IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ANTONIO MONTES AND YADIRA MONTES, HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

ROBERT E. RHINESMITH ADMINISTRATIVE TRUST, AN ARIZONA TRUST;
RICHARD F. RHINESMITH AND PAMELA K. DALLABETTA, TRUST ADMINISTRATORS,
Defendants/Appellees.

No. 2 CA-CV 2016-0093
Filed December 1, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20142225
The Honorable Christopher P. Staring, Judge
The Honorable Catherine M. Woods, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

COUNSEL

Tiffany & Bosco, P.A., Phoenix
By Lance R. Broberg and Timothy C. Bode
Counsel for Plaintiffs/Appellants

Aboud & Aboud, P.C., Tucson
By Michael J. Aboud
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Plaintiffs-appellants Antonio and Yadira Montes appeal from the trial court's judgment for defendants-appellees Robert E. Rhinesmith Administrative Trust and its administrators Richard Rhinesmith and Pamela Dallabetta (collectively, "the Trust"), a judgment wherein the court found the Trust did not breach a land sale contract. We affirm the court's judgment for the Trust on the breach of contract claim, but vacate its judgment for the Trust on the unjust enrichment claim and remand for further proceedings.

Factual and Procedural Background

¶2 When reviewing a judgment following a bench trial, we view the facts in the light most favorable to sustaining the trial court's judgment. *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶¶ 1-2, 36 P.3d 1208, 1210 (App. 2001). In June 2009 the parties entered a settlement contract that arose from a failed real estate purchase contract involving residential property. The settlement agreement, in principal part, required the Monteses to pay $197,500 for which the Trust would execute a quit-claim deed over the house. Additionally, the agreement incorporated a prior provision that both parties reserved their legal and equitable remedies in the event of a default. The Monteses only paid $190,000, the deed was not transferred, and the real property declined in value due to neglect. The Trust eventually repaired the property, paid

delinquent taxes, and sold it to a third party for a sum less than $197,500.

¶3 The Trust attempted to return to the Monteses the amount tendered in 2009 after subtracting the amounts paid for back taxes, repairs, a homeowner's insurance policy, an appraisal, and "other costs of protecting the property such as changing the locks and attorneys' fees." Acceptance of that amount also required the Monteses to relinquish all claims. They refused the amount tendered by the Trust and sued for breach of contract and unjust enrichment, seeking return of the full $190,000. After a bench trial, the trial court found for the Trust on both counts. The Monteses appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Analysis

Breach of Contract Claim

¶4 The Monteses argue the trial court erred in its factual determination of the contract's terms, and thus incorrectly determined the Trust had not breached the contract. Where ongoing oral and written negotiations result in conflicting testimony regarding the terms of the ultimate agreement, it is the duty of the trier of fact to resolve these conflicts in the evidence. *See Healey v. Coury*, 162 Ariz. 349, 353, 783 P.2d 795, 799 (App. 1989). We defer to and are bound by the trial court's factual findings unless they are clearly erroneous. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 58, 181 P.3d 219, 236 (App. 2008); *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). This means we will not reweigh the evidence on appeal as long as there is substantial evidence supporting the court's ruling. *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 233 Ariz. 355, ¶ 29, 312 P.3d 1121, 1130 (App. 2013); *see Healey*, 162 Ariz. at 353, 783 P.2d at 799. However, the court of appeals may draw its own legal conclusions from the facts the trial court reasonably found. *See Schnepp v. State ex rel. Dep't of Econ. Sec.*, 183 Ariz. 24, 27, 899 P.2d 185, 188 (App. 1995).

¶5 The trial court accepted the Trust's unopposed assertion that there was a contract. It also found that the "ultimate agreement" in the contract "was for a $197,500 purchase price," not a $190,000 purchase price as the Montes maintained. There is reasonable evidence in the record to support the $197,500 price, such as the June 10, 2009 letter from defense counsel to plaintiffs' counsel that contains the following excerpt:

> This letter will confirm our telephone conversation earlier today in which you said your client had authorized the settlement of our dispute for a total sum of $197,500. Previously you have delivered to my trust account $190,000. You have said you hoped to have the remaining sum in my hands soon, perhaps by the end of the week.
>
> As soon as I receive the remaining sum, I will forward to you a quit-claim deed to the property.

