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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SCOTT and GAYLENE YOUNG, husband and wife, Respondents and Cross-Appellants, v. ROBERT FRANK and JANE DOE FRANK, husband and wife, and the marital community composed thereof, d/b/a "BOB FRANK HOMES, LLC," and BOB FRANK CONSTRUCTION, LLC, a Washington limited liability company, Appellants.	)	No. 29550-8-III UNPUBLISHED OPINION

Sweeney, J. — Essential to most theories of recovery (like promissory estoppel, unjust enrichment, contract implied in fact) is the receipt of a benefit by one party at the expense of another. Here, a contractor was led along in the justifiable belief that the plaintiffs would buy a house after he built it. The court had correctly concluded that there was no express contract for the sale of this real property. The plaintiffs never took

title or received the benefit of the real property. The builder did not then meet any of the requirements for legal or equitable relief and we reverse the decision of the court to the extent that it awarded the builder damages based on equitable theories. We affirm the balance of the judgment and we award attorney fees and costs to the plaintiffs.

FACTS

Scott and Gaylene Young liked a home they saw at 5117 Camus Lane in Veradale, Washington. Robert Frank of Bob Frank Construction, LLC (Mr. Frank) had built the home. Mr. Frank and the Youngs discussed building a similar home on a vacant lot at 5206 Camus Lane. They signed something called a "lot reservation agreement" on March 21, 2007. The Youngs paid a $1,250 deposit to Mr. Frank. The "lot reservation agreement" was hand written on a standard real estate purchase and sale agreement form. After a heading entitled "PURCHASE PRICE," someone hand wrote, "TBD [to be determined] & mutually agreed upon." Clerk's Papers (CP) at 30; Ex. 4. After the heading "ADDENDA AND ADDITIONAL PROVISIONS," someone hand wrote "$250 of $1250 lot Res. Fee non refundable contingent upon feasibility study—specs & materials etc. & all parties agreeing to same & this period shall be 30 days." CP at 30; Ex. 4. They later added an addendum. It provided:

> Purchasers wish to proceed with construction. . . . [T]otal bid will change from the $880,000. Agreement contingent upon Builder/Seller & Purchaser agreeing on "final" dollar amounts & specs. etc. & shall be contingent until

> 4-30-07. Some more of the $1250 lot reservation fee will be used to obtain additional figures & revisions etc. At removal of Purchasers' contingency Buyer & Seller will enter into a construction agreement/contract.

CP at 37; Ex. 5.

Over the next few months, Mr. Frank and the Youngs discussed and revised the home plans. On May 17, 2007, they signed a similar "Custom Construction Proposal" that listed the "total bid" as $1,040,600 as well as a list of additional costs. CP at 41-45; Exs. 9, 10. The Youngs also paid a $50,000 deposit on May 17, 2007.

Construction began. Both parties had the property appraised. Mr. Frank had it appraised to get a construction line of credit. The Youngs had it appraised to get a home loan. Both appraisals valued the house at $850,000. The Youngs' appraisal meant that they could only borrow 80 percent of $850,000 rather than 80 percent of $1,040,600.

The Youngs told Mr. Frank on April 1, 2008, that they would rescind their offer to buy the house unless he reduced the price to $850,000. He refused. The Youngs sued Mr. Frank on May 8, 2008. They alleged conversion; "quantum meruit/unjust enrichment"; violations of chapter 64.06 RCW for failure to provide a seller's disclosure statement; intentional misrepresentation; negligent misrepresentation; that the March 21, 2007 lot reservation agreement was not an enforceable agreement for the sale of land; and violation of the Consumer Protection Act, chapter 19.86 RCW. Mr. Frank

counterclaimed. He alleged breach of an agreement for the sale of land, breach of construction contract, wrongful rescission, and "quantum meruit and unjust enrichment."

The dispute proceeded to a bench trial. Both parties and their real estate agents testified that they never intended the lot reservation agreement to be a contract for the sale of land. There was ample but conflicting testimony over whether the parties intended to contract for the sale of real estate and whether they had agreed to a price. Report of Proceedings (RP) (Jan. 26, 2010) at 312; RP (Jan. 27, 2010) at 28-31, 47; RP (Feb. 1, 2010) at 334, 348.

The trial court found that the parties never agreed to a price and that there was no mutual assent to the essential terms of a contract for the sale of real property. CP at 2415 (Findings of Fact (FF) 32, 34); CP at 2416 (Conclusion of Law (CL) 5). But the court ultimately concluded that there were sufficient grounds for Mr. Young to recover in equity:

> 10. The defendant, in reasonable reliance upon plaintiffs' actions, expended significant labor and money responding to plaintiffs' requests in expectation of completing construction and subsequent sale to plaintiffs.
>
> . . . .
>
> 12. Defendant's reasonable reliance regarding construction of the subject real property resulted in a detriment.
>
> 13. Plaintiffs made commitments and acted in accordance with those commitments to defendant regarding their intent to purchase a custom built home.
>
> 14. Plaintiffs knew or should have reasonably know [sic] that defendant

> would reply upon those actions or commitments and began construction accordingly.
> 15. Defendants did in fact change their position by expending considerable time, effort and money starting and continuing the construction of real property and were justified in so doing.
> 16. By the time defendants were aware of the fact plaintiffs were not going to go forward with the purchase, the vast majority of construction was completed, resulting in an injustice to defendants.

CP at 2416-17.

The court then awarded damages to Mr. Frank:

> An appropriate remedy under the circumstances is to compensate defendant by allowing him to retain the $50,000 payment received May 17, 2007, any materials/supplies provided by plaintiffs plus interest in excess of the $50,000 retained that is incurred on the construction loan for the period beginning April 1, 2008 until September 30, 2010 or closing after sale of the house, whichever event occurs first.

CP at 2417 (CL 17) (footnote omitted). The court did not characterize the remedy as the result of any specific equitable doctrine. The court entered a judgment for Mr. Frank for $31,751.50.

On November 19, 2010, the Youngs moved for attorney fees. Mr. Frank responded and the Youngs replied. The Youngs filed a notice on February 10, 2011, that they would present findings, conclusions, and judgment on February 25. They attached a copy of the proposed judgment. Mr. Frank objected and offered his own proposed findings, conclusions, and judgment on February 18. The Youngs replied on

February 24, and filed an amended proposed judgment. The court signed and filed findings, conclusions, and judgment on April 11. It concluded that the Youngs were entitled to $158,676.01 in attorney fees and costs.

On April 15, 2011, the Youngs e-mailed Mr. Frank another proposed judgment and told Mr. Frank that it would be presented on April 20. The court awarded the Youngs $158,676.01 in attorney fees and costs on April 20. The next day, Mr. Frank moved to vacate the judgment because it did not comply with CR 54(f)'s notice requirements. The court denied the motion:

> You did have notice of everything but the amount that I chose. You had the findings and conclusions exchanged by both of you and worked on them. You had the attorney fee billing that was submitted to work on, dispute and fight about and you did. And I had briefing on those matters more than five days. Ultimately, after I reviewed everything several times and in some detail with red lining and yellow lining and a lot of pages and a lot of billing and a lot of entry and trying to determine what of that bill was submitted, included time that should not be allowed because of the unique cause of action we were talking about that succeeded in the plaintiffs' case.
>
> . . . The work on that document and documents was put in by the Court and all the parties had submitted and had time to argue about what they thought in that, in each other's submissions was good, bad, or indifferent. All of that was considered by the Court, was in the Court's possession and the dollar amount chosen by the Court was the Court's conclusion as to what of the total bill presented was allowed.
>
> I do not see where there has been any disadvantage to either side during the procedural process of this matter. . . . I had both sides argue well and present well all of the best they had to offer and I accepted that and then I made a call. That call is not going to change. So I'm not going to vacate the order.

RP (May 13, 2011) at 12-13.

Both parties appeal.

DISCUSSION

I. Equitable and Contract Implied-In-Fact Theories

At trial, Mr. Frank took the position that the exchange of documents was sufficient to rise to the level of an express contract. RP (Jan. 25, 2010) at 126. Here on appeal, he relies on a number of equitable and implied contract theories to support the court's award of damages and to support his further claims for recovery; but he no longer claims that they had an express contract for the sale of real estate. Br. of Appellant at 18-31. Mr. Frank raises a number of complaints but very little in the way of concrete specific analysis of the legal or equitable theory upon which such an award would be based. The overarching question here is whether the circumstances set out in the court's findings of fact are sufficient to support an award based on some theory in equity.

Of course, we review the court's findings for substantial evidence. *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001). But there is no serious challenge to the court's finding here. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) ("It is incumbent on counsel to present the court with argument as to why specific findings . . . are not supported by the evidence."). And so the findings

are verities on appeal. *Id.* We then review the court's conclusions of law to decide whether they are supported by the findings and whether they in turn support a theory of recovery. *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329-30, 937 P.2d 1062 (1997).

A. Contract Implied in Fact

The documents here are insufficient to support the written mutual exchange of promises necessary to support an express contract for the sale of real estate. *See Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 318, 481 P.2d 17 (1971) (a contract for the cash sale of land could be enforced because it included a legal description and a method for determining price). Mr. Frank argues nonetheless that the court's findings support a contract implied in fact and that "part performance" then relieves him of the necessity of satisfying the statute of frauds. Br. of Appellant at 18-31.

"The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention." *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957). It requires a showing of mutual assent to a contract's essential terms, sufficiently definite terms, and consideration. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). A contract implied in fact is "an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from

circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other." *Johnson*, 50 Wn.2d at 91.

The problem with applying contract implied in fact here is that the court found that there was no mutual assent and concluded that, at most, the parties entered into an agreement to agree. CP at 2416 (CL 1, 5-7). Indeed, one of the most essential terms of any contract for the sale of real property—the selling price—was never agreed upon. CP at 2415 (FF 32, 34). There is no mutual assent to sufficiently definite terms and thus no contract. And the court correctly so concluded.

B. Part Performance

Mr. Frank contends that once the court implies a contract in fact, then the equitable doctrine of part performance can be used to circumvent the statute of frauds. We need not consider whether the dealings here are sufficient to satisfy the doctrine of part performance since there is no contract, express or implied. Nonetheless, we elect to briefly review the essentials to apply this doctrine.

"Every conveyance of real estate, or any interest therein . . . shall be by deed" and that "[e]very deed shall be in writing." RCW 64.04.010, .020. Part performance requires a showing of three elements: "(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent,

substantial and valuable improvements, referable to the contract." *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995). We are unable to find a single case in which the courts were willing to obligate parties to buy and sell real property based on the doctrine of part performance where there was no express contract. *See Kruse v. Hemp*, 121 Wn.2d 715, 723, 725, 853 P.2d 1373 (1993) (refusing to enforce option to buy in written lease contract because the contract was too indefinite to show mutual assent); *Powers v. Hastings*, 93 Wn.2d 709, 722, 612 P.2d 371 (1980) (enforcing oral contract providing for option to buy dairy farm after three year lease); *Miller v. McCamish*, 78 Wn.2d 821, 831, 479 P.2d 919 (1971) (enforcing oral contract for option to buy farm after three year lease). In other words, the court started with proof of an oral contract or an attempt at a written contract. *See Miller*, 78 Wn.2d at 829 ("'[T]he contract [must] be proven by evidence . . . which leaves no doubt as to the terms, character, and existence of the contract.'" (quoting *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623 (1947))).

Ultimately here, the court concluded, based on ample findings, that there was no mutual intent to contract. *See Park v. Ross Edwards, Inc.*, 41 Wn. App. 833, 838, 706 P.2d 1097 (1985). We agree. Again the findings will not support the elements necessary for a contract implied in fact. And the equitable doctrine of part performance does not apply to contracts implied in fact for the sale of real property, in any event.

C. Unjust Enrichment

Problems also derail Mr. Frank's claim based on unjust enrichment. First, there is a bit of conflation in the briefs on contract implied in fact, quantum meruit, and unjust enrichment. Br. of Appellant at 17-18; Br. of Resp't at 20-21. But that is certainly understandable given the confusion in the case law. *See Young v. Young*, 164 Wn.2d 477, 483-86, 191 P.3d 1258 (2008).

An award of damages under unjust enrichment is, of course, predicated on the notion that the Youngs benefited from Mr. Frank's efforts. *See id.* at 487. Unjust enrichment is the "'[g]eneral principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated.'" *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159, 810 P.2d 12, 814 P.2d 699 (1991) (quoting Black's Law Dictionary 1535 (6th ed. 1990)). Unjust enrichment follows when "one retains money or benefits which in justice and equity belong to another." *Id.* at 160 (emphasis omitted) (citing *L&A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 630 (Utah 1980)).

Here, no benefit was ever conferred on the Youngs; they ultimately wound up with neither the land nor the house. *See Bailie Commc'ns*, 61 Wn. App. at 160. Mr. Frank

kept title to the land with all of its improvements. The facts here do not support the equitable theory of unjust enrichment.

D. Promissory Estoppel

The court's conclusions of law suggest the court's award of damages to Mr. Frank was based on the equitable doctrine of promissory estoppel. CP at 2416-17. And the parties agree as much. Br. of Appellant at 26; Br. of Resp't at 36-38.

Promissory estoppel can render a promise enforceable without the usual requirement of consideration. *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13, 98 P.3d 491 (2004). There are a number of requirements, however. There must be a promise that the promisor reasonably expects the promisee to change his position. *Id.* The promisee must actually change his position based on that promise. *Id.* And, as with most equitable remedies, injustice can be avoided by enforcement of the promise. *Id.*

The doctrine does not apply here for several reasons. First, there must be a promise. And there is none. A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1); *see* § 90 cmt. a (referring to promise definition in § 2). The Youngs may have "made commitments and acted in accordance with those commitments to defendant [Mr. Frank] regarding their

intent to purchase a custom built home," CP at 2416 (CL 13), but those commitments do not rise to the level of a promise to buy the house. And, "[a]lthough promissory estoppel may apply in the absence of consideration, the doctrine may not be used as a way of supplying a promise." *Elliott Bay Seafoods*, 124 Wn. App. at 13.

Second, while one might conclude that the Youngs led Mr. Frank along, the court here correctly concluded that the agreement, such as it was, anticipated an agreement in the future. CP at 2416.

Finally, there is not the necessary written document to convey real property required by the statute of frauds. RCW 64.04.010, .020. And our Supreme Court has repeatedly rejected promissory estoppel as a way for circumventing the statute of frauds. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 398-401, 879 P.2d 276 (1994) (citing *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644 (1980); *Lige Dickson Co. v. Union Oil Co.*, 96 Wn.2d 291, 635 P.2d 103 (1981); *Lectus, Inc. v. Ranier Nat'l Bank*, 97 Wn.2d 584, 647 P.2d 1001 (1982); *Family Med. Bldg, Inc. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 702 P.2d 459 (1985)). Mr. Frank is therefore not entitled to recover under the equitable theory of promissory estoppel.

II. Disclosure Statement

The Youngs also argue that they had a right to rescind the agreement because Mr.

Frank failed to provide a disclosure statement. First, as we have concluded, the Youngs had neither a legal nor an equitable obligation to pay anything. And second, RCW 64.06.030 requires that "the seller shall deliver to the buyer a completed, signed, and dated real property transfer disclosure statement" "not later than five business days . . . after mutual acceptance of a written agreement between a buyer and a seller for the purchase and sale of residential real property."

The plain language of the statute says that the seller "shall" deliver the statement "not later than five business days . . . after mutual acceptance of a written agreement." RCW 64.06.030. So Mr. Frank could not have breached that duty until five business days after mutual acceptance of a written agreement. *Id.* The trial court's uncontested findings and conclusions indicate that there was no signed agreement to buy land. CP at 2415 (FF 31), 2416 (CL 7). There could not then have been a breach that would have entitled the Youngs to rescind; there was nothing to rescind.

III. Attorney Fees

Whether an award of attorney fees is authorized is a question of law that we will review de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

A trial court may award attorney fees to the prevailing party when authorized by

contract, statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).

Mutuality of remedy is an equitable principle that provides that a party who prevails by proving that a contract is invalid may seek attorney fees if the invalid contract provided for attorney fees. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 787, 197 P.3d 710 (2008); *see Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). Mutuality of remedy is a "'well recognized principle of equity.'" *Kaintz*, 147 Wn. App. at 789 (citing *Mt. Hood Bev. Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003)).

Mr. Frank argues that the Youngs did not substantially prevail because the court's May 24, 2010 findings and November 2010 judgment both state, "Plaintiffs' claims are denied and that they take nothing thereby." Br. of Appellant at 41. However, the Youngs' complaint claims that the purchase and sale agreement was invalid and the trial court concluded that there was no valid purchase and sale agreement. CP at 9, 2416 (FF 7). The Youngs, then, did prevail on one claim and Mr. Frank failed on all claims. The Youngs then substantially prevailed.

An attorney fees award was also proper under the mutuality of remedy theory. *Kaintz*, 147 Wn. App. at 787 (a party who prevails by proving that a contract is invalid

may seek attorney fees if the invalid contract provided for attorney fees). Mr. Frank alleged in his counterclaim and at trial that the lot reservation agreement was an enforceable contract for the sale of real estate. That document provided for an award of attorney fees to a prevailing party: "If Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorney's fees." Ex. 4. The trial court then properly awarded the Youngs attorney fees.

IV. Motion To Vacate Attorney Fees

Mr. Frank contends that the judgment awarding attorney fees to the Youngs should be vacated because the court entered it without Mr. Frank receiving proper notice under CR 54(f) ("No . . . judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed . . . judgment."). Br. of Appellant at 48-50.

Motions to vacate "are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of manifest abuse of discretion." CR 60(b)(5) provides that "the court may relieve a party . . . from a final judgment" if "[t]he judgment is void." CR 60(b) lists 10 other reasons why a party might be entitled to relief from a judgment. A judgment entered in violation of CR 54(f) is void if the lack of

notice caused prejudice. *Burton v. Ascol*, 105 Wn.2d 344, 352, 715 P.2d 110 (1986). CR 54(f)(2) provides that "[n]o . . . judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed . . . judgment." "The purpose of the rule is to give opposing counsel an opportunity to object to the form or content of the judgment before it is entered." 4 Karl B. Tegland, Washington Practice: Rules Practice at 302 (CR 54) (5th ed. 2006). A party may be prejudiced if it is unable to timely appeal or argue issues it wished to raise. *See Burton*, 105 Wn.2d at 352-53.

Mr. Frank does not identify for us which of these 11 reasons he relied on to try to vacate the judgment. Br. of Appellant at 48-50; Reply Br. of Appellant at 17; CP at 4107-16; RP (May 13, 2011) at 4-8. But, assuming he relied on CR 60(b)(5) because he alleges that the judgment is void, Mr. Frank failed to allege or show prejudice. He suggests that he had insufficient notice of the amount of the judgment and that entering the judgment with only three days' notice caused interest to accrue prematurely. Reply Br. of Appellant at 17. Presumably this is because, had Mr. Frank received five days' notice of the entry of judgment, interest would have started accruing on April 22, 2011, rather than April 20. But, Mr. Frank had notice of the amount of the judgment as of April 11. And, while interest may have started accruing on April 20 instead of April 22,

the early entry of the judgment did not prejudice Mr. Frank's right to appeal or raise arguments he wished to make. *See Burton*, 105 Wn.2d at 352-53. As the trial court noted, both parties extensively argued the issue of attorney fees. RP (May 13, 2011) at 12-13. And Mr. Frank clearly filed a timely appeal. The court, then, did not err by denying Mr. Frank's motion to vacate the judgment on attorney fees and costs.

V. Attorney Fees on Appeal

Finally, an appellant may recover attorney fees on appeal if "applicable law grants to a party the right to recover reasonable attorney fees" and the party devotes "a section of its opening brief to the request for the fees." RAP 18.1(a), (b). The Youngs are entitled to attorney fees on appeal.

We then reverse that portion of the judgment that awards Mr. Frank damages based on equity. We affirm the balance of the judgment and we award attorney fees and costs to the Youngs.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, J.

_____
Brown, J.