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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001078-MR

REUF KECO

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 14-CI-00879

MARIO AYALA

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND SPALDING, JUDGES.

SPALDING, JUDGE: Reuf Keco appeals from a judgment based upon a jury verdict awarding appellee, Mario Ayala, the sum of \$125,373 plus prejudgment interest. Appellant Keco argues that the jury was erroneously permitted to consider the equitable principle of unjust enrichment and that the trial court improperly awarded prejudgment interest on unliquidated damages. We affirm.

Green River Rentals, Inc., initiated the action below seeking recovery of approximately \$10,285 in rental payments from Mr. Ayala under an equipment rental contract. The complaint alleged that Mr. Ayala had utilized the equipment for improvement of Mr. Keco's property and that Green River Rentals had a valid mechanic's or materialman's lien on Mr. Keco's real property. Mr. Ayala answered the complaint and filed a cross-claim against Mr. Keco for breach of contract and unjust enrichment. In response, Mr. Keco asserted claims of indemnity, breach of contract, misrepresentation, and unjust enrichment against Mr. Ayala. After the trial court granted Green River's motion for summary judgment on its claim, Mr. Ayala and Mr. Keco satisfied that judgment and the case thereafter proceeded to a jury trial on their respective claims against each other.

At trial, Mr. Ayala argued that he had performed work on a building and parking lot on property owned by Mr. Keco, claiming that he was owed the sum of \$146,373 for which he had not been paid. In support of his claim, Mr. Ayala submitted into evidence written contracts and other invoices evidencing the work he had performed. In contrast, Mr. Keco argued that Mr. Ayala's work was substandard, deficient, negligently performed, and otherwise incomplete. Mr. Keco also claimed itemized damages in the amount of \$168,697.14.

Both parties submitted instructions to the trial court and participated in discussions concerning the instructions to be given the jury. Of particular pertinence to this appeal, counsel for Mr. Keco stated on the record that he accepted the instructions given by the trial court and made no specific objection to the unjust enrichment instructions. The instructions as given required the jury to answer a series of questions to resolve the various claims made in the case.

Under Instruction Number 2, the jury found that Mr. Ayala had substantially performed his duty to provide construction services “in a good and workmanlike manner, free of defects and in accordance with the plans and specifications referred to in the contract.” Similarly, under Instruction Number 3, the jury again found for Mr. Ayala, determining that he had substantially performed his duty under the contract without defects in the construction that he had failed to correct. Under Instruction Number 4, the jury again found that Mr. Ayala did not fail to substantially perform his duties as set forth in Instruction Number 2. Notably, Instruction Number 5 required the jury to determine if Mr. Ayala had established his claim of unjust enrichment by proving that Mr. Keco received the benefit of construction services from Mr. Ayala; that Mr. Keco failed to fully compensate Mr. Ayala for those services; and that Mr. Keco therefore received the benefit of construction services without providing just compensation to Mr. Ayala. The jury believed from the evidence that Mr. Ayala had proven the

elements set out in Instruction Number 5. Hence, based upon its answers to the questions posed by the instructions, the jury found no basis for awarding Mr. Keco the damages he claimed.

Further, under Verdict Form Number 6, the jury awarded Mr. Ayala the sum of \$125,373 to compensate him for breach of contract. Also, under Verdict Form Number 10, the jury awarded Mr. Ayala the sum of \$125,373 to compensate him for damages stemming from his claim of unjust enrichment. Importantly, the foreman made clear on the latter verdict form that the jury was awarding a total verdict of \$125,373, rather than separate awards under Instructions Numbers 2 and 5. Thus, the trial court entered a judgment based upon the jury verdict in favor of Mr. Ayala in the amount of \$125,373, plus costs and prejudgment interest at the rate of 6 percent. This appeal followed the entry of that judgment.

Two primary arguments form the basis of Mr. Keco's contention that the judgment must be set aside: 1) that it was error to instruct the jury on the issue of unjust enrichment; and 2) that Mr. Ayala was not entitled to prejudgment interest because the damages in this case were not a liquidated sum. In support of his first contention, Mr. Keco advances a two-pronged attack; insisting first, that the jury should never have been instructed on unjust enrichment as it is a matter of equity and second, arguing that he never consented to a jury trial on that issue. In

response to these contentions, Mr. Ayala argues that Mr. Keco's failure to preserve his arguments is fatal to this appeal; that the instructions were not erroneous; and that Mr. Keco did not suffer any manifest injustice as a result of the jury verdict. We agree and affirm.

Central to our decision in this case is the unambiguous language of CR¹ 76.12(4)(c)(v) which dictates that the argument section of appellate briefs: “*shall contain* at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” (Emphasis added.) A corollary requirement more specifically pertinent to the matter before us is set out in CR 51(3):

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Here, however, Mr. Keco does not specifically argue that the trial court improperly instructed the jury under Instruction Number 2. Rather, his argument is almost solely predicated upon the contention that Mr. Ayala's claim of unjust enrichment should not have been tried by the jury at all. Mr. Keco argues only secondarily that the unjust enrichment instruction, Number 5, should have included an element

¹ Kentucky Rules of Civil Procedure.

of bad faith. Only in his reply brief does Mr. Keco argue without any support that the unjust enrichment instruction prejudiced the whole result of the trial.

The requirements of CR 51(3) notwithstanding, appellate courts have “authority to review alleged errors not preserved at trial under CR 61.02 ‘upon a determination that manifest injustice has resulted from the error.’” *Mo-Jack Distributor, LLC v. Tamarak Snacks, LLC*, 476 S.W.3d 900, 907 (Ky. App. 2015). CR 61.02, the substantial error rule, provides that:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted **upon a determination that manifest injustice has resulted from the error.**

(Emphasis added.) As this Court stated in *Mo-Jack*, “[CR 61.02] is a rule rarely applied and only if the alleged error affects the substantial rights of the parties.” 476 S.W.3d at 907 (citation omitted). In this case, even if the jury was improperly instructed on the theory of unjust enrichment, which is arguable given Mr. Keco’s waiver, the fact remains that the jury was properly instructed under the contract theory of liability. The jury awarded the sum of \$125,373 on the breach of contract claim and specifically indicated that sum was the total amount of damages to be awarded. Thus, had there been any error in allowing the jury to consider the issue of unjust enrichment, it must be considered harmless in light of the jury verdict on the contract claim. The verdict would not have been reduced absent the

jury's consideration of unjust enrichment. Thus, Mr. Keco is unable to show the manifest injustice required to prevail on his unpreserved claim of error regarding the unjust enrichment instruction.

Turning now to the issue of prejudgment interest, Mr. Ayala argues that he filed a motion for prejudgment interest and neither Mr. Keco nor his counsel appeared to dispute the claim. Although the trial court granted that motion without explaining its basis for awarding prejudgment interest, the essential argument in this case is that prejudgment interest was not available at all because the judgment was based upon unliquidated damages. However, there is long-standing precedent to the contrary. As the Supreme Court of Kentucky explained in *Nucor Corporation v. General Electric Company*, 812 S.W.2d 136 (Ky. 1991), when “damages are ‘liquidated,’ prejudgment interest follows as a matter of course[,]” but a trial court may also award prejudgment interest “as justice requires on the amount that would have been just compensation had it been paid when performance was due.” *Id.* at 141, 144 (citation omitted). Thus, even if the amount of damages in this case could be considered to be unliquidated, the trial court nevertheless had authority to award prejudgment interest as an exercise of its discretion.

Mr. Keco did not, by appropriate motion or argument, require the trial court to state whether it was awarding interest as a matter of right because the

damages were liquidated or whether it was exercising its discretion regarding an unliquidated sum. Thus, his prejudgment interest argument fails for lack of preservation. Citing CR 76.12(4)(c)(v) which requires appellate briefs to contain references to the record showing that an issue was preserved for review and in what manner, this Court has previously noted “the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review,” emphasizing that “[i]t is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court.” *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987) (citations omitted), *overruled on other grounds by Conner v. George W. Whitesides Co.*, 834 S.W.2d 652 (Ky. 1992).

No manifest injustice has been demonstrated in the trial court’s award of prejudgment interest here. This litigation concerned a significant unpaid balance on a substantial amount of work Mr. Ayala performed for Mr. Keco. Despite this litigation having been filed in 2014, the trial court awarded prejudgment interest only from March 1, 2017 forward. In sum, regardless of whether prejudgment interest was awarded as a matter of course or discretion, because no manifest injustice has been demonstrated, we will not entertain an argument upon which the trial court had no opportunity to rule.

Accordingly, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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