STATE OF MICHIGAN

COURT OF APPEALS

DICKINSON HOMES, INC.,

Plaintiff-Appellee,

v

ROGER BARRETTE and DIANE BARRETTE,

Defendants-Appellants.

UNPUBLISHED
May 21, 2009

No. 282385
Iron Circuit Court
LC No. 06-003503-CK

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

In this action arising from plaintiff's construction and installation of a modular home on defendants' property, the trial court awarded plaintiff $137,416 pursuant to an order partially granting plaintiff's motion for summary disposition, and then subsequently awarded plaintiff additional damages of $107,327, plus interest, costs, and attorney fees, following a bench trial. Defendants appeal as of right. We affirm.

In May 2005, the parties executed two contracts whereby plaintiff agreed to construct and install a modular home on defendants' property. The purchase agreement (hereafter "PA contract") obligated plaintiff to construct and deliver the modular home to the site in accordance with plans and specifications attached to the PA contract, as well as "any other plans and drawings approved in writing by buyer and seller." The contract reflected a price of $291,873, subject to adjustments as provided in the PA contract. A second contract, the general contracting agreement (hereafter "GA contract"), obligated plaintiff to perform work at the property site, as specified in an exhibit to the GA contract. This contract reflected a price of $132,096, subject to adjustments for allowances or other listed occurrences, such as building code requirements.

Each contract contained a provision that precluded it from being modified or amended in any manner except by a written instrument executed by the parties. Each contract permitted defendants to request changes or altercations to the work by executing change order forms. Although defendants' occupancy of the home was not permitted unless plaintiff had been paid in full, defendants ultimately occupied the home before making full payment and then refused to pay plaintiff the balance that it claimed was owed under the contracts.

In June 2006, plaintiff filed this action to foreclose on a construction lien against defendants' property and to recover the amounts that allegedly were still owed by defendants under the contracts. Plaintiff's complaint sought recovery for breach of contract, but alleged alternative theories of recovery for unjust enrichment and quantum meruit. Defendants filed a

counter-complaint for breach of contract, alleging that plaintiff failed to deliver the house as promised and that they were entitled to damages for defective workmanship and overcharges. Defendants also asserted a claim for slander of title.

In March 2007, the trial court granted partial summary disposition in favor of plaintiff, agreeing that there was no genuine issue of material fact that plaintiff was entitled to partial recovery of $137,416 on its breach of contract claim. The court also dismissed all of defendants' counter-claims, except those involving alleged defects and overcharges under the contracts. The case proceeded to trial on the parties' remaining claims. Following a bench trial, after allowing certain offsets for defendants, the trial court awarded plaintiff additional damages of $107,327, plus interest, costs, and attorney fees.

We review a trial court's findings of fact at a bench trial for clear error and review its conclusions of law de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). Deference is given to the trial court's superior ability to judge the credibility of witnesses who appear before it. *Id.* at 652; MCR 2.613(C). A trial court's findings of fact are sufficient if they are "brief, definite, and pertinent" and it appears that the court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995), quoting MCR 2.517(A)(2).

Relying on *Zinchook v Turkewycz*, 128 Mich App 513; 340 NW2d 844 (1983), defendants first argue that plaintiff was not entitled to recover on its breach of contract claim because it failed to establish that it substantially completed the contracts. Defendants assert that it was necessary that plaintiff provide them with specific itemizations of materials and labor for all items identified as "allowances" in order to substantially comply with the contracts and thereby permit it to proceed with its breach of contract claim. Defendants assert that the trial court failed to fully appreciate this contractual term when rejecting their "high end allowance" argument.

