STATE OF MICHIGAN

COURT OF APPEALS

DONALD SMITH,

Plaintiff-Appellant,

v

CHRISTINE MELCHER,

Defendant-Appellee.

UNPUBLISHED
December 3, 1996

No. 177748
LC No. 92-6704-CZ

Before: Holbrook, Jr., P.J., and Saad and W.J. Giovan,* JJ.

PER CURIAM.

In this breach of contract action, plaintiff sought to obtain the value of labor and materials he expended to construct a home on defendant's property. Following a bench trial, the court entered a judgment of no cause of action in favor of defendant. Plaintiff appeals as of right and we reverse.

Plaintiff first argues that the trial court clearly erred in finding that an express contract did not exist between the parties. We find no error. This Court will not set aside findings of fact by the trial court unless they are clearly erroneous. MCR 2.613(C); *Attorney General v Acme Disposal Co,* 189 Mich App 722, 724; 473 NW2d 824 (1991). A finding is clearly erroneous when, although there is evidence to support it, this Court, after reviewing the entire record, is left with a definite and firm conviction that a mistake has been made. *Id.*

A valid express contract requires a meeting of the minds on all the essential terms. *Kamalnath v Mercy Memorial Hospital Corp,* 194 Mich App 543, 548; 487 NW2d 499 (1992). Here, the trial court determined that plaintiff had provided most of the material, labor, and cost of constructing the house on defendant's land, but that no express promise had been made by defendant at that time to compensate plaintiff. Indeed, plaintiff had testified that he did not feel the need to have a written contract setting forth the specifications and costs of construction because the parties were "boyfriend/girlfriend." Thus, the court did not commit clear error in finding that no express contract to compensate plaintiff existed between the parties.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Moreover, with regard to defendant's alleged oral promise to sell her land to plaintiff, the court incorrectly based its holding on the lack of express contract terms. Even if plaintiff could prove all the elements of an express oral contract, an oral promise to sell land is not enforceable because it violates the statute of frauds. MCL 566.108; MSA 26.908 (a contract for the sale of an interest in land is void unless in writing and signed by the seller). See also *DeWald v Isola*, 180 Mich App 129, 135; 446 NW2d 620 (1989). Thus, the court reached the right result, albeit for the wrong reason.

Plaintiff next argues that the trial court erred in failing to find the existence of a contract implied either in law or fact. In *In re Lewis Estate*, 168 Mich App 70, 74-75; 423 NW2d 600 (1988), this Court explained the distinction between contracts implied in law and implied in fact:

> A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. Calamari & Perillo, Contracts (2d ed), § 1-12, p 19. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation. *Moll v Wayne Co*, 332 Mich 274, 278; 50 NW2d 881 (1952), overruled on other grounds *Brown v Dep't of Military Affairs*, 386 Mich 194, 201; 191 NW2d 347 (1971). However, this fiction is not applicable where there exists a relationship between the parties that gives rise to the presumption that services were rendered gratuitously. *Roznowski v. Bozyk*, 73 Mich App 405, 409; 251 NW2d 606 (1977). See also *In re Parks' Estate*, 326 Mich 169, 172-173; 39 NW2d 925 (1949). A presumption of gratuity arises where the plaintiff is related by blood or marriage to the decedent, *In re Jorgenson's Estate*, 321 Mich 594, 598; 32 NW2d 902 (1948), and where the parties lived together as husband and wife although never married, *Roznowski, supra*. See also Anno: *Establishment of "family" relationship to raise presumption that services were rendered gratuitously, as between persons living in same household but not related by blood or affinity*, 92 ALR3d 726. Where a presumption of gratuity arises, the plaintiff may still recover for services rendered under the theory of contract implied in fact. *Roznowski, supra* at 408-409. A contract implied in fact arises "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *In re Spenger Estate*, 341 Mich 491, 493; 67 NW2d 730 (1954), quoting *In re Pierson's Estate*, 282 Mich 411, 415; 276 NW 498 (1937).

Here, there is no doubt that a personal relationship existed between the parties which gave rise to a presumption that plaintiff's work on the house was rendered gratuitously. The trial court correctly held that plaintiff had not stated a cause of action for an implied in law contract. See *Roznowski, supra* at 408-409. However, as this Court noted in *Lewis, supra*, a contract may be implied in fact where the presumption of gratuity is rebutted with proof that at the time services were rendered both parties expected the plaintiff to be compensated.

> In order to recover, the plaintiff must establish a contract implied in fact. Without proof of the expectations of the parties, the presumption of gratuity will

> overcome the usual contract implied by law to pay for what is accepted. The issue is a question of fact, to be resolved by consideration of all of the circumstances, including the type of services rendered, duration of the services, closeness of the relation of the parties, and the expressed expectations of the parties. [*Roznowski, supra* at 409.]

Here, plaintiff, a residential builder, testified that the house was part of his dream to build a portfolio of rental properties from which he would earn a living. He testified that he and defendant agreed the house would be his but the two of them would share future rental income in proportion to the value of their separate interests. Defendant, who at the time was a journeyman carpenter, testified that she provided some assistance in completing construction of the house. Although she believed the house was part of a "shared dream for a future together" with plaintiff, he had never told her the house was a gift. She also admitted asking plaintiff to pay for the increase in property taxes because of plaintiff's "project house." For a few months during 1990 the parties engaged in weekly meetings at which the topic of the house was discussed, along with other issues regarding their relationship. The minutes taken at these meetings generally indicate that the parties intended to keep their individual interests in the property separate, but do not indicate that a specific agreement was reached regarding ownership of the property. In sum, although neither party testified to any agreement to compensate plaintiff for the materials and labor expended in building the house, there was an implicit understanding that both parties would reap a benefit from rental income generated by the house. Clearly, plaintiff's services were not intended to be gratuitous. In *Roznowski, supra* at 409, the plaintiff was allowed to recover under an implied in fact contract for services of a commercial, as opposed to a domestic, nature. See also *In re Estate of Morris*, 193 Mich App 579, 583; 484 NW2d 755 (1992); *Carnes v Sheldon*, 109 Mich App 204, 213; 311 NW2d 747 (1981). Here, plaintiff was a residential builder and his construction of the house had a monetary value independent of his personal relationship with defendant. Accordingly, we find that plaintiff presented sufficient evidence to rebut the presumption of gratuity and we reverse that portion of the judgment which held that plaintiff had not stated a cause of action for a contract implied in fact.

Although plaintiff requested $42,000 based on the fair market value of the house (independent of the value of the land), he is only entitled to quantum meruit or restitution damages. Quantum meruit is measured by the cost of materials used and the value of labor expended. *Morris, supra* at 583. See also 5 Corbin on Contracts 1109, p 583. Here, plaintiff claimed a total of $38,000 expended in labor and materials, but submitted proof to support, at most, an outlay of $19,600 in materials and no proofs regarding labor costs. Plaintiff admitted that he did not keep track of the time he or his friends spent building the house. Thus, at this point, plaintiff's labor costs appear speculative. Nevertheless, because the trial court did not reach this issue, we remand for consideration of that question.

Reversed and remanded.

/s/ Donald E. Holbrook, Jr.
/s/ Henry W. Saad
/s/ William J. Giovan