Opinion issued July 22, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00126-CV

ANNA LIZA N. CRISTOBAL, Appellant

V.

FREDRICK SCOTT ALLEN, Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 856856

MEMORANDUM OPINION

Anna Cristobal sued Fredrick Allen, her former fiancé, seeking the

return of $52,000 and recompense for about $33,000 worth of his credit card debt. Allen denied that these monies were loans that he owed her. After Allen stopped paying on the credit cards and refused to pay her demand, Cristobal sued him for breach of contract, quantum meruit, and unjust enrichment.

The jury believed Allen, finding that Cristobal did not loan him the money. Accordingly, the trial court entered a take-nothing judgment against Cristobal. On appeal, Cristobal contends that: (1) the trial court erroneously admitted irrelevant and prejudicial e-mail excerpts; (2) the jury's findings are against the great weight and preponderance of the evidence; and (3) the trial court erroneously refused to submit jury questions on Cristobal's claims of quantum meruit and unjust enrichment. Finding no error, we affirm.

Background

Cristobal and Allen met while on vacation in Cabo San Lucas in 2002. After returning to the United States, they kept in touch and eventually began a long-distance romantic relationship. Shortly thereafter, Cristobal and Allen engaged to marry, and Cristobal moved to Houston from New Jersey. Allen added Cristobal to his checking account, set up direct deposit for her wages, and gave her full power to deposit and withdraw funds from the account.

Cristobal testified that she and Allen, while they were engaged, entered into two financial agreements. They first agreed that Cristobal would loan Allen money to pay off his debts so he could lower his interest rate, improve his credit score, and use the savings to purchase a house. Cristobal wrote four checks to Allen, totaling $52,000, which he deposited into their joint account. According to Cristobal, Allen promised that he would pay her back as soon as he could. Under the second agreement, Cristobal opened credit card accounts in her name and transferred some of Allen's credit card debts to the new accounts to take advantage of Cristobal's good credit score and lower interest rates. Allen allegedly promised that, although the cards were in Cristobal's name, he would continue to pay on the debts. Cristobal transferred $52,680 worth of Allen's credit card debt to these new cards. Although Allen made some payments on these cards, even after the relationship ended, he did not pay off the entire balance. Cristobal sought recovery of $33,329.70, the balance that she paid on the accounts. Cristobal acknowledged that Allen never conceded that a contractual relationship existed between them; however, when he asked to borrow money and transfer his credit card debt, he promised to repay the amounts.

In contrast, Allen testified that Cristobal suggested opening a new

credit card account with a lower interest rate and transferring Allen's balance to that card to save money. According to Allen, he and Cristobal never discussed repayment of any funds. The parties anticipated being married in the future. When they discussed finances, Cristobal never told Allen that she would write a check or transfer his credit card debt only if he later repaid her. Similarly, Allen did not ask Cristobal to repay him when he transferred his money into their joint checking account. Allen made the payments on the credit cards after the relationship ended not out of a contractual obligation, but because he cared for Cristobal and wanted to help her buy a house in New Jersey. Allen estimated that he had paid over $43,000 toward the various credit card balances.

The couple traveled frequently. They flew to New Jersey monthly, went on several cruises, and vacationed in Hawaii on two separate occasions. Allen testified that the couple jointly purchased clothes, jewelry, and food. Cristobal conceded that she had benefited from charges to Allen's credit cards before she transferred his balance to her cards.

On appeal, the parties dispute an evidentiary ruling. During Allen's direct examination, Cristobal's counsel read excerpts from Allen's e-mails to Cristobal and asked him whether he made those statements. After Cristobal's counsel read the first excerpt, Allen asked that the trial court

admit the entire e-mail into evidence. The trial court overruled this objection. At the end of Allen's direct-examination, the trial court reconsidered, and it allowed the jury to consider the entirety of the e-mails. Although the full version of the e-mails contained allegations of infidelity and other matters irrelevant to the parties' financial arrangements or the existence of a contract, Cristobal did not object.

On cross-examination, when Allen's counsel began to question Allen about the e-mails, Cristobal's counsel objected:

> Cristobal: Your Honor, I guess for the record let me object. [The e-mails] have not been entered into evidence. All I did was confirm whether or not this witness made statements, and he did confirm them. So, you know, object to any use of the e-mails—
>
> The Court: Overruled. I think under the rule of optional completeness it was very clear you were reading from them, and he gets them in.

Allen's counsel next asked which party had ended the relationship. Cristobal objected to Allen's question on relevancy grounds, and the trial court sustained this objection. Allen then offered, and the trial court admitted, the full versions of the e-mails without objection by Cristobal.

Cristobal requested jury questions relating to her quantum meruit and unjust enrichment claims. The trial court refused to submit these questions, and instead limited the jury questions to Cristobal's breach of contract claim. The jury found that (1) Cristobal did not loan the money to Allen, and

(2) Allen did not agree to pay all of the charges transferred to Cristobal's credit cards. The trial court rendered a take-nothing judgment against Cristobal.

Discussion

Admission of Evidence

Cristobal first contends that the trial court erred in admitting the portions of the e-mails that contain irrelevant and prejudicial information concerning Cristobal's alleged infidelity. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam).

To preserve error for appellate review, the complaining party must timely object at trial and state the grounds for the objection with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds are apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A); *see also* TEX. R. EVID. 103(a)(1). A party's trial objection must comport with the argument raised on appeal. *J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 290 (Tex. App.—San Antonio 2000, pet. denied) (citing *Samco Props., Inc. v. Cheatham*, 977 S.W.2d 469, 478–79 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)); *Jurek v. Couch-Jurek*, 296 S.W.3d 864, 869

(Tex. App.—El Paso 2009, no pet.). The complaining party waives error in the admission of evidence if she allows the evidence to be introduced during the trial without objection. *McShane*, 239 S.W.3d at 235; *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004).

Cristobal filed a pre-trial motion in limine requesting that the trial court require Allen to obtain a ruling outside the presence of the jury on the admissibility of evidence relating to the parties' romantic relationship on the ground that this information is "not relevant to the monetary issues" of the case. The trial court admitted the entire e-mails, however, Cristobal never objected to the offer or to the admission of the full e-mails, nor did she inform the trial court that allowing Allen to introduce statements from the e-mails that did not relate to the subject matter of the excerpts Cristobal had read to the jury—about Allen's alleged promise to repay Cristobal—did not satisfy the requirements of the rule of optional completeness. *See* TEX. R. EVID. 107 ("When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other . . . ."); *Crosby v. Minyard Food Stores, Inc.*, 122 S.W.3d 899, 903 (Tex. App.—Dallas 2003, no pet.) (stating requirements for admission of evidence pursuant to rule of optional completeness). Accordingly, we hold that Cristobal did not preserve her

contention that the trial court erred in admitting the e-mails for appellate review.

Factual Sufficiency

Cristobal next contends that the jury's findings are against the great weight and preponderance of the evidence. She observes that Allen failed to refute the evidence of (1) his promises of repayment, (2) the transfer of his credit card debt to Cristobal's credit cards, and (3) his failure to repay the debt. When a party challenges an adverse finding on which it had the burden of proof at trial, the party must demonstrate that the jury's finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Grider v. Mike O'Brien, P.C.*, 260 S.W.3d 49, 57 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). We consider all of the evidence in a neutral light, and we set aside the verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence such that it is clearly wrong and unjust. *See Francis*, 46 S.W.3d at 242. The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). As long as the evidence falls "within the zone of reasonable disagreement," we will not substitute our judgment for that of the fact-finder. *See City of Keller v.*

Wilson, 168 S.W.3d 802, 822 (Tex. 2005).

The jury first found that Cristobal did not loan money to Allen. The material terms of a contract to loan money are "the amount to be loaned, the maturity date of the loan, the interest rate, and the repayment terms." *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 678 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citing *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992)). The trial court admitted four cancelled checks, totaling $52,000, written by Cristobal to Allen. Cristobal also testified that she transferred about $33,000 worth of Allen's credit card debt to accounts opened in Cristobal's name to take advantage of her lower interest rate and to improve Allen's credit score. According to Cristobal, she loaned Allen this money in reliance on his promises that he would repay her and that he would continue making the credit card payments. The trial court also admitted e-mails from Allen which included statements such as "If 'things' work out, I will return ALL of the money immediately, if not it will just take me longer."

In contrast, Allen testified that he and Cristobal never discussed repayment of the checks or funds transferred to Cristobal's credit cards. Allen and Cristobal planned on getting married, both parties contributed money to their joint account, and they did not condition any of those

contributions on future repayment. And, although Cristobal characterized her financial arrangement with Allen as a loan, she did not testify about the loan's maturity date, interest rate, or any other repayment terms.

We defer to the jury's interpretation of evidence and weighing of this contradictory testimony. *See Jackson*, 116 S.W.3d at 761; *Grider*, 260 S.W.3d at 57. A jury reasonably could have determined based upon the evidence presented that Cristobal gave the money to Allen as a gift or that they had pooled their money for their mutual benefit and not as a loan with anticipated repayment. We hold that the jury's determination that Cristobal did not loan money to Allen is not against the great weight and preponderance of the evidence.

The jury also found that Allen did not agree to repay the charges he transferred to Cristobal's credit cards. Cristobal testified that Allen promised that, after transferring his debts to Cristobal's credit cards, he would continue making the payments and Cristobal would bear no financial responsibility for the amounts transferred. Cristobal relies on excerpts from Allen's e-mails which include the following statements:

- [You're] right about the Discover, I will keep that one too if you think I need to. That one went to the Amex bill that we ran up though—I will keep it if you want.
- The first thing attempting to do is pay down/off the cards so you can get your credit scores higher. This should be

happening this week (some).

- [T]he bank is STILL messing up things and I NOW hope to have more of your cards paid down soon (should have been done 10–14 days ago). The USAir card should be almost paid off and you can use it if you want.
- I am probably going to have to give back the Chase card payment to you. . . . I'll send all of the statements that I have and it will show that I had paid off the original amount put on the card.

Allen testified that Cristobal originally proposed opening new credit card accounts with low interest rates and transferring his debt to those accounts. They never discussed repayment of the amounts transferred and Allen never agreed that he would be solely responsible for paying off these debts. Allen acknowledged that he continued to make payments on the credit cards after their relationship ended; he maintained, however, that he did this because he wanted to help Cristobal improve her credit so she could buy a house in New Jersey, and not because of a contractual obligation to repay. We defer to the jury's resolution of this conflicting testimony and hold that the jury's finding that Allen did not agree to repay all of the transferred charges is not against the great weight and preponderance of the evidence.

Denial of Requested Questions on Alternative Causes of Action

Finally, Cristobal contends that the trial court erred by refusing to submit questions in the written charge on Cristobal's claims for quantum meruit and unjust enrichment. A trial court must submit the questions,

instructions, and definitions that are raised by the written pleadings and the evidence presented at trial. TEX. R. CIV. P. 278. But a trial court may refuse to submit a properly requested question if no evidence exists to warrant its submission. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); *see also City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 746 (Tex. App.—Fort Worth 2008, pet. dism'd) ("[Rule 278] is a substantive, nondiscretionary directive to trial courts, requiring them to submit requested questions to the jury if the pleadings and any evidence support them."). In determining whether legally sufficient evidence of Cristobal's alternative claims exists, we examine the record for evidence supporting the questions and disregard all contrary evidence. *See Elbaor*, 845 S.W.2d at 243. To be entitled to reversal due to the trial court's failure to submit a question, the complaining party must have requested the question in writing and in the substantially correct wording. TEX. R. CIV. P. 278; *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 780 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (holding that trial court's failure to submit valid theory of recovery may constitute reversible error when question is "timely raised by pleadings and evidence and properly requested to be included in the charge").

A. Quantum Meruit

Cristobal proposed the following question regarding quantum meruit:

> QUESTION NO. 9: Did Ms. Cristobal perform compensable work for Mr. Allen?
>
> One party performs compensable work if valuable services are rendered or materials furnished for another party who knowingly accepts and uses them and if the party accepting them should know that the performing party expects to be paid for the work.

Quantum meruit is an equitable remedy that is independent of an express contract. *See Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990); *Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 815 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A party may recover under this theory when no express contract governs the services rendered or materials furnished. *Vortt Exploration*, 787 S.W.2d at 944; *Speck*, 235 S.W.3d at 815 ("Quantum meruit 'is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.'" (quoting *Campbell v. Nw. Nat'l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex. 1978))). A plaintiff seeking to recover under quantum meruit must prove that: (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably

notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged. *Vortt Exploration*, 787 S.W.2d at 944; *Speck*, 235 S.W.3d at 815.

