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ATTORNEY FOR APPELLANT:

EDWARD A. CHAPLEAU
South Bend, Indiana

ATTORNEY FOR APPELLEE:

RONALD D. FOSTER
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CITY OF MISHAWAKA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0804-CV-247
	)	
MARIAN KVALE, Personal Representative of the Estate of Gordon Barclay,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Michael P. Scopelitis, Judge
Cause No. 71D05-0306-PL-231

September 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

The City of Mishawaka ("the City") appeals the amount of the trial court's unjust enrichment award. Marian Kvale, the personal representative for the Estate of Gordon Barclay ("the Estate") cross-appeals, challenging the trial court's subject matter jurisdiction. We affirm.

Issues

The City raises one issue, which we restate as whether the trial court correctly determined the amount that the Estate was unjustly enriched. On cross-appeal, the Estate raises one issue, which we restate as whether the trial court had subject matter jurisdiction to address the City's unjust enrichment claim.

Facts

In November 1996, Barclay suffered from health problems and Kvale was appointed to be his guardian. In December 1999 and May 2000, while under the guardianship, Barclay executed three mortgages with the City, totaling $18,681.00. The money was used to build a new garage on Barclay's property and to make improvements to Barclay's house. On January 30, 2003, Barclay died, and an estate was opened in the St. Joseph Probate Court ("the probate court"). As the personal representative, Kvale learned of the mortgages and sold the property for $47,500.00. At the sale, the City retained $13,868.95, the balance of the mortgages at the time of Barclay's death.

On May 22, 2003, the Estate filed a complaint in the St. Joseph Superior Court[1] ("the trial court") against the City alleging that the mortgages were void because Barclay was a protected person when the mortgages were executed. The City counterclaimed alleging that the Estate would be unjustly enriched if the mortgages were not repaid. Both parties moved for summary judgment, and the trial court granted summary judgment in favor of the Estate on both claims. The City appealed, and a panel of this court affirmed the trial court's determination that the mortgages were void because Barclay was a protected person. City of Mishawaka v. Kvale, 810 N.E.2d 1129, 1137 (Ind. Ct. App. 2004). As for the unjust enrichment claim, we reversed the grant of summary judgment, concluding there were genuine issues of material fact regarding whether the Estate was unjustly enriched. Id.

On remand, a bench trial was conducted on the issue of unjust enrichment. Following the trial, the trial court entered judgment on behalf of the City in the amount of $3,500.00. The trial court ordered the City to return to the Estate $10,368.95 of the $13,868.95 from the sale that the City had in its possession. Both parties now appeal.

Analysis

I. Subject Matter Jurisdiction

On cross-appeal, the Estate argues that the trial court, which decided the unjust enrichment claim, did not have subject matter jurisdiction because a party asserting a

[1] It appears that the Estate's complaint to void the mortgage was filed with the St. Joseph Circuit Court and then transferred to the St. Joseph Superior Court on June 18, 2003, pursuant to City's change of judge motion. There is no indication that the Estate's complaint was filed with the probate court as part of the administration of the Estate.

claim against an estate may only bring the claim in the court where the estate is being administered. The Estate raises this issue for the first time on appeal, and correctly claims that the issue of subject matter jurisdiction may be raised at anytime. See Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1223 n.8 (Ind. 2000) ("Although the Town previously failed to assert lack of subject matter jurisdiction, this claim cannot be waived.").

Referring to Indiana Code Section 29-1-14-1(a), the City argues that it is exempt from the requirement that its claim be filed in the probate court because it is a subdivision of the State. This section provides:

> Except as provided in IC 29-1-7-7, all claims against a decedent's estate, other than expenses of administration and claims of the United States, the state, or a subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees, and legatees of the decedent, unless filed with the court in which such estate is being administered within:
>
> > (1) three (3) months after the date of the first published notice to creditors; or
> >
> > (2) three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;
>
> whichever is later.

Ind. Code § 29-1-14-1(a).

This statute is generally referred to as a non-claim statute.[2] See Estate of Verdak v. Butler Univ., 856 N.E.2d 126, 134 (Ind. Ct. App. 2006). It creates a right of action if the claim is commenced within the time prescribed by the statute. Estate of Decker v. Farm Credit Services of Mid-America, ACA, 684 N.E.2d 1137, 1139 (Ind. 1997). Said another way, whether a claim exists in a specific case is dependent on whether it was filed within the appropriate time as described in Indiana Code Section 29-1-14-1(a). The Estate does not argue that the City's claim was untimely, and Indiana Code Section 29-1-14-1(a) does not confer subject matter jurisdiction to one court or another.

"'The question of subject matter jurisdiction entails a determination of whether a court has jurisdiction over the general class of actions to which a particular case belongs.'" K.S. v. State, 849 N.E.2d 538, 542 (Ind. 2006) (quoting Troxel v. Troxel, 737 N.E.2d 745, 749 (Ind. 2000)). To determine whether the trial court had jurisdiction over the general class of actions to which the particular cases belongs—an action against an estate—we turn to Indiana Code Sections 33-33-71-8 and 33-31-1-9.

The former describes the jurisdiction of the trial court and specifically provides, "The St. Joseph superior court has the following jurisdiction: (1) Original, appellate, concurrent, and coextensive jurisdiction with the circuit court in all civil cases, criminal cases, and probate matters. . . . (3) Concurrent and coextensive jurisdiction in all matters

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[2] In its cross-appellant's reply brief, the Estate argues that this statute is a statute of limitations. It is well-settled, however, that this is a non-claim statute not to be confused with a statute of limitations. Specifically, "'While such statutes limit the time in which a claim may be filed or an action brought, they have nothing in common with and are not to be confused with general statutes of limitation.'" See Estate of Decker v. Farm Credit Services of Mid-America, ACA, 684 N.E.2d 1137, 1139 (Ind. 1997) (quoting Donella v. Crady, 135 Ind. App. 60, 63, 185 N.E.2d 623, 625 (1962), trans. denied).

of probate and the settlement of decedents' estates, trusts, and guardianships." I.C. § 33-33-71-8. The later describes the jurisdiction of the probate court and explains in part:

> (a) The probate court in the county for which it is organized has original, concurrent jurisdiction with the superior courts of the county in all matters pertaining to the following:
>
> (1) The probate of wills.
>
> (2) Proceedings to resist probate of wills.
>
> (3) Proceedings to contest wills.
>
> (4) The appointment of guardians, assignees, executors, administrators, and trustees.
>
> (5) The administration and settlement of estates of protected persons (as defined in IC 29-3-1-13) and deceased persons.
>
> (6) The administration of trusts, assignments, adoption proceedings, and surviving partnerships.
>
> (7) Any other probate matters.

I.C. § 33-31-1-9. It is clear from these statutes that the trial court and the probate court had concurrent subject matter jurisdiction over the administration of an estate.

Generally, where two courts have concurrent jurisdiction, they cannot deal with the same matter at the same time. Keenan v. Butler, 869 N.E.2d 1284, 1289 (Ind. Ct. App. 2007). "Once a court has secured jurisdiction over the parties and the subject matter of an action, this jurisdiction is retained to the exclusion of other courts of equal competence until the case is determined." Id. "The court first acquiring jurisdiction

holds the *res in custodia legis* so long as it is empowered to administer complete justice."[3] Id.

To the extent the unjust enrichment claim is considered the same action as the administration of the Estate, as the Estate appears to argue on appeal, the method for defending against the improper filing of a claim is to file a motion pursuant to Indiana Trial Rule 12(B)(8) alleging that the same action is pending in another state court. Such a motion "shall be made before pleading if a further pleading is permitted or within twenty [20] days after service of the prior pleading if none is required." See Ind. Trial Rule 12(B) (brackets in original). A defense that the same action is pending in another state court is waived if it is not made by motion under Trial Rule 12, not included in a responsive pleading, or not included as an amendment made as a matter of course. T.R. 12(H). The Estate filed no such motion, and the defense is waived.

Further, any error related to the trial court's exercise of authority over the unjust enrichment claim is not available for our review because it is invited error. It is well-settled that a party may not take advantage of an error that he or she commits, invites, or which is the natural consequence of his or her own neglect or misconduct. Potter v. Houston, 847 N.E.2d 241, 248 (Ind. Ct. App. 2006). "An invited error is not subject to review by this court." Id. The Estate filed its complaint to void the mortgages with the trial court, and the City raised the unjust enrichment claim in response to the Estate's complaint. The Estate had the opportunity to have the probate court decide the validity of

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[3] *In custodia legis* is defined as "[i]n the custody of the law." Black's Law Dictionary 771 (7th ed. 1999).

the mortgages but chose to proceed in the trial court. The Estate cannot now take advantage of its own error.

The Estate cannot challenge the trial court's exercise of authority over the City's unjust enrichment claim for the first time on appeal simply by characterizing it as an issue of subject matter jurisdiction. Our supreme court has recently observed, "Attorneys and judges alike frequently characterize a claim of procedural error as one of jurisdictional dimension. The fact that a trial court may have erred along the course of adjudicating a dispute does not mean it lacked jurisdiction." K.S., 849 N.E.2d at 541. Regardless of the alleged procedural error, the trial court had subject matter jurisdiction to address the City's unjust enrichment claim. See I.C. § 33-33-71-8. The Estate's challenge to the trial court's exercise of authority over the City's claim is waived. See K.S., 849 N.E.2d at 542 ("K.S.'s claim of procedural error is untimely.").