The interpretation of a contract, including whether it is ambiguous and requires resolution by a fact-finder, presents a question of law that is reviewed de novo. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

Here, defendants have inappropriately taken the trial court's findings out of context and misapplied the rule of substantial completion. The rule of substantial completion in *Zinchook, supra* at 521, recognizes that a party who commits the first material breach of a contract cannot maintain an action against the other party for his or her subsequent breach or failure to perform. *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968); *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). In a case involving a building contractor, the general rule is that the contractor is required to furnish a building that substantially complies with the contract and may only recover in a breach of contract action if slight additions or alterations are required to finish the work. *Zinchook, supra* at 521. As more fully explained in *P & M Constr Co v Hammond Ventures, Inc*, 3 Mich App 306, 314-315; 142 NW2d 468 (1966), quoting 13 Am Jur 2d, Building and Construction Contracts, § 43, pp 46-48:

> While it is difficult to state what the term "substantial performance" or "substantial compliance" as applied to building and construction contracts means, inasmuch as the term is a relative one and the extent of the nonperformance must be viewed in relation to the full performance promised, it may be stated generally that there is substantial performance of such a contract where all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed are performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. Imperfections in the matters of detail which do not constitute a deviation from the general plan contemplated for the work, do not enter into the substance of the contract, and may be compensated in damages, do not prevent the performance from being regarded as substantial performance. * * *
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> In the last analysis, the question as to whether there has been substantial performance is one of fact for the trier of the fact, and it may be added that whether there is a substantial performance of a building contract is to be determined in reference to the entire contract and what is done or omitted under it, and not in reference to one specification.

The record here reflects that the trial court considered the requirement of substantial compliance when it decided plaintiff's summary disposition motion. The court found that the home was substantially completed within 210 days and granted a partial judgment in favor of plaintiff. Because defendants do not address the trial court's summary disposition ruling, their claim that plaintiff failed to substantially complete its required performance under the contracts is deemed abandoned. *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999).

Further, the trial court's subsequent findings at trial regarding "high end allowances," which are the basis for defendants' argument on appeal, have nothing to do whether there was substantial completion of the contracts. Rather, examined in context, the trial court's findings were responsive to defendants' claim in closing arguments that plaintiff's sales agent, Mario Santoni, promised a "turn-key" home during contract negotiations, using a budget scheme with "high-end allowances," and that approximately $50,000 was supposed to be available for this purpose. The trial court's finding that the written contracts speak for themselves and were controlling with respect to this issue was not erroneous, considering that neither contract uses the phrase "high-end allowance" and that the GA contract expressly defines an "allowance" as an estimate. A party who signs a contract is presumed to have read it. *Wilkie v Auto-Owners Ins Co,* 469 Mich 41, 59; 664 NW2d 776 (2003). Further, a court must enforce an unambiguous contract as written. *Hamade v Sunoco, Inc,* 271 Mich App 145, 166; 721 NW2d 233 (2006).

Defendants have failed to demonstrate that the trial court's findings regarding their "high end allowance" argument were clearly erroneous. Defendants' specific argument on appeal that an itemization of materials and labor was required for plaintiff to substantially complete the contracts is unpreserved because defendants have failed to show that this argument was presented to the trial court. *Frericks v Highland Twp,* 228 Mich App 575, 597; 579 NW2d 441 (1998). Indeed, having offered a computation of damages at trial that assumed that allowances were fully used, with the exception of the $4,557 credit given by plaintiff for the unused site allowance, defendants have no reason to complain that the trial court did not appreciate the use of the contract term "allowance" in its findings. The trial court was only required to make brief,

definite, and pertinent findings on contested matters. MCR 2.517(A)(2); *Triple E Produce Corp, supra* at 176.

Although this Court may overlook preservation requirements to consider an issue of law, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), defendants have failed to show any express contract language that required itemization of materials and labor, let alone that itemization would be necessary for plaintiff to substantially comply with the contracts. Although a question of fact could still arise with respect to whether plaintiff actually performed the work and the amount involved, defendants have not demonstrated any basis for disturbing the trial court's assessment of plaintiff's claims for work identified as allowances in the contracts. We will uphold a trial court's decision when its award falls within the range of evidence at trial. *Triple E Produce Corp, supra* at 176-177.

Defendants next challenge plaintiff's entitlement to charges that it recorded in various change orders for the contracts, which defendant did not sign. Specifically, defendants argue that the trial court should have evaluated each change order to determine whether the charges pertained to work already contemplated by the parties and, if not, determine the amount of damages to be awarded to plaintiff under equitable, rather than contract, principles.

We conclude, however, that defendants have failed to demonstrate any deficiency in the trial court's findings that require further explanation. MCR 2.517(A)(2); *Triple E Produce Corp, supra* at 176-177. Defendants have also failed to explain how the trial court erred, factually or legally, in its decision. "It is not enough for an appellant in his brief simply to announce a position or assert and error and then leave it up to this Court to discover and rationalize the basis for his claims." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Further, our review of the record fails to disclose any basis for relief. We review de novo the proper interpretation of a contract as a question of law. *DaimlerChrysler Corp, supra* at 184-185. Both contracts contemplate that changes could be made in writing. Each contract contains a written provision requiring the parties to exercise a written instrument to modify or amend the contract. Each contract also permits defendants to request changes based on their execution of a change order. The PA contract provides:

> Buyer may request changes or alterations in the Home, Work and the Plans and Specifications by executing a Contract Revision Change Order form satisfactory to Seller. By the execution of such Change Order, Buyer agrees to pay the additional charges of Seller resulting there from. . . .

The GA contract provides:

> Buyer may request changes or alterations in the Work by executing a Contract Revision Change Order in form satisfactory to Contractor. By the execution of such Change Order, Buyer agrees to pay the additional charges of Contractor resulting there from. . . . .

Contract language is construed in accordance with its plain and ordinary meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). A dictionary may be consulted to determine the meaning of undefined terms. *Citizens Ins Co v Pro-Seal Service*

Group, Inc, 477 Mich 75, 84; 730 NW2d 682 (2007). The word "form" is defined, in pertinent part, as "a document with spaces to be filled in with particulars." *Random House Webster's College Dictionary* (1997), p 510. From the face of each of the contract provisions, it is apparent that they contemplated the use of some type of document for defendants to request changes.

Contrary to plaintiff's argument on appeal, we do not construe the word "may" in these provisions as permitting changes by means other than a writing. Although the word "may" generally denotes permissive action, *Murphy v Sears, Roebuck & Co*, 190 Mich App 384, 386-387; 476 NW2d 639 (1991), absent defendants' execution of a form satisfactory to plaintiff, the parties would be left with the task of overcoming the other provisions in each contract, which require that contract modifications be in a written instrument executed by both parties.

Nonetheless, as defendants observe on appeal, a contract may be modified. Essential to any breach of contract action is a valid contract, including mutual assent and consideration, albeit the law may supply missing details of a contract by construction. See *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941); *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990); see also *Walter Toebe & Co v Dep't of State Hwys*, 144 Mich App 21, 31; 373 NW2d 233 (1985). Parties may modify contract provisions through a course of conduct, even where the contract contains a restrictive amendment clause, if there is mutual assent to the modification. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). "Any clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses." *Id.* at 374-375. The question whether a waiver occurred is generally a mixed question of fact and law. *Cascade Electric Co v Rice*, 70 Mich App 420, 424-425; 245 NW2d 774 (1976).

Absent a valid, express contract or some bar to enforcement of its terms, a party may recover for services performed in quantum meruit. *Biagini v Mocnik*, 369 Mich 657, 659-660; 120 NW2d 827 (1963); *Allen v McKibbin*, 5 Mich 449, 454 (1858). "[T]he court conclusively implies an intent to pay for services, in order to prevent unjust enrichment." *Roznowski v Bozyk*, 73 Mich App 405, 409; 251 NW2d 606 (1977). The more general equitable doctrine of unjust enrichment is based on the principle that a party should not be allowed to profit at another's expense. *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952). The law will imply a contract to prevent the inequity arising from a defendant's receipt of a benefit from the plaintiff. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007).

Although the trial court in this case did not specify the particular contract or equitable principles that it applied in resolving the parties' disputes, we may affirm a trial court's decision where the correct result was reached, even if doing so requires other reasoning. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 136-137; 676 NW2d 633 (2003); see also *Taylor v Laban*, 241 Mich App 449, 457-458; 616 NW2d 229 (2000). Here, it is clear from the evidence that defendants requested changes without executing change order forms or some other written instrument and that plaintiff acted on the requests. With the exception of the first change order for the PA contract that was signed by both parties, the evidence indicated that plaintiff essentially used its "contract revision change order" forms to record how the requested changes increased or decreased the price of each contract. Plaintiff presented most of the change

orders to defendants at a meeting in December 2005, after the changes recorded in the orders had been made.

It is also clear from the trial court's findings that, with the exception of certain electrical charges recorded in change order forms for the GA contract, the court was satisfied that plaintiff performed the additional work ordered by defendants, without executing a written form, and that plaintiff was entitled to payment for the work. The trial court's award for the additional electrical charges is indicative of an equitable remedy arising from a lack of mutual assent. In awarding plaintiff only part of its requested amount for the electrical charges, the trial court found that the contract called for a written change order and that "[t]here is none and plaintiff did not make it clear that defendants were going to be charged," but that "defendants were benefited by the extras that were clearly not in the contract."[1] The trial court's awards to plaintiff for other disputed contract changes is supported by the contract modification principles set forth in *Quality Products & Concepts Co, supra*. Accordingly, we reject defendants' argument that the trial court should have taken an equitable approach in assessing the amounts to which plaintiff was entitled.

With regard to defendants' specific claim concerning plaintiff's charge for the basement firewall in the first change order to the GA contract, we note that the trial court specifically found that defendants approved the work by e-mail. We are not persuaded that the trial court clearly erred in treating this charge as extra work not contemplated by the initial contracts. MCR 2.613(C); *Ligon, supra* at 124. We decline to consider whether other change orders reflected work contemplated in the initial contracts because defendants have not sufficiently briefed their claim as required by MCR 7.212(C)(7). An appellant may not leave it to this Court to search for factual support for a claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see also *Mitcham, supra* at 203.

We also decline to address defendants' claim that change orders prepared by defendants inappropriately included commissions and sales tax. Defendants' cursory argument regarding their alleged discovery of inappropriate charges is insufficient to present this issue for review. *Mitcham, supra* at 203.

Defendants have also failed to show any clear error in the trial court's finding that plaintiff was entitled to $22,957, which plaintiff sought in the third change order for the GA contract for the added deck and railing, less the offset of $750 in favor of defendants to fix loose boards on the deck. MCR 2.613(C); *Triple E Produce Corp, supra* at 176-177; *Ligon, supra* at 124.

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[1] We recognize that a construction lien is only permitted if there is a valid contract. See MCL 570.1107(1); *Colonial Brick Co v Zimmerman*, 255 Mich 655, 657; 239 NW 301 (1931). Even though the electrical charges were not specifically included in a written contract, it is clear that the trial court's decision as a whole was otherwise based on contract principles, and defendants have not in any way challenged the trial court's determination of the total lien amount. We will therefore not disturb it.

With regard to the other offsets sought by defendants at trial, we note that the trial court's findings are consistent with the approach set forth in *P & M Constr Co, supra* at 315, whereby, when a contractor substantially performs under a contract, the property owner is allowed to deduct the cost of remedying any defects from the contract price. Having reviewed the record and considered defendants' arguments regarding the amounts allowed by the trial court with respect to their claimed offsets, we find no basis for disturbing the trial court's findings.

Considering that there was evidence at trial that the placement of the well and septic system did not violate the contracts, and that plaintiff did not learn of defendants' parking plans in the area where the septic tank was installed until after the installation was complete, the trial court did not clearly err in refusing to grant defendants offsets for purposes of moving the well and septic tank. Similarly, we find no clear error in the trial court's consideration of the "white" color selection contained in the PA contract for the bathroom fixtures when determining that plaintiff did not breach the contract by supplying a white bathtub.

With respect to the grading problem outside the house, the trial court in fact accepted Robert Wloszczynski's estimate of $2,800 to repair the grading. We are not persuaded that the trial court erred by failing to grant any additional award based on Wloszczynski's testimony regarding his other bids for work on the property.

