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

HOSFORD BROTHERS CONCRETE, INC.,

Plaintiff/Counter Defendant,

v

MARK PREMER d/b/a PREMER BUILDERS, and PREMER DEVELOPMENT, LLC,

Defendants/Cross Plaintiffs/Cross Defendants-Appellants,

and

SHAFER REDI-MIX, INC., SHAFER BROS., INC., and MARK BURLEY EXCAVATING, INC.,

Defendants/Cross Plaintiffs,

and

MID-MICHIGAN FOUNDATION, INC.,

Defendant/Cross Plaintiff,

and

WILLIAM M. MORRIS and LAURIE L. MORRIS,

Defendants/Cross Defendants-Appellees,

and

DEPARTMENT OF CONSUMER & INDUSTRY SERVICES BUREAU OF WORKERS' & UNEMPLOYMENT COMPENSATION, and DEPARTMENT OF TREASURY,

UNPUBLISHED
July 26, 2011

No. 298492
Eaton Circuit Court
LC No. 09-000537-CH

Defendants.

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

In this suit involving a claim of unjust enrichment, appellants Mark Premer (d/b/a Premer Builders) and Premer Development, LLC (referred to collectively as "Premer") appeal by right the circuit court's May 19, 2010, opinion and order, entered following a one-day bench trial and holding that Premer had no cause of action against appellees William M. and Laurie L. Morris ("the Morrises"). We affirm.

I. FACTS

In September 2005, Premer entered into a land contract with the Morrises under which Premer agreed to purchase a tract of land in Eaton County known as the Morris Brooks Estates Subdivision II (the "subdivision" or the "property"). The purchase price was $417,000, with a down payment of $10,000 and financing on the remaining $407,000 owed at six percent annual interest.[1] The principal and interest were to be paid by September 2007. Premer was to make interest only payments on a monthly basis and pay approximately $16,000 towards the principal when each one of the lots it was to develop on the land sold.

In addition to the land contract, the Morrises lent Premer $350,000 at eight percent interest so that Premer could develop the property.[2] As with the land contract, Premer was to pay approximately $16,000 toward the principal of this loan when one of the lots in the subdivision sold. This loan was secured with a mortgage on the property. On July 24, 2007, the parties executed an addendum to the land contract and the improvement loan agreement containing various provisions, including the reduction of the principal owed under the land contract and the increase of the improvement loan amount.

From 2005 to 2007, Premer performed land site preparation, installed the streets, curbs, gutters, sewers, utilities, and otherwise got the subdivision "ready to sell." A list of Premer's development expenses, totaling approximately $622,000, was introduced at trial. Premer also built a "Parade of Homes" house (the "parade house") on lot 31 for "about $208,000." Premer sold lot 17 in November 2007 for $53,000 and lot 24 in July 2008 for $54,000.

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[1] The parties later amended the contract to reduce the principal owed after the down payment from $407,000 to $374,440.

[2] The parties later agreed to increase the loan amount to $367,050.

Premer eventually defaulted on both contracts and owed the Morrises approximately $37,000 in interest. The Morrises filed a land contract forfeiture proceeding in district court, seeking possession of the land.[3] Premer did not respond, and the district court entered a default judgment on December 9, 2008. Premer did not redeem the contract during the 90-day statutory period, see MCL 600.5744(3), and on March 9, 2009, the district court entered an order of eviction.

Eventually, contractors filed suit against Premer in the circuit court to foreclose on construction liens. The Morrises paid a little over $44,000 to remove those liens. Premer then filed a cross-claim against the Morrises, claiming that they had been unjustly enriched from the improvements Premer made to the property. On February 26, 2010, a one-day bench trial was held on Premer's unjust enrichment claim. The circuit court subsequently entered a judgment of no cause of action in favor of the Morrises. Premer now appeals.

II. STANDARDS OF REVIEW & APPLICABLE RULES

As noted above, this case involves among other items a land contract between the parties and Premer's forfeiture of the contract. However, while the forfeiture of land contracts are in part governed by statute, the parties do not cite to any statutory provision or other default rule governing the forfeiture of improvement loan agreements. Thus, we will address this issue using general contract principles.

"Whether a specific party has been unjustly enriched is generally a question of fact. However, whether a claim for unjust enrichment can be maintained is a question of law, which we review de novo. Finally, we review de novo a trial court's dispositional ruling on an equitable matter." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006) (citations omitted). Findings on questions of fact are reviewed for clear error. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009). Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

"The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Morris Pumps*, 273 Mich App at 194. "'However, a contract will be implied only if there is no express contract covering the same subject matter.'" *Id.*, quoting *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

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[3] See MCL 600.5726. The land contract at issue specifically provided for forfeiture as a remedy.

III. ANALYSIS

A. EXISTENCE OF EXPRESS CONTRACT

Here, there is no express contract between the parties covering the same subject matter as Premer's claim of unjust enrichment. Although it is true that Premer and the Morrises had several contracts, none of those contracts specifically dealt with the subject matter of the unjust enrichment claim, i.e., the physical improvements Premer made to the property. The initial land contract and mortgage dealt only with the real property. They said nothing about the physical improvements that Premer made to the property or that the Morrises would acquire the improvements free and clear in the event of a land contract forfeiture proceeding or foreclosure. Likewise, the improvement loan agreement did not address the actual physical improvements in any way. It was a simple loan agreement, whereby the Morrises lent Premer $367,000 at eight percent interest. As such, the parties did not have an express contract covering the subject matter of Premer's unjust enrichment claim.

B. INEQUITABLE RETENTION BY THE MORRISES

The next issue is whether the circuit court erred in concluding that the Morrises were not unjustly enriched. In this regard, the court concluded that Premer failed to prove that the Morrises inequitably received and retained a benefit from Premer. The court found that both parties had lost considerable money on the venture, that the Morrises continued to lose money, that Premer failed to establish that it conferred any benefit on the Morrises, and that Premer's evidence of a financial benefit was speculative given the current economic climate.

On appeal, Premer characterizes the circuit court's decision as a finding that Premer presented speculative evidence and then provides two reasons why its evidence was not speculative. First, Premer claims that the amount the Morrises were enriched could be measured by the materials and labor Premer expended in developing the subdivision and building the parade house. Second, Premer claims that the amount could be calculated based on expert testimony regarding the market value of the property.

As indicated, a party claiming unjust enrichment must establish (1) that the other party received a benefit and (2) an inequity to the party claiming unjust enrichment because of the retention of the benefit by the other party. *Morris Pumps*, 273 Mich App at 194-195.

Premer is incorrect in contending that the circuit court should have used the amount Premer expended in developing the property in order to calculate how much the Morrises were enriched. It has long been established that the correct measure of damages in an unjust enrichment claim is the amount the property is enhanced, not the amount the enhancing party expended. *Pakulski v Ludwiczewski*, 291 Mich 502, 511; 289 NW 231 (1939) ("The measure of [damages in an unjust enrichment claim] is not the amount of the expenditures on the property but the amount the land has been enhanced by reason of the repairs and improvements made upon it."). As such, Premer's first argument is without merit.

Premer's second argument, that the circuit court erred in concluding that its evidence regarding enrichment was speculative, is likewise without merit. Whether a party has been unjustly enriched is a question of fact, *Morris Pumps*, 273 Mich App at 193, and we are not left

with a definite and firm conviction that the court made a mistake in concluding that Premer failed to prove that the Morrises were unjustly enriched by Premer's physical improvements to the property.

The majority of the testimony at the bench trial related to the value of the property. Premer presented testimony from John Craig, a licensed real estate appraiser who was recognized as an expert in that area. Craig's appraisal report was admitted into evidence. Craig opined that the value of the 20 remaining lots in the subdivision was $942,500, assuming that a final coat of asphalt was applied to the subdivision. The lots were valued between $39,000 and $60,000 each. Craig's appraisal included an estimated 15 percent profit. He estimated an absorption rate of five years, which meant that his appraisal assumed that all 20 lots would be sold in five years. Craig's appraisal valued the property as of December 8, 2008, and used comparables from 2006 and 2007. Craig said that he would be comfortable extending his appraisal to March 9, 2009, the date the Morrises regained possession of the property, but "definitely would like to look at additional [sales] data that may have occurred" during that approximately 90-day time period. Craig's appraisal did not include lot 31, which contained the parade home, but Craig agreed that the lot and home were worth $245,000, based on an offer that Premer had received on the home.

The Morrises presented testimony from Dennis Goff, also a licensed real estate appraiser who was recognized as an expert in that area. Goff's appraisal report was also admitted into evidence. Goff opined that the value of the 20 remaining lots in the subdivision was $586,000. Goff estimated a 20-year absorption rate, given that there were 20 lots and one lot sold in 2007, one lot sold in 2008, and zero lots sold in 2009. Goff's appraisal valued the property as of February 3, 2010, and primarily used comparables from 2009, with one comparable from 2008.

There were problems with both parties' evidence regarding the value of the property. First, both appraisals were based on a time period other than March 9, 2009, the date the Morrises regained possession of the property. Craig's appraisal was done approximately three months earlier and Goff's appraisal was done nearly a year later. Although Craig said he would be comfortable extending his appraisal ahead three months, he also recognized that one would need to assess the sales data during that interim time period in order to be accurate, which he did not do. Second, the five-year absorption rate in Craig's appraisal appears rather optimistic given that one lot sold in 2007, one lot sold in 2008, and zero lots sold thereafter. Third, Craig's appraisal used comparables from 2006 and 2007. Thus, it did not take into account the subsequent large decline in the housing market.

Moreover, in its claim of unjust enrichment, Premer fails to account for the $367,050 the Morrises lent him to develop the subdivision. Premer additionally fails to account for the initial value of the land itself, which the Morrises originally owned, and which was worth approximately $400,000 based on the land contract. Premer also fails to account for the $107,000 he received when he sold lot 17 and lot 18. The Morrises also paid more than $44,000 in outstanding construction liens after gaining ownership of the property. Premer simply presents an appraisal that values the subdivision at $942,500, and ignores the fact that the Morrises owned the property initially, lent Premer money to develop it, and paid outstanding construction liens. It is not this Court's duty to calculate for Premer all of these numbers in this rather complex transaction, to retrace the circuit court's steps in doing so, or to entertain

plausible alternative interpretations of the evidence presented; the test is whether the court's finding was clearly erroneous, and Premer fails to show where clear error occurred. See *Capitol Props Group, LLC*, 283 Mich App at 430; see also *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 649; 719 NW2d 40 (2006) ("A party may not simply announce a position and leave it to this Court to find support for it.")

In light of the expenses that the Morrises were saddled with, Premer has failed to show that the physical improvements it made brought about a windfall situation. Moreover, given its five-year absorption rate, the appraisal Premer presented appears rather optimistic and the circuit court was justified in discounting it as such. Premer has failed to meet its burden of showing that the court committed clear error in finding that the Morrises were not unjustly enriched by Premer's physical improvements to the property.

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens