J. S19031/13
NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PAUL ANDERSON T/D/B/A ANDERSON MAINTENANCE & CONSTRUCTION and PAUL ANDERSON CONSTRUCTION,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CHRISTOPHER BUCK and NAHZY BUCK, HIS WIFE,	:	
Appellants	:	
	:	No. 1346 WDA 2012

Appeal from the Judgment entered August 22, 2012,
in the Court of Common Pleas of Allegheny County,
Civil Division, at No(s): AR-10-002591.

BEFORE: SHOGAN, OTT, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: FILED: May 6, 2013

Appellants, Christopher and Nahzy Buck (the Bucks) *pro se*,[1] appeal from the judgment entered against them and in favor of Appellees Paul Anderson t/d/b/a Anderson Maintenance & Construction and Paul Anderson Construction (Anderson) in the action filed by Anderson against the Bucks. The Bucks also appeal from the judgment entered against them and in favor of Anderson on the Bucks' counterclaim. Upon review, we affirm.

The testimony at trial revealed that in September of 2009, Anderson was contacted by the Bucks, who were interested in having some work done

[1] Appellant Christopher Buck is an attorney licensed to practice law in Pennsylvania. Throughout the course of most of this action, including this appeal, the Bucks have been *pro se*. The only exception was when the Bucks were represented by Attorney Thomas King for their argument on post-trial motions on August 7, 2012.

* Retired Senior Judge assigned to the Superior Court.

on their home. Specifically, a large storm in June 2009 had resulted in some concerns about drainage in and around the Bucks' home. Anderson met the Bucks at a coffee shop on November 3, 2009 to provide an estimate (bid 606) for the drainage work to be done on the home. The cost for the work was estimated to be $6,560. Anderson testified that it took "[t]hree days of actual labor on the job" to complete the drainage work. N.T., 5/21/2012, at 42. He further testified that the work was performed in workmanlike fashion, the drain was operating when he left the site, and "[e]very single detail of bid 606 had been done to business standards and was fully functional." ***Id***. at 42-43. Although Anderson invoiced the Bucks for $6,560, he was never paid.

On November 25, 2009, Anderson filed a complaint with a magisterial district judge. The magisterial district judge entered judgment in favor of Anderson and against Mr. Buck for $5,131. Mr. Buck filed a timely notice of appeal with the Arbitration Division of the Court of Common Pleas of Allegheny County. On April 22, 2010, Anderson filed a complaint against the Bucks with counts for breach of contract and unjust enrichment. The Bucks filed an answer, new matter, and counterclaim. In their counterclaim, the Bucks asserted claims for breach of contract and breach of warranty.

On September 17, 2010, a panel of arbitrators found in favor of Anderson and against the Bucks for $5,000. The panel also found in favor of Anderson and against the Bucks on the Bucks' counterclaim. The Bucks filed a timely notice of appeal for a *de novo* non-jury trial. After several

continuances, a non-jury trial was held before the Honorable Paul F. Lutty, Jr. on May 22, 2012. The trial court found in favor of Anderson and against the Bucks in the amount of $5,650, and also in favor of Anderson and against the Bucks on the counterclaim. The Bucks filed a timely post-trial motion. The trial court heard arguments on August 7, 2012. On August 22, 2012, the trial court denied the Bucks' motion for judgment notwithstanding the verdict and motion for a new trial and entered judgment in favor of Anderson and against the Bucks for $5,650. The trial court also entered judgment in favor of Anderson and against the Bucks on the counterclaim. The Bucks filed a timely notice of appeal and concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On November 28, 2012, the trial court issued an opinion.

On appeal, the Bucks present six issues for our review, which we have re-ordered for ease of disposition.

> [1.]. Has [the Bucks'] *Motion for Post-Trial Relief* properly preserved the issues for appeal?
>
> [2.] In denying [the Bucks'] motion for new trial and motion for JNOV, did the Trial Court commit an error of law, or abuse its discretion, by failing to apply the law under Pennsylvania's *Home Improvement Consumer Protection Act* ("HICPA"), 73 Pa. Stat. Ann. § 517.7 et seq., at 73 Pa. Stat. Ann. § 517.7(a), where the Trial Court's verdict is silent and its opinion is ambiguous?
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> [3.] In denying [the Bucks'] motion for new trial and motion for JNOV, did the Court commit an error of law, or abuse its discretion, where the second element of unjust enrichment (i.e. appreciation of benefits) is not met because [the Bucks'] did not receive the *warranted* benefits derived from the subject French drain itself, and did the Court commit further errors of

> law in not applying the rule of material failure of performance and the "Builder's Risk" rule, where the verdict is against the great weight of the evidence?
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> [4.] In denying [the Bucks'] motion for new trial and motion for JNOV, did the Court commit an error of law, or abuse its discretion, in awarding [Anderson] the full value of Estimate #606, under a theory of *quantum meruit*, where, as a matter of law an unjust enrichment claim cannot be duplicative of a breach of contract claim, and therefore the full "contract" price cannot be the measure of *quantum meruit*, and where the record shows that [Anderson] offered no evidence at trial for the reasonable value of the benefit allegedly conferred upon [the Bucks], thereby failing to meet [Anderson's] burden of production in proving his unjust enrichment and *quantum meruit* damages - where, if damages are not proven with reasonable certainty so as to be sufficiently ascertainable, they are legally insufficient as a basis for recovery?
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> [5.] In denying [the Bucks'] motion for new trial and motion for JNOV, did the Court commit an error of law, or abuse its discretion, in denying [the Bucks'] Breach of Warranty counterclaim of $2,400.00, per the testimony of their expert witness at trial (unrebutted by expert opinion to the contrary at trial)?
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> [6]. In denying [the Bucks'] motion for new trial, did the Trial Court ("Court") commit an error of law, or abuse its discretion, by improperly applying the "evidence most favorable to the plaintiff" (JNOV) standard, and by the appearance of bias, where the Trial Court's August 22, 2012 Order omits review of [the Bucks'] *Brief* and *Reply Brief* in support of their *Motion for Post-Trial Relief*?

Bucks' Brief at 10-11 (suggested answers, headings, and citations to the reproduced record omitted; italics in original).

First, the Bucks assert that they properly preserved all issues for appeal.[2] Because we do not find any issues waived, *infra*, this issue is moot.

We consider whether the HICPA precluded the trial court from granting relief to Anderson where there was no written contract in compliance with the HICPA. In ***Durst v. Milroy Gen. Contracting, Inc.***, 52 A.3d 357 (Pa. Super. 2012), we considered this very issue and concluded that quasi-contract theories of relief survive the HICPA.

> Under the HICPA, in order to maintain a cause of action for home improvement contracts, those contracts must be in writing. ***See*** 73 P.S. § 517.7(a). However, the HICPA is silent as to actions in quasi-contract, such as unjust enrichment and quantum meruit—which, by definition, implicate the fact that, for whatever reason, no written contract existed between the parties. Thus, we hold that quasi-contract theories of recovery survive the HICPA[.]

Id. at 361. Accordingly, the Bucks are not entitled to relief on this basis.

We next consider the Bucks' third and fourth issues, wherein they argue that even if Anderson could recover on its quasi-contract theory, the trial court erred in denying their motions for judgment notwithstanding the verdict and for a new trial.

Our well-settled standard of review when considering an appeal from the denial of a motion for JNOV is as follows.

> In reviewing a motion for [JNOV], the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, a [JNOV] should only be entered

[2] Presumably, this concern arises from the trial court's statement that the Bucks' "multitude of post-trial objections are without merit and have further been waived." Trial Court Opinion, 11/27/2012, at 4.

> in a clear case and any doubts must be resolved in favor of the verdict winner….
>
> There are two bases upon which a [JNOV] can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Estate of Hicks v. Dana Companies, LLC, 984 A.2d 943, 950-51 (Pa. Super. 2009) (internal quotation omitted).

Our standing of review from an order denying a motion for a new trial

> is to decide whether the trial court committed an error of law which controlled the outcome of the case or committed an abuse of discretion. A new trial will be granted on the grounds that the verdict is against the weight of the evidence where the verdict is so contrary to the evidence it shocks one's sense of justice. An appellant is not entitled to a new trial where the evidence is conflicting and the finder of fact could have decided either way.

Thomas Jefferson Univ. v. Wapner, 903 A.2d 565, 576 (Pa. Super. 2006).

Instantly, the Bucks argue that Anderson did not prove the elements of the unjust enrichment claim because the Bucks received no benefit from the work. Furthermore, the Bucks argue that the trial court should have believed the Bucks' expert rather than Anderson. Bucks' Brief at 43.

The standard the trial court considers for proof of an unjust enrichment claim is as follows.

> A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. The most significant element of the doctrine is whether the enrichment of the defendant is unjust; the doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff. Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in *quantum meruit*.

Ne. Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc., 933 A.2d 664, 668-69 (Pa. Super. 2007) (internal quotation omitted).

We also point out that "[w]hen the trial court sits as fact finder, the weight to be assigned the testimony of the witnesses is within its exclusive province, as are credibility determinations, [and] the court is free to choose to believe all, part, or none of the evidence presented. [T]his Court is not free to usurp the trial court's duty as the finder of fact." ***Mackay v. Mackay***, 984 A.2d 529, 533 (Pa. Super. 2009) (internal quotation and citations omitted).

Here, the trial court "found [Anderson's] testimony credible. The record established that [Anderson] performed work properly and in a workmanlike manner, and that [the Bucks] benefitted from such work." Trial

Court Opinion, 11/27/2012, at 3-4. This conclusion is supported by the record.

Anderson testified that he spent three days of actual labor hand-digging and installing a French drain at the Bucks' residence. N.T., 5/21/2012, at 42. Anderson invoiced the Bucks $6,560 and was never paid. ***Id***. at 43. Furthermore, there is no question that the French drain is still in place. It was a reasonable inference on the part of the trial court that the work that was done benefitted the Bucks in the amount of $6,560 they were originally to pay for the work; therefore, we conclude the trial court did not err in denying the Bucks' motion for a new trial or motion for JNOV.

Next, the Bucks contend the trial court erred in finding against them on their counterclaim for breach of warranty and "material failure of performance." Bucks' Brief at 53-54. Essentially, the Bucks argue that the trial court should have accepted the testimony of its expert. However, the trial court specifically rejected the testimony of the Bucks' expert. Trial Court Opinion, 11/27/2012, at 4. Thus, the Bucks are not entitled to relief on this issue.

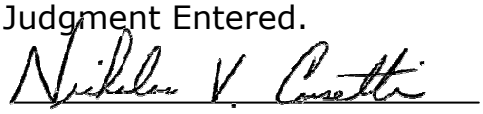
Finally, we address the Bucks' contentions that Judge Lutty applied wrong standards of review and/or was biased in his determinations by not referring to certain documents filed by the Bucks. We conclude that such claim is devoid of merit.

The Bucks claim that the trial court did not "mention" two briefs they filed; therefore they argue that "[t]his omission raises the inference that

Judge Lutty did not read, much less seriously consider, these two Briefs … [giving] the appearance of bias on the part of the Trial Court." Bucks' Brief at 33. Failure to mention the Bucks' briefs in no way indicates that Judge Lutty did not read or consider them. Furthermore, to imply that Judge Lutty was biased without any evidence of such conduct is irresponsible and does not entitle the Bucks to any relief.[3]

Judgment affirmed.

Judgment Entered.



Deputy Prothonotary

Date May 6, 2013

[3] We remind Appellant Christopher Buck that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]" Pennsylvania Rule of Professional Conduct 8.2(a).