With respect to the log staircase that was the subject of the first change order to the PA contract, the record shows that the primary dispute at trial concerned whether the contract required posts with flared or rooted bottoms. Considering that there was conflicting testimony on this issue, and that the contract did not expressly require flared or rooted bottoms, we find no basis for disturbing the trial court's finding that the staircase was constructed in compliance with the contract. We therefore reject defendants' argument that they should have been awarded an offset to fix the staircase.

With respect to the first-floor flooring, defendants have failed to substantiate their position that Todd Laturi provided an expert opinion regarding the flooring or how it was installed and, specifically, that Laturi was qualified as an expert under MRE 702. Regardless, the trial court was not required to accept Laturi's testimony. Considering the photograph and testimonial evidence presented at trial, a factual question existed with respect to whether there was faulty workmanship. We are not left with a definite and firm conviction that the trial court erred in finding that there was nothing wrong with the floor. *Ambs, supra* at 651.

Finally, defendants give only cursory treatment to their claim that they should have been granted an offset of $1,000 for alleged defects in the condition of the siding and propane tank. We are not persuaded that the trial court clearly erred by limiting the offset to an award of $200 in defendants' favor to repaint the propane tank.

Next, defendants argue that the trial court erred in summarily dismissing their slander of title claim against plaintiff. We decline to consider this issue because defendants do not address the elements of a slander of title claim. Further, the trial court dismissed this claim on summary disposition pursuant to MCR 2.116(C)(8), and defendants do not address the trial court's summary disposition decision. *Mitcham, supra* at 203; *Prince, supra* at 197.

Rather, defendants present a challenge to the amount of the construction lien claimed by plaintiff under the Construction Lien Act, MCL 570.1107. Defendants' argument is factually inaccurate because plaintiff's claim of lien, dated March 31, 2006, was for $256,453, not $508,753. Further, the claim was partially resolved on summary disposition when the trial court granted a partial judgment in favor of plaintiff and then, following the bench trial, gave defendants a credit for $137,419 against the judgment. The trial court ultimately allowed a construction lien for the total amount of $192,310.19 adjudged to be due from defendants for damages, interest, costs, and attorney fees. Because defendants do not address any challenge to that finding or include this question in the statement of the questions presented in their brief, any challenge to the accuracy of the trial court's finding may be deemed abandoned. MCR 7.212(C)(5); *Prince, supra* at 197; *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

We decline to consider defendants' additional argument that the scope of the construction lien extends to property that should not be subject to the lien because it is based on evidence that is not properly part of the record on appeal, inasmuch as it was filed in support of defendants' motion for relief from the judgment, which the trial court lacked jurisdiction to consider because the motion was filed while this appeal was pending. Enlargement of the record on appeal is not permitted. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

Finally, defendants argue that the trial court erred in awarding attorney fees to plaintiff under the Construction Lien Act, MCL 570.1118(2). We disagree. Considering the trial court's determination that plaintiff was entitled to a lien, and defendants' failure to show any error in the trial court's resolution of the contract issues underlying this determination, we find no basis for disturbing the trial court's decision to grant attorney fees in favor of plaintiff. *Schuster Constr Services, Inc v Painia Dev Corp*, 251 Mich App 227, 238; 651 NW2d 749 (2002).

We decline to consider plaintiff's request for additional attorney fees and costs for posttrial and appellate proceedings, under either the terms of the PA contract or the Construction Lien Act, because the trial court has not yet decided this issue and plaintiff failed to file a cross appeal. An appellee who does not file a cross appeal may not obtain a more favorable decision on appeal than was rendered in the trial court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); cf. *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 139; ___ NW2d ___ (2009) (request for appellate fees and costs preserved in cross-appeal where attorney fees and costs for collecting a judgment were requested in a proposed final judgment in the trial court).

But as the prevailing party on appeal, plaintiff may tax costs pursuant to MCR 7.219(A). Further, plaintiff may pursue any statutory or contract claim to attorney fees and costs in an appropriate postjudgment motion in the trial court. See *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 376-377; 652 NW2d 474 (2002); cf. *LaVene v Winnebago Industries*, 266 Mich App 470, 702 NW2d 652 (2005).

Affirmed.

/s/ William C. Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher