

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA12-384

ANTON MENNINGER and SONJA
HAUSMANN

APPELLANTS

V.

JOHN CONCOBY; ENERGY SMART
CONSTRUCTION, INC.; and PINE
CREEK LUMBER

APPELLEES

Opinion Delivered November 7, 2012

APPEAL FROM THE MADISON
COUNTY CIRCUIT COURT
[NO. CV-10-231]HONORABLE KIM M. SMITH,
JUDGEAFFIRMED IN PART; REVERSED
AND REMANDED IN PART**JOHN B. ROBBINS, Judge**

Anton Menninger and Sonja Hausmann appeal from a judgment awarding \$8,855.96 to appellee John Concoby. They argue that the circuit court erred in finding that they were unjustly enriched by that amount and in dismissing their counterclaim against Concoby. We affirm the dismissal of appellants' counterclaim, but we reverse the \$8,855.96 judgment and remand for entry of an order consistent with this opinion.¹

The following events led to this appeal. Appellants hired Concoby's company, Energy Smart Construction, Inc., for an extensive remodeling project. Concoby prepared an estimate of \$123,161.07, which required appellants to pay ten percent down and the balance via intermittent invoices. Appellants signed the estimate on January 14, 2009.

¹Appellees Concoby, Energy Smart Construction, Inc., and Pine Creek Lumber did not file briefs in this appeal.

Concoby engaged Pine Creek Lumber as his wood-products supplier, and Pine Creek supplied \$3,372.41 in materials during January 2009. Concoby marked up the amount by twenty-five percent (as he did with all materials and labor), and billed appellants for the resulting \$4,215.51 as part of a larger invoice. Appellants paid the invoice in February 2009, and Concoby remitted the amount he owed to Pine Creek.

In the following months, Pine Creek supplied additional materials on the project and billed Concoby accordingly. Concoby again applied the twenty-five-percent mark-up and sent corresponding invoices to appellants. In March and April 2009, appellants paid Concoby \$18,451.84 and \$11,656 pursuant to two invoices that included amounts for lumber as well as other materials and labor. Upon receiving appellants' payments, Concoby made no further remittances to Pine Creek. Appellants were unaware of Concoby's failure to pay.

In mid-April 2009, appellants dismissed Concoby from the job due to cost overruns. As a result, Concoby sued appellants for over \$40,000 in payments due. Appellants responded with a counterclaim asserting various causes of action. Ultimately, appellants and Concoby settled the lawsuit. The settlement agreement provided that it applied to "any and all" disputes pending between the parties; that it was a "global release of claims"; and that it included the causes of action set forth in appellants' counterclaim: breach of contract, breach of warranty, unjust enrichment, fraud, slander of title, failure to give a correct list of parties furnishing materials or labor, failure to forward payments to subcontractors, and negligence.

Of particular importance to this appeal, the settlement agreement contained the following clause:

However, if any third party files a claim against any named party herein, the remaining parties named herein may be added as third-party defendants.

After the settlement agreement was executed, Pine Creek sued Concoby for money due on the materials provided during appellants' project. Concoby then filed a third-party complaint against appellants, alleging that appellants were unjustly enriched by receiving materials from Pine Creek for which they did not pay. Appellants answered that they had paid for the materials, and they re-asserted the counterclaim that they had filed in the settled lawsuit.

On Concoby's motion, the circuit court dismissed appellants' counterclaim, ruling that it was resolved by the settlement. The remainder of the case then proceeded to a bench trial. After hearing the evidence, the court determined that Pine Creek provided \$15,258.13 in materials on the project for which it had not been paid. The court entered judgment against Concoby for that amount, plus finance charges. The court also determined that appellants were partially responsible for the \$15,258.13 owed to Pine Creek. In allocating appellants' liability, the court calculated that only \$6,402.17 of appellants' payments to Concoby on the March and April invoices was attributable to Pine Creek and that, consequently, appellants unjustly received \$8,855.96 in materials for which they had not paid. The court thus granted judgment against appellants for \$8,855.96 on Concoby's third-party complaint. This appeal followed.

