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IN THE
COURT OF APPEALS OF INDIANA

BOYER CORP. EXCAVATING,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 18A02-1009-CT-1078
	)	
SHEILA FORBES,	)	
	)	
Appellee-Defendant.	)	
	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0910-CT-32

July 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Boyer Corp. Excavating loaned out its expensive excavating equipment to a laid-off employee, who then used the equipment to clear timber for his aunt, but an agreement as to rental charges was never reached. Boyer Corp. now appeals the trial court's grant of summary judgment in favor of that aunt, Sheila Forbes. Finding no genuine issues of material fact and that the trial court properly rejected a last-minute claim by Boyer Corp., we affirm.

Facts and Procedural History

Sheila owns land in Delaware County, Indiana, which contained timber. Brad Boyer is the owner of Boyer Corp., which has a track hoe, back hoe, and skid steer. In or around October 2008, Sheila's nephew, Hans Buckey, logged timber from Sheila's land using Boyer Corp.'s equipment. Hans had worked for Boyer Corp. since 2001 or 2002 but was laid off at the time. Neither Sheila nor Hans entered into a written agreement with Boyer Corp. to use its equipment for the logging. In addition, neither Sheila nor Hans discussed contract terms with anyone from Boyer Corp., such as the equipment to be leased, the rental rates, or the duration of any lease. According to Sheila and Hans, they each believed Hans was using Boyer Corp.'s equipment in exchange for the payment of all out-of-pocket expenses and firewood.

From October 2008 to July 2009 Sheila had no contact with anyone from Boyer Corp. In July 2009, however, she received an invoice dated July 20, 2009, in the amount of $91,230.00 for "equipment" "for the logging of the woods." Appellant's App. p. 63.

When Sheila failed to pay the invoice, Boyer Corp. filed suit. Boyer Corp. filed a complaint in October 2009 followed by an amended complaint in January 2010 alleging (1) breach of the parties' oral agreement to compensate Boyer Corp. for the rental charges for the use of the equipment and (2) promissory estoppel. Sheila filed a motion for summary judgment. Boyer Corp. filed a memorandum in opposition in which it argued promissory estoppel and unjust enrichment. However, Boyer Corp. raised unjust enrichment for the first time in its memorandum in opposition to summary judgment; it did not raise the issue in either of its complaints.

Following a hearing, the trial court entered summary judgment in favor of Sheila on both counts. As for Count 1, breach of a verbal agreement, the trial court found that Brad himself "admitted in his deposition that he had no verbal or written agreement with Hans and/or Sheila as to the equipment to be leased, the rates for the lease agreement, and the duration." *Id.* at 7. Accordingly, the court found that there was no genuine issue of material fact and entered summary judgment in favor of Sheila. As for Count 2, promissory estoppel, the trial court stated,

> [Boyer Corp.] asserted in its Brief, at page 5: "[Hans] made a promise to enter into a contract with Boyer for the use of Boyer equipment in the logging of timber from [Sheila's] residence at [Sheila's] direction." [Boyer Corp.] does not cite to any authority for this statement. As [Sheila] points out in the Reply Brief, at page 2, all undisputed evidence is contrary to this statement. In order to go forward with [this] claim, [Boyer Corp.] has to produce a fact that shows [Sheila] and/or her agent, Hans . . ., made a statement which created a reasonable reliance on [Boyer Corp.'s] part. [Boyer Corp.] has not produced such a statement.

Id. (formatting altered). Accordingly, the court entered summary judgment in favor of Sheila on this count, too. Finally, as for Boyer Corp.'s attempt to raise unjust enrichment

at the last minute, the trial court found, "For the first time in its Brief opposing the summary judgment motion, [Boyer Corp.] asserts the theory of unjust enrichment. The Court cannot consider theories raised for the first time in the reply brief to a summary judgment motion." *Id.* at 8. Boyer Corp. now appeals.

Discussion and Decision

Boyer Corp. contends that the trial court erred in granting summary judgment in favor of Sheila on Count 2, promissory estoppel. Boyer Corp. also contends that the trial court erred in rejecting its last-minute quantum meruit claim. Boyer Corp. does not appeal the trial court's entry of summary judgment in favor of Sheila on Count 1, breach of an oral contract.

I. Promissory Estoppel

Boyer Corp. first contends that the trial court erred in granting summary judgment in favor of Sheila on its promissory estoppel claim. When reviewing the entry or denial of summary judgment, our standard of review is the same as that of the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269-70 (Ind. 2009). All facts established by the designated evidence and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007).

Promissory estoppel permits recovery where no contract in fact exists. *Hinkel v. Sataria Distribution & Packaging, Inc.*, 920 N.E.2d 766, 771 (Ind. Ct. App. 2010). The

elements of promissory estoppel are (1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise. *Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001).

The trial court found that Boyer Corp. failed to produce a statement on Sheila's and her agent Hans' part that created a reasonable reliance by Boyer Corp. Boyer Corp. responds on appeal that Hans "made a promise to Brad for the use of Boyer equipment in the logging of timber from [Sheila's] residence at [Sheila's] direction" and that "[o]bviously, the promise was relied upon by Boyer in that the equipment was furnished for the seven (7) week project." Appellant's Br. p. 5. However, Boyer Corp. does not identify any promise. As Brad testified in his deposition, Sheila never discussed equipment, rates, or duration and her agent Hans never agreed to any rates. Appellant's App. p. 54, 55; Appellee's App. p. 3, 4, 6, 7, 9. Sheila's affidavit corroborates Brad's deposition. Her affidavit states that she did not discuss the matter with Brad and certainly did not agree or promise to pay rental fees. Appellant's App. p. 38. Hans' affidavit is consistent in that Hans never agreed or promised to pay rental fees. *Id.* at 36. In fact, it was Hans' understanding that there would be no rental charges because Boyer Corp. was making the equipment available so long as they paid for out-of-pocket expenses and Brad could have a few loads of firewood. *Id.* Simply put, Boyer Corp. has failed to establish the first and most basic element of promissory estoppel, a promise. We therefore affirm the trial court's entry of summary judgment in favor of Sheila on Count 2, promissory estoppel.

II. Unjust Enrichment

Boyer Corp. next contends that the trial court erred in rejecting its last-minute quantum meruit claim. Boyer Corp. concedes that it did not raise quantum meruit in its pleadings but argues that Brad's *deposition testimony* interjected the issue into the case.[1] *See* Appellant's Br. p. 8. Accordingly, Boyer Corp. argues that Trial Rule 15(B) "clearly provides for the pleadings to be amended to conform to the evidence presented." *Id.* Trial Rule 15(B) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Even a cursory reading of Trial Rule 15(B), however, shows that it is not applicable to the summary judgment context. Rather, this rule "provides a vehicle by which the action may be decided upon the evidence that is actually admitted at trial, notwithstanding the initial direction of the pleadings." 22 Stephen E. Arthur, *Indiana Practice: Civil Trial Practice* § 16.2 (2d ed. 2007). Because there was no trial in this case, Trial Rule 15(B)

[1] Boyer Corp. cites a specific page of Brad's deposition for the proposition that Sheila was aware that a claim for unjust enrichment was being made. On this page, Brad testifies that Hans was familiar with his rental rates because Hans worked for him, at which point Brad was asked, "So you're just assuming that there was knowledge on [Hans'] part of how much he was going to pay?" Appellant's App. p. 59. Brad then testified, "I can't imagine anybody thinking you'd be doing it for free." *Id.* It was quickly clarified, however, that Hans and Brad did not "expressly agree to a specific fee for the use of the equipment." *Id.*

cannot be used to amend Boyer Corp.'s pleadings to add a claim of quantum meruit. The cases it cites on appeal are thus readily distinguishable.

Finally, as the trial court noted, Boyer Corp. first raised unjust enrichment in its memorandum opposing summary judgment. A memorandum opposing summary judgment is not a proper place to assert a claim against a defendant. *See Briggs v. Finley*, 631 N.E.2d 959, 964 (Ind. Ct. App. 1994), *trans. denied*. Accordingly, the trial court properly rejected Boyer Corp.'s last-minute unjust enrichment claim.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.