Here, Cristobal allegedly loaned money to Allen. Cristobal cites to no authority that holds that loaning money and transferring debt qualifies as the "valuable services rendered or materials furnished" necessary to support recovery under quantum meruit. A loan of money is not the type of benefit that allows a claim for equitable relief on a quantum meruit theory. *See Vortt Exploration*, 787 S.W.2d at 944–45; *cf. La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 567 (Tex. 1984) (holding that pure extension of credit does not constitute "goods or services," and therefore borrower in this transaction will not qualify as consumer under Deceptive Trade Practices Act). We therefore hold that the trial court correctly refused her requested jury questions relating to quantum meruit.

B. Unjust Enrichment

Cristobal further contends that the trial court erred in refusing to submit a jury question on unjust enrichment. Although unjust enrichment is usually characterized as a basis for quantum meruit recovery, we have held

that it can be an independent cause of action.[1] *Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("Unjust enrichment is an independent cause of action. However, a claim that the opposing party is unjustly enriched by retaining the benefit of services rendered by the plaintiff can also be the basis for a quantum meruit cause of action, rather than a separate claim in itself."); *see also HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 885 (Tex. 1998) (noting that statute of limitations for unjust enrichment claim is two years). Unjust enrichment is an equitable principle requiring one who receives benefits unjustly to make restitution for those benefits. *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied). A plaintiff recovers under an unjust enrichment theory if a defendant obtains a benefit from the plaintiff "by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. *Tex. Integrated Conveyor Sys. v.*

[1] We note that other courts of appeals have held that unjust enrichment is not an independent cause of action. *See, e.g.*, *Barnett v. Coppell N. Tex. Court Ltd.*, 123 S.W.3d 804, 816–17 (Tex. App.—Dallas 2003, pet denied) (holding that, because unjust enrichment is not an independent cause of action, trial court erroneously instructed jury on it).

Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied).

Although Cristobal contends that she requested a question on unjust enrichment, she actually requested a question on promissory estoppel. Cristobal requested the following question:

> QUESTION NO. 7: Did Ms. Cristobal substantially rely to her detriment on Mr. Allen's promise to pay the debts and/or loan, and was this reliance foreseeable by Mr. Allen?

This question does not inquire about fraud or duress, but instead focuses on Cristobal's reliance. It exactly tracks the pattern jury charge's recommended question for promissory estoppel. *See* Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance, Employment* PJC 101.41 (2008); *see also Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1966) (stating that elements of claim for promissory estoppel are (1) a promise, (2) that could be reasonably be expected to induce forbearance of a definite and substantial character, (3) which does induce such forbearance on the part of the promise, and (4) creates a circumstance where injustice may only be avoided by the enforcement of the promise). In contrast, jury questions on unjust enrichment generally ask whether the defendant was unjustly enriched due to fraud, duress, or the taking of undue advantage or if the defendant retained a benefit to the loss of

another or against the fundamental principles of justice, equity, and good conscience. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.,* 142 S.W.3d 459, 490 (Tex. App.—Fort Worth 2004, no pet.) ("Did [defendant] obtain 300 shares of stock [in Allen Rae] by fraud, duress, or the taking of undue advantage?"); *Conoco, Inc. v. Fortune Prod. Co.*, 35 S.W.3d 23, 31 (Tex. App.—Houston [1st Dist.] 1998) ("Unjust enrichment is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."), *rev'd on other grounds*, 52 S.W.3d 671 (Tex. 2000).

Cristobal's proposed jury instruction at trial, based on promissory estoppel, thus differs from her argument on appeal that the trial court should have asked the jury about unjust enrichment. Cristobal's complaint on appeal does not comport with her request made at trial; thus, we hold that she waived her complaint because she did not present it to the trial court. *Wolfahrt v. Holloway,* 172 S.W. 3d 630, 639–40 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (stating that an argument raised on appeal must comport with an argument made at trial).

Conclusion

We hold that the jury's findings are not against the great weight and preponderance of the evidence. We also hold that Cristobal failed to

preserve her complaint regarding the admission of Allen's e-mails. We further hold that Cristobal is not entitled to a jury question on quantum meruit, and she never requested a question on unjust enrichment in the trial court and thus cannot complain about the lack of one on appeal. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Sharp.