

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

RICHARD BENEICKE, JR.,

Plaintiff-Appellant,

v

CHARLES JOHNSON and
PAMELA JOHNSON,

Defendants-Appellees.

UNPUBLISHED
November 26, 2002

No. 233448
Oakland Circuit Court
LC No. 1999-019032-CK

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment in his favor requiring defendants to pay him \$2,873.36 in damages for a breach of contract. We affirm.

Plaintiff is a self-employed licensed residential builder and contractor. Defendant, Charles Johnson (Charles), works as a demolition contractor. Plaintiff and Charles began discussing defendants' home renovation in 1997. The work began in February of 1998 with design and blueprints prepared by plaintiff at no cost with the understanding that defendants would hire him as a general contractor for the project. Defendants approved the plans and plaintiff started obtaining bids from subcontractors. Construction began in mid-May of 1998, and was near completion in June of 1999.

Plaintiff testified that the cost estimate for materials and labor was agreed to be \$118,715.00, with an additional ten percent fee over the actual costs for his services, making the total estimate \$130,586.00. Charles, on the other hand, believed that the agreed upon estimate was between \$80,000 and \$85,000, which included an eight percent fee that defendants believed plaintiff was due. Charles arrived at his estimate based on the square footage of the proposed project, while plaintiff produced an unsigned estimate sheet as evidence of the parties' understanding. Plaintiff maintained that the final cost of the project was \$141,116.78, which, after adding his ten percent fee, totaled \$157,828.69.

The parties agreed that there was not a written construction contract, but that there was an understanding that plaintiff was responsible for hiring and paying off the subcontractors and that defendants were not personally responsible to the subcontractors. During construction, plaintiff would submit to defendants construction draw requests for the work completed. The draws were requests for payment, which included subcontractor invoices, and defendants would give

plaintiff cash or a check for the amount requested. During 1998, all draws requested were paid and totaled an undisputed amount of \$107,106.77. However, in 1999, defendants refused to pay the last draw request, even though work was still being done on their home until June of 1999.

On November 17, 1999, plaintiff filed suit alleging breach of contract, promissory estoppel, and unjust enrichment. Plaintiff alleged in his complaint that defendants owed \$5,468.68 to plaintiff and \$26,615 to the subcontractors. Plaintiff amended the complaint to indicate that the amounts were owed only to plaintiff, and the parties proceeded to trial.

After a bench trial, the trial court found an oral agreement existed between the parties. Also, the trial court found that there was an implied term of the contract that made defendants liable for plaintiff's debts incurred for work performed on defendants' home. The testimony focused on the amount over \$107,106.77 that was owed to plaintiff. Plaintiff produced invoices from subcontractors, which plaintiff asserted were evidence of his present obligations to each subcontractor for work performed on defendants' home. The total amount of these invoices was \$33,000. However, these invoices were directed to various persons and entities other than plaintiff, including Rescon, The Beneicke Group and Dick Beneicke.

On March 9, 2001, the trial court issued an opinion and order granting judgment for plaintiff in the amount of \$2,873.36. The trial court denied plaintiff's claim of money owed to subcontractors because plaintiff's invoices did not show that he personally owed the subcontractors and because there was no evidence that plaintiff still owed the subcontractors. The trial court did find, as to plaintiff's fee, that the correct percentage that was owed was nine percent of the total completed cost, which was the basis of the \$2,873 award to plaintiff.

On appeal, plaintiff argues that the trial court improperly concluded that defendants were not liable to plaintiff for obligations owed by plaintiff to subcontractors for work performed on defendants' home. We disagree.

We review the trial court's findings for clear error. An appellate court will set aside a trial court's finding of fact only when those findings are clearly erroneous. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire record, is left with a definite and firm conviction that a mistake has been made. *Id.*

The trial court found that there was a contract in this case. A contract is made when both parties have executed or accepted it, and not before. *Kamalnath v Mercy Hosp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). Also, the burden is on the plaintiff to show the existence of the contract sought to be enforced, and there is no presumption in favor of the execution of a contract. *Id.* In the instant case, plaintiff substantially renovated defendants' home and defendants, in turn, paid plaintiff over \$107,000. Thus, the parties executed an oral contract, and only the total amount that was owed was in dispute.

To be entitled to damages in a contract case, a party has the burden to show by the preponderance of evidence that the breach of contract caused him ascertainable damages. *Wheelmakers, Inc v Flint*, 47 Mich App 434, 435; 209 NW2d 444 (1973). Also, damages cannot be allowed where it is not shown that the plaintiff was actually damaged by the defendant's breach. *Wright v Bateson*, 370 Mich 660, 668; 122 NW2d 683 (1963).

The trial court found that plaintiff failed to show that he was personally obligated to the subcontractors. This finding is well supported by the record. The trial court heard testimony from plaintiff regarding his obligations to each subcontractor. These obligations were evidenced by invoices, which indicated that the bills arose from work on defendants' home. However, these invoices were directed to various persons and entities other than plaintiff, including Rescon, The Beneicke Group and Dick Beneicke. However, this evidence did not establish that plaintiff was personally required to pay these invoices. Moreover, the trial court found that, although the invoices may have represented work done by the subcontractors, plaintiff failed to show that the invoices were outstanding. The trial court noted that there was no testimony by the subcontractors to establish the existence of the debt, rather than the existence of invoices. Therefore, the trial court's finding was not clearly erroneous.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper