NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., JUDGE

DIVISION II

CA07-364

12 December 2007

STEVEN STOUFFER and PAMELA STOUFFER, APPELLANTS	AN APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [CV-2004-56(V)]
v.	
T & L JANITORIAL, INC. d/b/a SERVICEMASTER, APPELLEE	THE HONORABLE J. MICHAEL FITZHUGH, CIRCUIT JUDGE
	AFFIRMED

After a bench trial, the circuit court concluded that Pamela and Steven Stouffer had a contract with T & L Janitorial, Inc. d/b/a ServiceMaster to clean and restore their home after a fire. The court further concluded that the Stouffers broke that contract when they refused to endorse a final check from their insurer, one of the Cincinnati Insurance Companies, to ServiceMaster. The Stouffers contend that no contract existed. They argue that their obligation to ServiceMaster was a matter of quasi-contract, and thus we should reverse and remand for the circuit court to fix the reasonable value of ServiceMaster's services. The Stouffers also challenge the court's award of attorney's fees to ServiceMaster because that award stands or falls on the contract question. We affirm on all the issues because the circuit court's conclusion that the parties had a contract is not clearly against the

preponderance of the evidence.

I.

In May 2003, the Stouffers' house caught on fire. The next day, their insurance company contacted ServiceMaster about cleaning and restoring the house. Several days later, Cincinnati's adjuster, Wayne Gammon, and ServiceMaster's owner, Tommy Smith, went to the property to view the damage. That day, the Stouffers indicated to Gammon that they wanted to hire ServiceMaster to do the restoration work on their home. Mr. Stouffer signed an "Authorization & Assignment of Insurance" agreement on ServiceMaster letterhead, which stated:

> This is to authorize the firm of *ServiceMASTER* Professional Cleaning & Restoration Services (herein referred to as ServiceMaster) to proceed with the cleaning and/or repair of the loss of damage resulting from fire which occurred on or about ____ to the property located at ____. This is also to serve as an authorization for the insurance company of responsible party to pay ServiceMaster direct for services rendered. It is fully understood that the insured is personally responsible for all charges or costs not paid by the insurance company. This insurance benefits to ServiceMaster for services performed and is irrevocable and legally binding. In the event that the insured is paid directly by the insurance company, or if listed payee on a check or a draft is other than ServiceMaster, the insured agrees to pay ServiceMaster for services rendered within five (5) days of their receipt of the document. The insured agrees to be responsible for all the legal costs to collect this debt and agrees to pay a finance charge of 1.5% per month after this (5) day period.

(emphasis in original). This form also contained the home's address and contact information for everyone, including Gammon.

The Stouffers moved out of their house from late May through mid-August while

ServiceMaster cleaned and restored it. As the work progressed, ServiceMaster prepared detailed estimates for the tasks, which Gammon approved from time to time. There was no evidence that the Stouffers saw or approved these estimates. Cincinnati paid for the restoration in several installments. It issued the first check in June and a second check in July. It made each check payable to both the Stouffers and to ServiceMaster. The Stouffers endorsed each of these checks, and then gave them to ServiceMaster as required by the Authorization and Assignment of Insurance document.

After the Stouffers moved back into their home in August, they complained that ServiceMaster had failed to complete the job and had caused additional damage to their house by scratching their Jacuzzi bathtub. In late September 2003, Gammon, Smith, and the Stouffers met at the house to discuss the final tasks that needed to be finished. Mr. Stouffer was ill and did not participate in this meeting. Mrs. Stouffer participated, but did not testify about what occurred. According to Gammon, the work was 95% completed by this meeting and only a few minor tasks remained, such as hanging a towel rack and installing a ceiling fan. In the following weeks, Cincinnati received a final estimate from ServiceMaster and issued the final check in the amount of $15,111.25.

The Stouffers refused to endorse that check. ServiceMaster had polished but not replaced the scratched bathtub; the remaining restoration tasks had not been done; and the working relationship between the Stouffers and ServiceMaster had fallen apart.

ServiceMaster then sued the Stouffers for breach of contract because they refused to

sign the final check in accordance with the Authorization agreement. The Stouffers counterclaimed against ServiceMaster, alleging that it had failed to complete the job, leaving more than $15,000.00 worth of restoration and repair undone. The Stouffers also alleged an additional $25,000.00 in damages because, among other things, ServiceMaster removed their personal property from the house to do the repairs, and failed to return or damaged many of the items. No one sued Cincinnati.

After the trial, the circuit court concluded that ServiceMaster and the Stouffers had a contract and that the Stouffers were in breach. Here is Judge Fitzhugh's reasoning:

> The Court finds that a contract existed between the parties. Both sides intended to enter into a service agreement. That is, Plaintiff was to provide restoration work, for a fee and Defendants were to benefit from said work. That was the objective manifestation of each side as well as the oral understanding between the sides.

The court held that the Stouffers failed to provide sufficient proof on their counterclaim and dismissed it. The court ordered the Stouffers to pay ServiceMaster $15,111.25. The court also ordered ServiceMaster to complete the restoration of the home or reimburse the Stouffers in "a reasonable sum to cover . . ." a list of specific repairs. On ServiceMaster's later motion, the court awarded the company approximately $4,000.00 in attorney's fees.

The Stouffers appealed. This court dismissed their appeal for lack of a final order because the judgment was indefinite about the reimbursement for additional repairs. *Stouffer v. T & L Janitorial*, CA05-613, slip op. (Ark. App. March 8, 2006). On remand, the circuit court modified its previous order by giving the Stouffers a $924.83 credit for the

uncompleted repairs. The court then reaffirmed the rest of its prior judgment. The Stouffers' second appeal brings the merits here.

II.

The record sustains the circuit court's decision. The Stouffers' main contention is an either/or: either the parties had an express contract, which would support a claim for breach, or their obligations were quasi-contractual, implied by law and enforced to prevent unjust enrichment irrespective of breach. This is a false choice. Our law also recognizes contracts implied in fact, "where the contract is inferred from the acts of the parties. . .." *Steed v. Busby*, 268 Ark. 1, 7, 593 S.W.2d 34, 38 (1980); *see also Berry v. Cherokee Village Sewer, Inc*., 85 Ark. App. 357, 360–61, 155 S.W.3d 35, 38 (2004). The legal relationship created by a contract implied in fact is no different from the one created by an express contract. *Steed*, 268 Ark. at 7, 593 S.W.2d at 38.

The Stouffers argue that no contract existed because the Authorization and Assignment of Insurance was indefinite and lacked mutuality. As to definiteness, they point out that the document contained no total or estimated price, no rates, and no specifics about the restoration tasks. As to mutuality, they argue that though Mr. Stouffer assigned the insurance proceeds, ServiceMaster did not promise unequivocally to do the work. These attacks, however, overlook the parties' course of performance. This document was just one of the parties' many acts manifesting an objective intention to be bound. *Shea v. Riley*, 59 Ark. App. 203, 206, 954 S.W.2d 951, 953 (1997).

The parties executed their arrangement. The Stouffers told ServiceMaster to do the restoration. The company went to work. It was undisputed that, for about three months, ServiceMaster had possession of the Stouffers' home and performed a clean up. During this time, the Stouffers endorsed two checks from Cincinnati to pay toward the clean-up costs. This performance eliminated any mutuality problem about ServiceMaster's obligations that may have existed at the threshold. *Swafford v. Sealtest Foods Division of Nat'l Dairy Products Corp*., 252 Ark. 1182, 1188, 483 S.W.2d 202, 206 (1972).

We discern no insuperable indefiniteness problem either. The law requires reasonable certainty about the parties' terms. *Key v. Coryell*, 86 Ark. App. 334, 341, 185 S.W.3d 98, 103 (2004). Though "a contract is uncertain in its terms, it does not necessarily follow that it is a nullity." *Beasley v. Boren*, 210 Ark. 608, 612, 197 S.W.2d 287, 289 (1946). The Stouffers wanted their house restored to pre-fire condition as soon as possible, as anyone in this difficult situation would. Cincinnati's obligation to the Stouffers was to pay for that restoration—in Gammon's words "to get . . . an insured back to the way they were one hour before the incident happened." ServiceMaster offered to "proceed with the cleaning and/or repair of the loss of damage resulting from the fire . . .." This was a definite offer to restore the home completely. There was no indefiniteness about the Stouffers' assignment of all their insurance proceeds to ServiceMaster. And the particulars of ServiceMaster's tasks came clear during the work.

> The parties to a contract may, by their mutual actions in carrying it out, furnish an index to its meaning, which the language thereof fails to do. After all, the

> written instrument is but an evidence of what the signers thereof propose to bind themselves to do, and when by their conduct in carrying out the agreement, both of the parties demonstrate an intention to heal an uncertainty in the contract, the courts will generally adopt this practical construction.

Beasley, 210 Ark. at 612, 197 S.W.2d at 289.

Completely restoring the Stouffers' home necessarily involved some uncertainty at the outset about the extent of the work. ServiceMaster's undisputed performance through the detailed estimates and the work across several months, coupled with the Stouffers' repeated endorsement of Cincinnati's checks for that work, healed any uncertainty in the parties' contract. *See also Foundation Telecommunications, Inc. v. Moe Studio, Inc*., 341 Ark. 231, 242, 16 S.W.3d 531, 538-39 (2000).

It is not dispositive that the Stouffers never saw and approved the detailed estimates. Cincinnati did. And this company was footing the bill and acting on behalf of its insureds, the Stouffers. Moreover, the parties' main dispute was not about whether ServiceMaster agreed to do particular tasks; it was about whether ServiceMaster had done all the tasks it had agreed to do in the estimates. The detailed estimates show the parties' contract in execution. The alleged breach turned on ServiceMaster's follow through. The Stouffers described this situation in their counter-claim: "Despite the representations of [ServiceMaster] as to having the requisite skill, staff, training, materials, and supplies to completely clean, restore, and repair the damages resulting from the fire [ServiceMaster has] wholly and totally failed to complete the job leaving in excess of $15,000.00 worth of

restoration and repair undone[.]" The parties' arrangement achieved reasonable certainty, which allowed the circuit court to determine whether a breach occurred and an appropriate remedy. Arkansas law required no more. *Key*, *supra.*

We affirm the circuit court's decision that the parties had a contract and that the Stouffers were in breach of it. The Stouffers do not challenge the circuit court's rejection of their counterclaim or the amount of the credit that they received for the few unfinished repairs. The Stouffers attack on the attorney's-fee award therefore fails. Their obligation to ServiceMaster was a matter of contract, not quasi-contract. And our statute allowing the circuit court to award fees in a breach-of-contract case, Ark. Code Ann. § 16-22-308 (Repl. 1999), makes no distinction between express contracts and contracts implied in fact. There is no distinction because the legal relationship created by both kinds of contracts is the same. *Steed*, *supra*. We therefore affirm the award of fees too.

Affirmed.

VAUGHT and MILLER, JJ., agree.