

STATE OF MICHIGAN
COURT OF APPEALS

DROST LANDSCAPE, INC.

Plaintiff-Appellant,

v

DERITA AND ROBERT DOWNEY,

Defendants-Appellee/Cross-
Appellant.

UNPUBLISHED

March 5, 2013

No. 308146

Charlevoix County Circuit Court

LC No. 11-000498-23-CK

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Following the grant of defendants' motion for summary disposition, defendants were awarded sanction in the amount of \$7,500 based on the filing of a frivolous complaint. Plaintiff appeals as of right and defendants cross-appeal. We reverse.

John and Diane Vick defaulted on a land contract with defendants and ultimately there was a forfeiture. Language in the land contract stated that defendants would retain any improvements if the Vicks defaulted. Plaintiff had done substantial landscaping work and was only partially paid by the Vicks. Plaintiff filed suit against the Vicks and obtained a consent judgment for \$180,998.25. However, the consent judgment stated that plaintiff could not collect against the Vicks until it exhausted all legal claims against defendants.

Plaintiff subsequently filed a complaint against defendants stating claims of unjust enrichment, quantum meruit and quantum valebant.¹ Ultimately, the trial court dismissed plaintiff's claim under MCR 2.116(C)(7) based on res judicata. The trial court also dismissed plaintiff's claim under MCR 2.116(C)(8) finding that plaintiff failed to state a claim upon which relief could be granted. It then awarded sanctions for the filing of a frivolous claim.

We agree that plaintiff may not pursue claims that initially belonged to the Vicks and were later assigned to plaintiff. However, plaintiff's claim of unjust enrichment are wholly their

¹ These claims are all essentially the same. The gist of each is that defendants received the benefit of the labor and materials supplied by plaintiff, and that defendants therefore should pay plaintiff.

own, and not dependent on the Vicks' rights. Therefore, they could not have been subject to res judicata because there was no prior litigation between the parties to the present case.

We must therefore determine whether the quantum meruit claim set forth in plaintiff's complaint was frivolous. MCL 600.2591(3)(a) states that a claim is frivolous when: (1) the party's primary purpose "was to harass, embarrass or injure the prevailing party"; (2) [t]he party had no reasonable basis to believe that the facts underlying that party's legal position were true"; or (3) "[t]he party's position was devoid of arguable legal merit." *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). There is no suggestion that plaintiff's purpose was to harass, embarrass or injure defendants.

As to whether plaintiff had a reasonable basis for its quantum meruit pleadings, we conclude that this case is controlled by *Morris Pumps v Centerline Piping*, 273 Mich App 187; 729 NW2d 898 (2006). In that case, the supplier to a subcontractor was not paid before the subcontractor went out of business. The replacement subcontractor used the supplies on site to finish the project but neither the replacement subcontractor nor the general contractor paid the supplier. The supplier brought a claim of unjust enrichment against the general contractor.

The general contractor argued that the unjust enrichment claim was barred because of the express contract between the supplier and the subcontractor. The Court noted that, "[g]enerally, an implied contract may not be found if there is an express contract *between the same parties* on the same subject matter." 273 Mich App at 194 (emphasis added), quoting 42 CJS, *Implied and Constructive Contracts*, § 34, p 33. However, it concluded that this principal did not bar a quantum meruit claim against the general contractor because the only express contract was between the supplier and the original subcontractor.

The general contractor also claimed that its retention of the materials was not inequitable. The Court noted that "not all enrichment is necessarily unjust in nature." 273 Mich App at 196. In that case, the general contractor was responsible for overseeing construction and supervising subcontractors, would have been aware of the delivery of the supplies and would likely have been aware they were not paid for, and was "necessarily a party to the decision to use and retain the materials without paying benefits." 273 Mich App at 197. The Court found that the enrichment was unjust, stating: "If defendant's retention of the materials supplied by plaintiffs had been completely innocent and without knowledge, we might be inclined to conclude that defendant's enrichment was not unjust. . . . However, we simply cannot classify defendant's act of retaining and using the materials, without ever ensuring that plaintiffs were compensated for the materials, as innocent, just, or equitable." *Id.*

In the present case, plaintiff asserted that defendants were complicit in allowing the landscaping to go forward and that their retention of the benefit would be unjust. Defendants were the beneficiaries of approximately \$200,000 of landscaping and ultimately stood to make a considerable profit on the home. In addition, there is some evidence that defendants were aware of the landscaping project, although, unlike in *Morris Pumps*, defendants had no authority to stop the landscaping project from proceeding and could not simply have returned the materials used to plaintiff because the work was already finished. Plaintiff has not appealed the grant of summary disposition, and we need not decide whether mere knowledge of the project is enough to render the defendants' enrichment unjust. However, the circumstances of the present case are

sufficiently similar to *Morris Pumps* that, plaintiff's claim, at least at the outset, was not "devoid of arguable merit." Therefore, the grant of sanctions against plaintiff was inappropriate.

Given our disposition of plaintiff's appeal, we need not address defendant's claim on cross-appeal that the amount of sanctions was deficient, and we decline defendants' invitation to impose sanctions on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Douglas B. Shapiro