STATE OF MICHIGAN

COURT OF APPEALS

GLOBAL TECHNOLOGY, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

W.F. WHELAN, CO.,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
December 12, 2013

No. 311216
Oakland Circuit Court
LC No. 2010-113710-CK

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Global Technology, Inc., appeals as of right the trial court order granting summary disposition to defendant, W.F. Whelan Co., in this action involving breach of contract and unjust enrichment. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiff is a sales representation agency that represented Dicastal Wheel Manufacturing Co., Ltd. (Dicastal), a company based out of China that manufactures wheels for the automobile industry. Defendant is an import warehouse distributor. The instant litigation arose based on plaintiff's allegations that it had two agreements with defendant regarding Dicastal business, and that defendant failed to pay the agreed upon compensation under both arrangements.

First, plaintiff claimed that under a written Sales Representative Agreement, defendant agreed to pay two cents for every wheel shipped from Dicastal through defendant's warehouse. While plaintiff claimed that this agreement resulted from its efforts in procuring the warehousing business for defendant, defendant contended that this agreement was entered into well after the warehousing agreement between defendant and Dicastal. Thus, defendant characterized this as nothing more than an illegal kickback agreement.

The second agreement related to the installation of tire pressure monitoring systems (TPMS). Plaintiff claimed that in exchange for its efforts in obtaining this business for defendant, defendant orally agreed to pay plaintiff 41 cents for each unit installed. Defendant, on the other hand, contended that no such agreement was ever reached, and that plaintiff was merely

trying to obtain an illegal kickback. While plaintiff also asserted claims for *quantum meruit* based on these two agreements, defendant responded that equity did not favor plaintiff.

Defendant eventually filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). It argued that the alleged agreements were nothing more than improper kickback agreements, that the Sales Representative Agreement lacked consideration, and that the TPMS agreement violated the statute of frauds. The trial court agreed, granting summary disposition for count I, the Sales Representative Agreement, under MCR 2.116(C)(8) and (10), and for count II, the TPMS agreement, under MCR 2.116(C)(7). The court also found that plaintiff's claims for *quantum meruit* under count III failed pursuant to MCR 2.116(C)(10), as defendant had not been unjustly enriched. Plaintiff now appeals.

II. SALES REPRESENTATIVE AGREEMENT

A. STANDARD OF REVIEW

Plaintiff first contends that the trial court erred in finding that the Sales Representative Agreement was unenforceable because it lacked consideration. When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court views the evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).[1]

B. ANALYSIS

A valid contract must be supported by consideration, which is a bargained-for exchange. *Gen Motors Corp v Dep't of Treasury, Revenue Division*, 466 Mich 231, 238; 644 NW2d 734 (2002). In order to constitute consideration, "[t]here must be a benefit on one side, or a detriment suffered, or service done on the other." *Id.* at 238-239 (quotation marks and citation omitted). Courts generally will not inquire into the sufficiency of consideration, and even "a cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Id.* at 239 (quotation marks and citation omitted). However, past consideration does "not constitute a legal consideration for the subsequent" agreement. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58 n 7; 698 NW2d 900 (2005) (quotation marks and citation omitted).

This Court has recognized that consideration for a contract need not be specified in the written agreement. *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prods, Inc*, 265 Mich App 105, 115; 693 NW2d 394 (2005); *In re Skotzke Estate*, 216 Mich App 247, 249-250; 548 NW2d

[1] Although the trial court cited MCR 2.116(C)(8) as another basis for summary disposition, the court referenced exhibits outside of the pleadings. MCR 2.116(C)(10) is therefore the appropriate basis of review.

695 (1996); see e.g. MCL 566.136 ("The consideration of any contract, agreement or promise required by this chapter to be in writing, need not be expressed in the written contract, agreement or promise, or in any note or memorandum thereof, but may be proved by any other legal evidence."). Generally, "[w]hether there was consideration for a promise is a question for the trier of fact." *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992). The burden of proving that the contract lacked consideration is on the party asserting its absence. *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 12; 708 NW2d 778 (2005).

The trial court in the instant matter found that summary disposition was justified on count I of plaintiff's complaint, the Sales Representative Agreement, because it lacked consideration. The court stated that no consideration was apparent on the face of the agreement and plaintiff's alleged consideration, namely, that it procured the warehousing services for defendant, was past consideration. The trial court reasoned that any efforts made to procure Dicastal warehousing business for defendant occurred before the Sales Representative Agreement, so could not be the consideration to support it.

However, this ignores plaintiff's arguments and evidence that the Sales Representative Agreement was merely the written memorization of a prior oral agreement. According to plaintiff, if it succeeded in obtaining the warehousing business, defendant agreed to pay plaintiff a commission. Plaintiff argued that the parties subsequently renegotiated the price of the commission, writing it down as the Sales Representative Agreement. Plaintiff also argued that a modification of a prior agreement does not require consideration. To support its argument, plaintiff cites MCL 566.1, which states:

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

For factual support, plaintiff cites its responses to interrogatories, wherein it claimed that it was paid a commission for its efforts in obtaining Dicastal warehousing services for defendant. Timothy Donovan, plaintiff's agent, testified that he worked on behalf of plaintiff to obtain the necessary agreement and approval so that defendant became the preferred supplier. Plaintiff also relies on the deposition testimony of its president, Dale Hadel, who testified that the parties came to an oral agreement regarding warehousing before the written Sales Representative Agreement. When asked when they entered into the agreement, Hadel specified that it was sometime before the warehousing contract was signed. When asked why he never billed defendant for the two cents owed before July 2005, Hadel replied that there was not a lot of volume in the beginning and that originally they had agreed to four cents, then three cents, and then two cents, in a series of meetings. In light of this evidence, we find that there is a genuine issue of material fact whether the written Sales Representative Agreement was a modification of a prior warehousing agreement.

Defendant counters with several arguments in support of the trial court's ruling. The defendant asserts that the Sales Representative Agreement was an illegal kickback agreement, was the result of economic duress, and was in violation of plaintiff's agency duties.[2] These arguments are premised on a finding that there was no prior oral agreement between the parties, that plaintiff did not actively procure the warehousing business for defendant, and that the Sales Representative Agreement was the result of plaintiff's belated attempt to profit from defendant's prior agreement with Dicastal. To reach such conclusions the trial court had to make impermissible factual determinations, believing defendant's version of events rather than plaintiff's. While defendant may ultimately prevail in its arguments, it cannot prevail under a motion summary disposition, where this Court must view all evidence in the light most favorable to plaintiff. *Walsh*, 263 Mich App at 621.

Defendant also failed to specifically address Hadel's testimony and merely asserts that plaintiff's arguments are illogical, "without merit and unsupported by the facts." Defendant cites to evidence supporting its theory of the case, such as plaintiff's failure to invoice or request payment from defendant before July 2005, which defendant argues demonstrates there was no prior oral agreement. However, as mentioned above, Hadel testified that this was because of the insignificant volume in the beginning of the parties' agreement, and the continually changing price. Defendant further claims that when plaintiff approached defendant in 2005, Hadel threatened to direct Dicastal's warehousing business to another entity after defendant and Dicastal had been doing business for years. Yet, Hadel testified that these conversations did not occur in 2005, after defendant and Dicastal had entered into an agreement, but when the parties were initially negotiating the contract.

Although defendant raises evidence to support its version of events, so too has plaintiff, and "a court may not weigh the evidence before it or make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003) (emphasis in original) (quotation marks and citation omitted). As noted above, consideration is generally a question of fact for the jury, *Haji*, 196 Mich App at 87-88, and that is especially so in this case, which involves significant credibility and factual determinations.

III. TPMS AGREEMENT

A. STANDARD OF REVIEW

Plaintiff next argues that the trial court erred in finding that the TPMS agreement failed under the statue of frauds. This Court reviews a motion for summary disposition de novo. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). "Although courts should start with the pleadings when reviewing a motion brought under MCR 2.116(C)(7), courts must also consider any affidavits, depositions, admissions, or other documentary evidence that the parties submit to

[2] Defendant does not challenge that a modification of a prior agreement does not require consideration, but merely argues that this case does not involve a modification of a prior agreement.

determine whether there is a genuine issue of material fact." *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010). When reviewing a motion under MCR 2.116(C)(7), "we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it." *Shay*, 487 Mich at 656.

B. ANALYSIS

The trial court erred in finding that the one-year rule in the statute of frauds precluded plaintiff's claim.

Under the statute of frauds, certain agreements have to be in writing. Included in this category is "[a]n agreement that, by its terms, is not to be performed within 1 year from the making of the agreement." MCL 566.132(1)(a). "This Court has construed the one-year rule strictly[.]" *Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 509; 525 NW2d 905 (1994). "If there is *any possibility* that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period and even though it does so extend." *Id.* at 509-510 (emphasis in original) (quotation marks, brackets, and citation omitted).

In the instant case, plaintiff produced sufficient evidence to establish a genuine issue of material fact regarding whether there was an oral TPMS agreement. Plaintiff's president, Hadel, testified that he brought the TPMS opportunity to the attention of defendant's president, William Whelan (Bill), and that significant work went into obtaining that business for defendant. Hadel also testified that in a series of meetings with Bill, the parties agreed in 2005 that plaintiff would receive 41 cents for every TPMS unit installed. Hadel claimed that he was not entirely sure who would be paying that commission, but that he only knew of defendant's company, W.F. Whelan Company. Hadel also acknowledged that the parties had discussed an agreement between different companies that the parties owned, but the agreement ultimately ended as between Global and Whelan Company.

Plaintiff also produced emails purportedly confirming the 41-cent commission agreement. In an email dated July 13, 2005, Bret Evans, working on behalf of plaintiff, copied Bill Whelan as a recipient. Evans wrote, "[b]ased on the final price to Dicastal of $2.01, my understanding of Whelan's costs are as follow: Base Cost-$1.55; Base Price to Dicastal-$1.96; Remainder-$1.96 - $1.55 = $.41." He then wrote, "Change in Price to Dicastal - $2.01-$1.96 = $.05. Revised Cost - $1.55 + $.05 = $1.60; Revised Price to Dicastal - $2.01; Remainder - $2.01 - $1.60 = $.41. Please confirm this to be correct." In a response email dated July 14, 2005, Bill wrote, "[c]ost of labor, overhead, personal property tax, space, finance of sensor band frt. is $.69 plus 15% equals $.79. That leaves $1.22 for cost of machine, maintenance, insurance, finance and *commission to you and Dale*." (Emphasis added.)

Nevertheless, the trial court ruled that count II failed under the statute of frauds. The court found that plaintiff admitted that the TPMS program was meant to extend for more than a year, and that any argument that the program could have ended early is mere speculation. Thus, the trial court found that under MCL 566.132, the contract fell within the statute of frauds and

had to be in writing. Because the trial court found that it was not in writing, it granted defendant's motion for summary disposition under MCR 2.116(C)(7).

The TPMS contract between Dicastal and defendant may have been for a five-year term. Plaintiff was not a party to that agreement. Because defendant denies the existence of any independent oral agreement with plaintiff, it has produced no evidence that the actual agreement specified a term longer than one year. The trial court also acknowledged that plaintiff produced evidence "that no specific time period was ever discussed or agreed upon[.]" As this Court and the Michigan Supreme Court have recognized, agreements for indefinite terms generally do not fall within the statute of frauds. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997);[3] see *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 612 n 24; 292 NW2d 880 (1980) ("A contract for a definite term has been generally regarded to be within the section of the statute of frauds concerning an 'agreement that, by its terms, is not to be performed within 1 year from the making thereof,' . . . while an agreement for an indefinite term is generally regarded as not being within the proscription of the statute of frauds."); see also *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 536; 473 NW2d 652 (1991) (opinion by Riley, J.) ("We can certainly agree with Justice Levin that a contract for an indefinite term has traditionally been considered capable of performance within the first year.").

Furthermore, Hadel attested in his affidavit to various ways in which programs like TPMS terminate long before the anticipated life of the program. When asked how long the TPMS agreement between plaintiff and defendant would last, Evans testified to a vague term of "[a]s long as TPMS was being installed." Thus, there is no evidence that the terms of the agreement specified a period for more than a year.

Moreover, although the parties may have intended that the TPMS agreement would extend beyond a year, and were correct in that expectation, that is not the inquiry under the statute of frauds. Rather, the focus is on whether there is "*any possibility* that an oral contract is capable of being completed within a year," even if "it is clear that the parties may have intended and thought it probable that it would extend over a longer period and even though it does so extend." *Hill*, 207 Mich App at 509-510 (emphasis in original) (quotation marks, brackets, and citation omitted); see also *Drummey v Henry*, 115 Mich App 107, 111; 320 NW2d 309 (1982) ("Finally, we note that if there is any possibility that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period, and even though it does so extend.").

Here, because plaintiff produced evidence that the TPMS agreement was for an indefinite period and was capable of being performed within a year, the trial court erred in finding that "by its terms" it could not be completed within a year or that it failed under the statute of frauds. MCL 566.132(1)(a).