Our standard of review in bench trials is well established. We review the circuit court's findings to determine whether they are clearly erroneous. *Feagin v. Jackson*, 2012 Ark. App. 306, ___ S.W.3d ___. A finding is clearly erroneous when, although there is evidence to

support it, the reviewing court is left with the definite and firm conviction, after viewing all of the evidence, that a mistake was made. *See id.*

Appellants argue first that the circuit court erred in finding that they were unjustly enriched. Unjust enrichment is a fact-based inquiry involving the weighing of equities and a determination of the value unjustly received. *See Central Ark. Found. Homes, LLC v. Choate*, 2011 Ark. App. 260, ___ S.W.3d ___. It is an equitable principle invoked to render a situation fair under the circumstances. *Feagin, supra*. For a circuit court to find unjust enrichment, the party must have received something of value to which he was not entitled and which he should restore. *Sparks Reg'l Med. Ctr. v. Blatt*, 55 Ark. App. 311, 935 S.W.2d 304 (1996). There must also be some operative act, intent, or situation to make the enrichment unjust and compensable. *Id.*

Applying the above standard and applicable law, we conclude that the circuit court clearly erred in finding that appellants were unjustly enriched. Although each invoice from Concobly to appellants contained a line item showing the dollar amount of the materials supplied by Pine Creek during the invoice period, appellants did not pay each item on the invoices separately. Rather, they paid Concobly pursuant to each total invoice amount, after which it became Concobly's responsibility to pay Pine Creek. According to the testimony at trial, appellants paid Concobly \$112,543.47 during the course of the project. This was more than enough to satisfy the Pine Creek bill, particularly when we consider that part of appellants' payments to Concobly included his profits, obtained through his twenty-five-

percent markup. Given these circumstances, we cannot conclude that anyone but Concoby was at fault for Pine Creek's balance due.

Further, appellants obtained no unjust benefit from their receipt of the Pine Creek lumber. Even where a party benefits from a particular transaction, he is not subject to a claim for unjust enrichment unless his benefit was truly unjust under the circumstances. See *Lewis v. AT&T Mobility*, 2011 Ark. App. 756, ___ S.W.3d ___; *Central Ark. Found. Homes, supra*; *Stevens v. Heritage Bank*, 104 Ark. App. 56, 289 S.W.3d 147 (2008); *Sparks Reg'l Med. Ctr., supra*. Here, while appellants may well have retained the benefit of Pine Creek's materials, their retention was not unjust. It was Concoby's responsibility to pay Pine Creek, and appellants made sufficient payments to Concoby to do so.

We therefore reverse and remand the \$8,855.96 judgment against appellants. Our ruling makes it unnecessary for us to address appellants' arguments that the case should have been governed by the parties' express contract; that the court erred in refusing to allow them to utilize the defense of unclean hands; and that the court erred in computing the damage award.

We do reach appellants' argument that the court erred in dismissing their counterclaim. As mentioned, in response to Concoby's third-party complaint, appellants filed the same counterclaim that they had filed in the settled lawsuit. The counterclaim sought both compensatory and punitive damages from Concoby. The circuit court ruled that the counterclaim was prohibited by the parties' settlement agreement, and we see no error.

The settlement agreement contemplated that, if one of the settling parties were sued, that party could file a third-party complaint against the other settling party. This possibility of future litigation, however, did not contemplate that the third-party defendant could then seek affirmative relief from the other settlor by way of a counterclaim. The purpose of the “third-party” clause was to determine how to allocate any liability the parties might share toward another entity. Additional relief beyond that would be antithetical to the “global” settlement agreement. We therefore affirm the circuit court’s dismissal of the counterclaim.

Affirmed in part; reversed and remanded in part.

HOOFFMAN and BROWN, JJ., agree.

Jones, Jackson & Moll, PLC, by: *Kathryn A. Stocks*, for appellants.

No response.