II. Unjust Enrichment

Having determined that the trial court had subject matter jurisdiction to decide the City's unjust enrichment claim, we address the City's claim that the trial court erred in determining the amount that the Estate was unjustly enriched. Where, as here, a party requests findings of fact and conclusions thereon under Indiana Trial Rule 52(A), our standard of review is well-settled. Maxwell v. Maxwell, 850 N.E.2d 969, 972 (Ind. Ct. App. 2006), trans. denied. We must determine whether the evidence supports the findings and second, whether the findings support the judgment. Id. We will disturb the judgment only if there is no evidence supporting the findings or if the findings do not support the judgment. Id. "We do not reweigh the evidence and consider only the

evidence favorable to the trial court's judgment." Id. An appellant must establish that the trial court's findings are clearly erroneous, which occurs only when a review of the record leaves us firmly convinced a mistake has been made. Although we defer substantially to findings of fact, we do not defer to conclusions of law. Id. Additionally, a judgment is clearly erroneous if it relies on an incorrect legal standard. Id.

Unjust enrichment is also referred to as quantum meruit, contract implied-in-law, constructive contract, or quasi-contract. Bayh v. Sonnenburg, 573 N.E.2d 398, 408 (Ind. 1991), cert. denied, 502 U.S. 1094 (1992). A quasi-contract is not a contract at all; it is a legal fiction invented by the common-law courts to permit a recovery where there is no contract, but where the circumstances are such that under the law of natural and immutable justice there should be a recovery as though there had been a promise. Id. "The Restatement of Restitution sets out the theory broadly: 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" Id. (quoting Restatement of Restitution § 1 (1937)). Generally, "[t]o prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." Id.

The trial court found in part:

> 22. According to Total Construction Company, the fair market value of the Barclay property before the new garage and improvements were made was in the "low $30,000's" and the fair market value after the building of the new garage and improvements was in the "high $40,000's".

> 23. According to an appraisal of the property done on November 11, 1999, the Barclay property had a fair market value of approximately $44,000 prior to the demolition of Barclay's original garage and the construction of the new garage and the electrical carpentry and roof improvements.
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> 24. The property was sold in April 2003 for $47,500.
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> 25. Total Construction Company constructed the new garage and made the improvements at the direction and with the cooperation of Gordon Barclay.
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> 26. Gordon Barclay lived in his home with the improvements and the new garage for approximately three (3) years before his death.
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> 27. At the time of the sale of Mr. Barclay's residence in April 2003, the city took possession of the sum of $13,868.95 pursuant to its mortgage liens that were subsequently declared void and unenforceable.

Appellant's App. pp. 10-11. The trial court concluded that the amount of compensation necessary to prevent unjust enrichment of the Estate was equal to the difference in the value of the property before the improvements and after the improvements, which the trial court calculated at $3,500.

The City asserts that the proper measure of damages is $18,681.00—the total amount of the mortgages. The City urges that the value of its services was the cost of materials and labor provided to improve Barclay's property. However, the City did not provide these services to the Estate, the contractor did. The City's role in the transaction was to provide the financing for the improvements. For this reason, the cases involving disputes directly between a subcontractor and a homeowner or developer are not directly

on point.[4] See Troutwine Estates Dev. Co., v. Comsub Design & Eng'g, 854 N.E.2d 890 (Ind. Ct. App. 2006), trans. denied; Encore Hotels of Columbus, LLC, v. Preferred Fire Protection, 765 N.E.2d 658 (Ind. Ct. App. 2002); and Stafford v. Barnard Lumber Co., 531 N.E.2d 202 (Ind. Ct. App. 1988). Moreover, the amount of restitution sought by the City does not take into account the almost $5,000.00 that the mortgages had been reduced. At the time of Barclay's death, the balance of the mortgages was only $13,868.95.

In determining the amount in which the Estate was unjustly enriched, an equitable remedy, the determinative factor is not necessarily the amount of the mortgages. Rather, we consider to what extent the Estate has been conferred a "measurable benefit" by the City's actions. See Bayh, 573 N.E.2d at 408. The trial court determined that the measurable benefit to the Estate was the increase in the value of the home, which was $3,500.00. The evidence supports the trial court's assessment of the increased value. The City has not established the trial court erred is assessing the amount of the benefit to the Estate.

Conclusion

The trial court had subject matter jurisdiction to decide the City's unjust enrichment claim. The City has not established that the trial court erred in measuring the benefit retained by the Estate as $3,500.00. We affirm.

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[4] Likewise, because the City is claiming unjust enrichment, the cases involving replevin, fraud, voidable contracts, and rescission are not applicable to our decision today.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.