[Cite as *Anchor Realty Constr., Inc. v. New Albany Links Golf Course Co., Ltd.*, 2010-Ohio-6347.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Anchor Realty Construction, Inc. et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	
New Albany Links Golf Course Company Ltd.,	:	No. 09AP-840 (C.P.C. No. 08CVH02-2431)
Defendant/Third-Party Plaintiff-Appellant,	:	(REGULAR CALENDAR)
New Albany Links Development Company Ltd. et al.,	:	
Defendants-Appellees,	:	
v.	:	
Italian Pub Group, Inc.,	:	
Third-Party Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 23, 2010

Law Offices of Daniel R. Mordarski LLC, Daniel R. Mordarski, and *Paige C. Buffington*, for Anchor Realty Construction.

Gordon P. Schuler, *Attorney At Law, LLC*, and *Gordon P. Shuler*, for New Albany Links Golf Course Company, Ltd.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant/third-party plaintiff-appellant, New Albany Links Golf Course Company, from a judgment of the Franklin County Court of Common

Pleas, finding in favor of plaintiff-appellee, Anchor Realty Construction, Inc. ("Anchor"), on Anchor's claim for unjust enrichment.

{¶2} On February 19, 2008, Anchor and VIP Express Ltd. filed a complaint, naming as defendants New Albany Links Golf Course Company ("New Albany Links"), New Albany Links Development Company, Ltd., Ciminello's Inc., Joseph Ciminello, and various "John Doe Defendants." The complaint alleged that Anchor had performed construction services for New Albany Links and its owner, Joseph Ciminello, with respect to the renovation of a restaurant at the New Albany Links Golf Course. The complaint further alleged that the restaurant subsequently opened under the name "Vito's Italian Pub," and that defendants had failed to compensate Anchor for the services rendered. Plaintiffs alleged various causes of action, including breach of contract, breach of implied contract, and unjust enrichment. On March 31, 2008, New Albany Links filed an answer and counterclaim, asserting in the counterclaim causes of action for abuse of process, frivolous conduct, and conduct lacking good faith.

{¶3} On June 26, 2008, New Albany Links filed a third-party complaint against Italian Pub Group, Inc. ("Italian Pub Group"). On September 10, 2008, New Albany Links filed a motion for default judgment against Italian Pub Group, alleging it had failed to answer or otherwise defend against the third-party complaint. On September 30, 2008, the trial court granted default judgment in favor of New Albany Links on its third-party complaint against Italian Pub Group.

{¶4} With respect to the claims between Anchor and New Albany Links, the trial court conducted a two-day bench trial beginning August 3, 2009. By agreement of the parties, Anchor's claims against New Albany Links Development Company, Ltd.,

Ciminello's Inc., and Joseph Ciminello were dismissed. Further, the counterclaims of New Albany Links against Anchor were also dismissed.

{¶5} The following facts are drawn primarily from the trial court's decision and entry filed August 6, 2009, finding in favor of Anchor on its claim for unjust enrichment. Larry Gunsorek is a part-owner of Anchor, a company that provides restaurant "build out" construction services. Gunsorek is also a part-owner of Vito's Italian Pub, which operates several restaurants in central Ohio.

{¶6} Joseph Ciminello is a developer, and has been involved in the development of several residential communities, including Pinnacle and New Albany Links. Ciminello and Gunsorek had previously entered into a joint venture to construct and operate a restaurant in the clubhouse of the golf course at Pinnacle. On that particular project, work was undertaken by Anchor prior to the execution of an agreement between the parties.

{¶7} Based in part on the previous venture at Pinnacle, representatives of Anchor and New Albany Links discussed the renovation and retrofitting of an existing restaurant at the clubhouse at New Albany Links, and plans were made to transform the restaurant into an Italian style eatery. Anchor started work on the renovation without executing a written agreement with New Albany Links.

{¶8} A lease agreement was drafted and modified between New Albany Links, as landlord, and Italian Pub Group, as tenant, with respect to the clubhouse restaurant at New Albany Links, but that document was never executed. Specifically, in April 2007, New Albany Links forwarded a draft lease agreement to Italian Pub Group. The draft agreement included a section titled "TENANT IMPROVEMENTS," in part: "Tenant is accepting the Premises 'AS-IS' and shall be fully responsible for all improvements and

retrofits to the Premises. Tenant, at Tenant's sole cost and expense, shall furnish, replace, improve and retrofit the Premises in accordance with the requirements set forth in Section 15 regarding Alterations."

{¶9} In July 2007, Italian Pub Group made revisions to the draft lease agreement and retuned it to New Albany Links. Under the section titled "TENANT IMPROVEMENTS," the July 2007 version stated in part: "Tenant is accepting the Premises 'AS-IS' and shall share the responsible [sic] for all improvements and retrofits to the Premises. Tenant/Landlord, together, shall furnish, replace, improve and retrofit the Premises in accordance with the requirements set forth in Section 15 regarding Alterations."

{¶10} At trial, Anchor sought to recover costs it had incurred primarily under the doctrine of unjust enrichment, while New Albany Links denied any liability for those costs based upon the argument that its relationship was with the Italian Pub Group. Based upon the evidence presented, the trial court found that Anchor had provided equipment and performed substantial work on the renovation.

{¶11} The trial court filed a decision August 6, 2009, awarding judgment in favor of Anchor and against New Albany Links in the amount of $28,925.34. The court noted that "Anchor is neither mentioned nor a party to the unexecuted lease agreement" (involving New Albany Links and Italian Pub Group). With respect to Anchor and New Albany Links, the court found "there was no meeting of the minds with respect to who was to pay for the improvements to the existing restaurant at Links," and, therefore, "there is neither a written nor an oral contract between these parties." The trial court found that Anchor "has established that a benefit has been conferred by it upon Links," inasmuch as

the "then existing restaurant at Links was substantially renovated with additional or different equipment installed in the kitchen." The court thus found that New Albany Links "has been unjustly enriched by the benefits conferred and retained by Links at the restaurant on its premises." The trial court also entered default judgment against Italian Pub Group in the amount of $8,092.35.[1]

{¶12} On appeal, New Albany Links sets forth the following single assignment of error for this court's review:

> THE TRIAL [COURT] ERRED BY ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ANCHOR REALTY CONSTRUCTION, INC. ON ITS CLAIM FOR UNJUST ENRICHMENT BECAUSE THAT JUDGMENT WAS PROHIBITED BY THE EXPRESS CONTRACT BETWEEN DEFENDANT NEW ALBANY LINKS GOLF COURSE COMPANY, LTD. AND THIRD PARTY DEFENDANT ITALIAN PUB GROUP, INC. COVERING THE SAME SUBJECT, THAT IS, THE CONSTRUCTION PERFORMED AND EQUIPMENT DELIVERED AT THE KITCHEN AND RESTAURANT AT NEW ALBANY LINKS.

{¶13} Under its single assignment of error, New Albany Links asserts that the trial court erred in granting judgment in favor of Anchor on its claim for unjust enrichment. New Albany Links argues that recovery by Anchor for unjust enrichment is barred because an express contract existed between New Albany Links and another party, Italian Pub Group, covering the same subject matter.

{¶14} In general, in a civil appeal from a bench trial, "[a] reviewing court will not reverse a civil judgment supported by some competent, credible evidence going to all the essential elements of the case as being against the manifest weight of the evidence."

[1] Following a motion for clarification filed by New Albany Links, the trial court issued a decision and entry on September 2, 2009, in which the court "modifie[d] the default judgment against [Italian] Pub [Group] to include the $28,925.34 awarded to Anchor."

Rosepark Properties, Ltd. v. Buess, 167 Ohio App.3d 366, 2006-Ohio-3109, ¶18, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Further, "[a]n appellate court must presume that the findings of the trial judge in a bench trial are correct since the trial judge had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Yowonski v. MDB Constr. Co*., 7th Dist. No. 09 BE 10, 2010-Ohio-4185, ¶16, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. However, in addressing "matters of contractual interpretation involving questions of law, appellate review is de novo." *Rosepark* at ¶18, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108.

{¶15} In order to recover under a theory of unjust enrichment or quasi-contract, a plaintiff must prove by a preponderance of the evidence that "(1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust for him to retain that benefit without payment." *Redi Mix Co., Inc. v. Steveco, Inc.* (Feb. 6, 1996), 4th Dist. No. 95CA3, citing *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183.

{¶16} As noted under the facts, the trial court found that New Albany Links had been unjustly enriched by the benefits conferred and retained by it following the renovation of the restaurant on its premises by Anchor. Specifically, the trial court found in relevant part:

> The then existing restaurant at Links was substantially renovated with additional or different equipment installed in the kitchen. The massive cooler was repositioned on the

> outside of the building freeing up additional internal space in the kitchen area. Where the prior kitchen was able to provide only limited menu options, the refurbished one was able to expand its culinary fare. Contributing to the menu expansion was the addition of various specialized pieces of restaurant equipment which remains in the Links facility.
>
> Links was aware of the work undertaken by Anchor. Ciminello testified that he was not particularly concerned about the internal renovations taking place in the kitchen but was concerned about the aesthetics of the work, especially with the re-positioning of the cooler outside the building.
>
> The improvements to the restaurant at the Links by Anchor remained at the restaurant at the Links. The pre-positioned cooler is still outside the building freeing up the internal workspace in the kitchen. The kitchen equipment remains on premises. Regardless of Ciminello's testimony that there was an adequate kitchen at the Links before the modification by Anchor, the kitchen has been substantially altered for the better based on Anchor's work. A benefit has been conferred and retained.

{¶17} In the present case, the record contains competent, credible evidence that a benefit was conferred upon New Albany Links by the services performed by Anchor. Testimony regarding Anchor's renovation work on the restaurant was provided by Gunsorek, the part-owner of Anchor, as well as Steven Brown, Anchor's construction superintendent. Ciminello, the owner of New Albany Links, acknowledged that the construction work had been performed, that equipment was brought into the restaurant, and that the restaurant is still operating with the improvements.

{¶18} Despite evidence of a benefit conferred, New Albany Links argues that unjust enrichment is not available to Anchor, citing the general rule that there can be no recovery on an unjust enrichment claim if there is an express contract covering the same subject. More specifically, New Albany Links argues that Anchor's unjust enrichment

claim is barred because of an express contract between New Albany Links and Italian Pub Group covering the same subject matter (an issue New Albany Links argues was decided by the default judgment rendered in its favor and against Italian Pub Group). New Albany Links acknowledges that cases in which a defendant argues the existence of an express contract as a defense to an unjust enrichment claim almost always concern a contract between the same parties (i.e., a plaintiff making the unjust enrichment claim and the defendant against whom the claim is made). New Albany Links argues, however, that the lack of an express contract between the same parties is not an essential element of its "express contract defense."

{¶19} We note that the parties to this appeal do not dispute the fact there was no contract, express or implied, between New Albany Links and Anchor. Thus, the primary issue raised by New Albany Links is whether, assuming the existence of a valid express contact between New Albany Links and Italian Pub Group, such agreement precludes a claim by Anchor, a non-party to that agreement, for unjust enrichment against New Albany Links.

{¶20} New Albany Links cites a number of cases in support of its argument that unjust enrichment is barred where an agreement exists covering the same subject matter. Those cases, however, essentially involve contracts between the plaintiff and the party against whom unjust enrichment is asserted. See *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 55 (contract between plaintiff hospital association and defendant insurance company described "the nature of services to be rendered and the compensation to be paid," and "[t]he record does not reveal that Blue Cross received unjust enrichment outside the parameters of the express contract"); *Hughes v.*

