, under an exception to the express-contract rule, she partially performed an express contract that was unilateral in nature.[8] *See Truly v. Austin*, 744 S.W.2d 934, 936–37 (Tex. 1988); *see also City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011)

[8]In a footnote in her opening brief, Power stated that no exception to the express-contract rule applied.

(explaining that unlike a bilateral contract, in which both parties make mutual promises, a unilateral contract is created when a promisor promises a benefit if a promisee performs). The exception is inapplicable for several reasons.

Power is not entitled to the partial-performance exception because there is no evidence that she partially performed her obligations as an energy consultant. Instead, Power took the position at trial that she was entitled to recover her backlog and underpaid sales commissions because she had *fully* performed her contractual responsibilities by brokering deals between commercial entities and REPs. Power's course of conduct and corresponding arguments at trial are clearly incompatible with any application of the partial-performance exception. *See Gulf Liquids New River Project, LLC v. Gulsby Eng'g*, 356 S.W.3d 54, 71 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (reasoning that partial-performance exception did not permit contractor to recover in quantum meruit because jury found that it had *substantially* performed under contract); *Montclair Corp. v. Earl N. Lightfoot Paving Co.*, 417 S.W.2d 820, 830 (Tex Civ. App.—Houston 1967, writ ref'd n.r.e.) ("It has long and many times been held in this State that though there be an express contract there may be a recovery in quantum meruit if there has been partial performance as distinguished from *full* performance." (emphasis added)).

Further, we cannot ignore that, generally, quantum meruit is available when nonpayment for services rendered would result in an unjust enrichment to the party benefited by the work. *See Gibson v. Bostick Roofing & Sheet Metal*

Co., 148 S.W.3d 482, 489 (Tex. App.—El Paso 2004, no pet.). As explained, the 2005 employment agreement unambiguously conditioned GSE's obligation to pay Power a sales commission on GSE's first being paid its fee by an REP. The evidence conclusively demonstrated that no REP paid GSE after the asset sale on October 31, 2011, the date that Power confirmed marked the beginning of her claim for backlog sales commissions. Because GSE was not unjustly enriched by any post-October 31, 2011 REP payments, permitting Power to recover under an exception to the express-contract rule would have the undesirable effect of working an inequity upon GSE, as it would be paying a commission on funds that it did not receive. The partial-performance exception to the express-contract rule cannot apply.

The trial court did not abuse its discretion by refusing to submit a jury question on Power's claim for quantum meruit. *See HFE Dev. Corp. v. Wilbourne*, No. 03-03-00322-CV, 2004 WL 1171680, at *4 (Tex. App.—Austin May 27, 2004, no pet.) (mem. op.) (holding similarly). We overrule Power's only issue.

IV. CONCLUSION

Having overruled Power's sole issue, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and KERR, JJ.

DELIVERED: June 22, 2017