The Montes' insistence that the trial court erred in concluding this letter accurately stated the terms of the parties' ultimate agreement is nothing more than a request that we reweigh the evidence, which we will not do. *CSA 13-101 Loop, LLC*, 233 Ariz. 355, ¶ 29, 312 P.3d at 1130. We defer to the court's factual finding regarding the terms of the agreement because it is supported by substantial evidence and is not clearly erroneous.

¶6 In addition, the trial court found the Montes "defaulted on [this] ultimate agreement, and each and every one leading up to it." It is undisputed that the Montes paid only $190,000, not $197,500. The Trust had no obligation to furnish the deed until the Montes paid the full purchase price, and the Montes never did so. *See generally* Restatement (Second) of Contracts §§ 231, 237 (1981). Thus, the trial court did not err by not finding that the Trust had breached the contract, and judgment for the Trust on the breach of contract claim was proper. *See Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, ¶ 16, 302 P.3d 617, 621 (2013) (to

prevail in breach of contract action, plaintiff must prove defendant breached).

¶7 The Monteses also challenge the trial court's conclusion of law that the Trust's remedies for the Monteses' default were not limited to the $10,000 they initially deposited in escrow as earnest money. A provision of an earlier agreement[1] subsumed into the June 2009 contract read: "Upon the default of either party, the aggrieved party shall have all remedies at law and equity. Seller shall retain the [$10,000] earnest money as liquidated damages." Substantial evidence supports the trial court's conclusion that, by its terms, the contract does not limit the Trust's remedies to $10,000 in liquidated damages, but also contemplates the availability of further "remedies at law or equity" as appropriate. In that respect, the breach clause is not analogous to the one in the case the Monteses rely on, *Mining Investment Group, LLC v. Roberts*, 217 Ariz. 635, ¶¶ 19-21, 177 P.3d 1207, 1212 (App. 2008). There, the contract stated the earnest money would "be deemed a reasonable estimate of the damages" if the buyer breached, and the sellers apparently did not seek any additional remedies beyond those reasonable liquidated damages. *See id.* ¶ 20.

Unjust Enrichment Claim

¶8 The Monteses next argue the trial court erred in finding for the Trust on the unjust enrichment claim. At trial, defense counsel's position was that "[u]njust enrichment does not come into play in this case because there is a contract." After defense counsel had so argued, the court had the following exchange with the Monteses' counsel:

---

[1]The Monteses argue for the first time in their reply brief that the statute of frauds prevented any modification of this earlier agreement without an additional signed writing. We regard this argument as waived because (1) it was not presented to the trial court and (2) it was raised for the first time in a reply brief. *See Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, n.8, 254 P.3d 418, 423 n.8 (App. 2011); *Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, ¶ 16, 41 P.3d 651, 654 (App. 2002).

> [THE COURT:] Can I infer that you agree with [defense counsel] in this matter insofar as he asserts unjust enrichment [i]s an unavailable option because there is a contract? The question [in this case] is what that contract is, whether that contract was breached, what the implications are for remedy related to that contract, but ultimately there is no unjust enrichment claim. Is that something you would agree with?
>
> [COUNSEL:] I agree. I agree. And the unjust enrichment [claim] was there just in case because of the vagueness/ugliness of the contract[;] it was really a safety net in case it was determined that there is not enough here for us to be able to figure out what the contract is. But I agree. There was a contract.

In its under advisement ruling the trial court refers to this exchange, stating that it "accept[ed] counsel's unopposed assertion that the doctrine of unjust enrichment does not apply in this case because there was a contract," and entered judgment for the Trust on that claim with no further analysis.

¶9 The Trust argues the Montes's challenge to the trial court's unjust enrichment ruling is barred by judicial estoppel, which prevents a party who obtained judicial relief in a prior judicial proceeding upon one theory from asserting an inconsistent theory in a subsequent proceeding. "Three requirements must exist before the court can apply judicial estoppel: (1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding." *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996). Moreover, judicial estoppel is a discretionary doctrine which the court may decline to apply in a proceeding in equity. *See Flood Control Dist. of Maricopa Cty. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, ¶ 34, 279 P.3d 1191, 1203 (App. 2012).

¶10 It is not clear that the Monteses averred at trial that breach of contract and unjust enrichment are mutually exclusive as a matter of law, which would be inconsistent with its argument on appeal. The Monteses did not, for example, stipulate to dismissal of the unjust enrichment claim after the Trust had agreed a contract existed. Moreover, a reasonable person could read the above quote as nothing more than an argument that the Monteses were entitled to relief for breach of contract, and that if the court agreed then it would not need to reach the unjust enrichment claim. Indeed, this would be in keeping with the complaint, which alleged unjust enrichment "[i]n the alternative . . . *only if* [the] breach of contract claim fails." (Emphasis added.) This interpretation is consistent with our case law holding that judicial estoppel does not prevent a party from advancing alternative theories of relief. *See State Farm Auto. Ins. Co. v. Civil Serv. Emps. Ins. Co.*, 19 Ariz. App. 594, 599-600, 509 P.2d 725, 730-31 (1973); *see also* Ariz. R. Civ. P. 8(a)(3).

¶11 Even if the doctrine of judicial estoppel otherwise applied, in our discretion we would decline to apply it here in view of the equitable nature of an unjust enrichment claim. *Flood Control Dist. of Maricopa Cty.*, 230 Ariz. 29, ¶ 34, 279 P.3d at 1203; *see also W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, ¶ 27, 96 P.3d 1070, 1077 (App. 2004) (unjust enrichment sounds in equity).[2]

¶12 "Unjust enrichment occurs when one party has and retains money or benefits that in justice and equity belong to another." *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, ¶ 31, 48 P.3d 485, 491 (App. 2002). Restitution, a "flexible, equitable remedy" for unjust enrichment, requires a defendant in an appropriate case to make compensation for benefits received in keeping with "natural justice and equity." *Commercial Cornice & Millwork, Inc. v. Camel Constr. Servs. Corp.*, 154 Ariz. 34, 38-39, 739 P.2d 1351, 1355-56 (App. 1987), *quoting Murdock-Bryant Constr., Inc.*

---

[2]Nor do we apply the doctrine of invited error here, because the Monteses were not the initiators or source of the error. *See State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009). The Trust was the first to suggest that breach of contract and unjust enrichment are mutually exclusive as a matter of law.

v. Pearson, 146 Ariz. 48, 53, 703 P.2d 1197, 1202 (1985). "[A] defendant is generally liable for restitution of a benefit that would be unjust for him to keep, even though he gained it honestly." *Renner v. Kehl*, 150 Ariz. 94, 98, 722 P.2d 262, 266 (1986). Moreover, the "mere existence of a contract governing the dispute does not automatically invalidate an unjust enrichment alternative theory of recovery." *Arnold & Assocs., Inc. v. Misys Healthcare Sys., a Div. of Misys, PLC*, 275 F. Supp. 2d 1013, 1030 (D. Ariz. 2003), *quoting Adelman v. Christy*, 90 F. Supp. 2d 1034, 1045 (D. Ariz. 2000) (applying Arizona law); *see USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 355, 732 P.2d 579, 585 (App. 1986).

¶13 An example of an appropriate case for restitution is one in which a purchaser defaults on a land sale contract by paying most—but not all—of the purchase price. *See* Restatement (Third) of Restitution and Unjust Enrichment § 36 cmt. d (2011); *see also* Dan B. Dobbs, *Remedies* § 12.14 (1973) (allowing defaulting real estate purchaser to recover restitution for substantial payments made in excess of seller's damages is "just" and "equitable"). The Restatement (Second) of Contracts provides an illustration directly applicable to this case:

> A contracts to sell land to B for $100,000, which B promises to pay in $10,000 installments before transfer of title. After B has paid $30,000 he fails to pay the remaining installments and A sells the land to another buyer for $95,000. B can recover $30,000 from A in restitution less $5,000 damages for B's breach of contract, or $25,000.

Restatement (Second) of Contracts § 374 illus. 1 (1981); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 36 illus. 6 (2011).

¶14 In light of the foregoing authorities, the trial court erred by concluding that unjust enrichment was inapplicable as a matter of law simply because the parties had a contract. Thus, we vacate the court's judgment for defendants on the unjust enrichment claim,

and remand for the court to reconsider that claim and any restitutionary remedy that may be appropriate. *See* Restatement (Second) of Contracts § 374(1) & illus. 1, 7 (1981); Dan B. Dobbs, *Remedies* § 12.14 (1973); *cf. Renner*, 150 Ariz. at 98-99, 722 P.2d at 266-67.

Conclusion

¶15 We affirm the trial court's judgment as to the breach of contract claim, vacate its judgment as to the unjust enrichment claim, and remand for further proceedings consistent with this decision. We deny all parties' requests for attorney fees and costs because we determine that no party was "successful." *See Murphy Farrell Dev. Corp., LLLP v. Sourant*, 229 Ariz. 124, ¶ 38, 272 P.3d 355, 365-66 (App. 2012).