Oberholtzer (1954), 162 Ohio St. 330, 335 (no recovery for unjust enrichment in action in which plaintiff alleged an express oral contract with defendant: "It is generally agreed that there can not be an express agreement and an implied contract for the same thing existing at the same time"); *Ullmann v. May* (1947), 147 Ohio St. 468, 475 (unjust enrichment theory inapplicable in action by plaintiff-employee against defendant-employer "for the reason that there is an express contract which has not been breached, and no fraud or bad faith necessary to support the theory of unjust enrichment has been shown"); *R.J. Wildner Contracting Co., Inc. v. Ohio Turnpike Comm.* (N.D.Ohio 1996), 913 F.Supp. 1031, 1043 (no claim for unjust enrichment where "it is undisputed that Wildner and the OTC had an express contract pertaining to the same subject, i.e., the stripping and recoating of the bridge"); *Champion Contracting & Constr. Co., Inc. v. Valley City Post No. 5563,* 9th Dist. No. 03CA0092-M, 2004-Ohio-3406, ¶26 (claim for unjust enrichment could not lie where written contract existed between the parties); *Pawlus v. Bartrug* (1996), 109 Ohio App.3d 796, 800 (where there existed "an agreement [between plaintiff and defendant] in existence relative to payments for * * * hayrides * * * [plaintiff] was limited to that agreement and the trial court could not impose a different agreement or award a recovery based upon unjust enrichment for [plaintiff's] provision of those services"); *Davidson v. Davidson,* 3d Dist. No. 17-05-12, 2005-Ohio-6414, ¶19 (appellant's claim that appellee was unjustly enriched is legally insufficient, since the promissory note is an express contract, with appellant as a third-party beneficiary who could recover based upon the terms of the promissory note); *Bickham v. Standley,* 183 Ohio App.3d 422, 2009-Ohio-3530 (doctrine of unjust enrichment inapplicable where express contract between the parties set forth conditions and terms of payment).

{¶21} In *Resource Title Agency, Inc. v. Morreale Real Estate Servs., Inc.* (E.D.Ohio 2004), 314 F.Supp.2d 763, 772, the issue before a federal district court was whether, under Ohio law, unjust enrichment was available "not * * * against the party to the contract but rather against a non-party." The court noted that, although "Ohio law generally does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject, * * * these cases generally involve claims between two parties to a contract." Id. Citing this court's prior decision in *Nationwide Heating & Cooling, Inc. v. K&C Constr., Inc.* (Sept. 10, 1987), 10th Dist. No. 87AP-129, the court in *Resource Title* noted that circumstances may exist "to support an unjust enrichment claim against a non-contracting party who benefits from the uncompensated work of one of the parties to the contract." *Resource Title* at 772. See also *4 Seasons Heating, Cooling v. Hartwell* (1985), 2d Dist. No. 2072 (appellee unjustly enriched at appellant's expense when it repossessed refrigerator equipment in repaired and operable condition; the fact that appellant did not expect payment from appellee has no impact in quasi-contract claim, as the "very reason why a party seeks unjust enrichment as a remedy is to prevent injustice in situations not originally contemplated by the parties").

{¶22} Another federal court has observed that "[u]nreported Ohio Court of Appeals cases support the proposition that, in the contractor/subcontractor context, when the subcontractor is not paid by the contractor and the owner has not paid the contractor for the aspect of the job at issue, the subcontractor can look to the owner for payment under a theory of unjust enrichment." *Reisenfeld & Co. v. Network Group, Inc.* (C.A.6, 2002), 277 F.3d 856, 861. (Emphasis omitted.) Under the facts of *Reisenfeld,* the plaintiff, a real estate broker, had entered into a commission agreement with a

commercial broker who failed to pay the commission. The court in *Reisenfeld,* applying Ohio law, held that the plaintiff could bring a claim for unjust enrichment against the defendant sub-lessor, who had obtained a benefit from the plaintiff's efforts, even though the defendant was not a party to the commission agreement.

{¶23} As previously noted, in the instant case, no express contract existed between Anchor and New Albany Links. In considering the above authority, we find unpersuasive New Albany Links' contention that the mere existence of an express agreement between New Albany Links and Italian Pub Group barred Anchor, a non-party to that agreement, from bringing a claim for unjust enrichment. Further, because there was evidence to support the requirements for an unjust enrichment claim, we find that the trial court did not err in granting judgment in favor of Anchor.

{¶24} Based upon the foregoing, New Albany Links' single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, granting judgment in favor of Anchor, is hereby affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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