[3] To the extent that *Phinney* has been abrogated, it was on different grounds, see *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 290; 696 NW2d 646 (2005).

IV. *QUANTUM MERUIT*

A. STANDARD OF REVIEW

Lastly, plaintiff challenges the trial court's dismissal of its *quantum meruit* claims. When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court views the evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

B. ANALYSIS

"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 v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006). A contract will be implied only if no express contract between the same parties exists that covers the same subject matter. *Id.* Furthermore, an implied contract will be found only when there has been receipt of a benefit by one party from the other, and it would be inequitable for the party to retain such a benefit. *Id.* at 195. "Thus, in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Id.*

This Court has recognized that not all enrichment is necessarily unjust. *Id.* at 195-196. Rather, "[t]he key to any quantum meruit recovery from a noncontracting party is proof that he or she unjustly received and retained an independent benefit from the plaintiff's contractual services." *Id.* at 196 (quotation marks and citation omitted). Whether a party has been unjustly enriched generally is a question of fact, but whether a claim for unjust enrichment can be maintained is a question of law. *Id.* at 193.

The trial court in the instant case properly dismissed the *quantum meruit* claim as it relates to the warehousing agreement. As stated above, "a contract will be implied only if there is no express contract covering the same subject matter." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Here, the Sales Representative Agreement specifically addresses plaintiff's receipt of two cents for every wheel shipped from Dicastal through defendant's warehouse. Plaintiff may not proceed on a theory of *quantum meruit* that pertains to the same subject matter as this express contract.[4]

[4] If the express Sales Representative Agreement fails for lack of consideration, it would necessarily fail under a *quantum meruit* theory, as an implied contract likewise must be supported by consideration. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990).

However, the trial court improperly dismissed the *quantum meruit* claim as it relates to the TPMS agreement. While defendant contends that the entity receiving the benefit was not defendant, but a separate entity WFW, L.L.C., the trial court never made any findings in this regard. Furthermore, there is a genuine issue of material fact regarding whether plaintiff conferred a benefit to defendant, the retention of which would result in an inequity to plaintiff. *Morris Pumps*, 273 Mich App at 194. Hadel claimed that he only knew of defendant's company, and that the ultimate agreement was between Global and Whelan Company. While defendant contends that the emails relating to the TPMS discussions do not specify which entity was involved, the emails do not exclude the possibility that it was defendant, and we view the evidence in a light most favorable to the nonmoving party. *Walsh*, 263 Mich App at 621.

Furthermore, as discussed more fully above, plaintiff presented evidence of an oral agreement with defendant about the TPMS installation, and defendant's failure to pay plaintiff pursuant to the agreement. If defendant were to retain the benefit of these services without paying the agreed upon amount, and plaintiff is unable to recover under an express contractual theory, there is at least a question of fact regarding whether plaintiff could recover under an unjust enrichment theory.[5]

While the trial court concluded that plaintiff could not recover under *quantum meruit* because it received a commission from Dicastal and defendant had lost money in its contract with Dicastal, these were factual determinations. As noted above, whether a party has been unjustly enriched is normally a question of fact. *Morris Pumps*, 273 Mich App at 193. Further, plaintiff presented evidence that it expended time and resources in procuring this business for defendant, and the trial court failed to make any finding that defendant's alleged losses outweighed plaintiff's expenses. Moreover, the trial court failed to acknowledge plaintiff's evidence, particularly its response to interrogatories, that it had "never received any compensation, commission or otherwise, from Dicastal with respect to the TPMS business." Thus, there is a genuine issue of material fact regarding plaintiff's *quantum meruit* claim based on the oral TPMS agreement.[6]

V. CONCLUSION

The trial court erred in granting defendant's motion for summary disposition based on a lack of consideration for the Sales Representative Agreement and the statute of frauds for the TPMS agreement. While the trial court properly dismissed plaintiff's *quantum meruit* claim for the Sales Representative Agreement, it erred in dismissing the *quantum meruit* claim for the

[5] Defendant cites *Krause v Boraks*, 341 Mich 149, 157; 67 NW2d 202 (1954), for the proposition that when an agreement fails because of the statute of frauds, a plaintiff may not recover based on *quantum meruit*. However, as discussed above, the TPMS agreement did not fail under the statute of frauds.

[6] While defendant also filed a counterclaim, neither party raises any issues regarding the counterclaim. Further, plaintiff has voluntarily withdrawn any issues relating to its motion for reconsideration or motion to amend its complaint.

TPMS agreement. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan