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IN THE
COURT OF APPEALS OF INDIANA

STEPHEN H. PERLMUTTER, JENNIFER A. PERLMUTTER,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 35A05-0610-CV-610
E.E. BRANDENBERGER CONSTRUCTION, INC.,	)	
Appellee-Respondent.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0503-PL-59

September 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Stephan and Jennifer Perlmutter appeal the trial court's judgment in favor of E.E. Brandenberger Construction, Inc., in Brandenberger's breach of contract action against the Perlmutters. Concluding that: 1) the Perlmutters were unjustly enriched by improvements they requested and then refused to pay for; 2) the parties' conduct modified the terms of the construction contract; 3) the Perlmutters breached the contract; 4) the trial court did not err in awarding Brandenberger attorney fees; and 5) the trial court awarded Brandenberger double recovery on two items, we affirm in part and remand to the trial court to modify the judgment in favor of Brandenberger from $108,456.64 to $79,694.14.

Facts and Procedural History

In June 2004, the Perlmutters and Brandenberger entered into a contract for the construction of a custom home. Pursuant to the terms of the contract, the price for the home was $309,438.53,[1] and it was to be completed by January 30, 2005. In July 2004, the Perlmutters obtained a five-draw construction loan for $330,000.00 from Standard Federal Bank, with the final draw to be paid at the completion of work. Construction on the home was delayed until the end of July 2004 as the Perlmutters' architect finalized the drawings and the Perlmutters completed the lot purchase.

The Perlmutters wanted their home built on a rise in the property with fully exposed basement windows without window wells. However, as construction on the home began, it became apparent that the house as drawn could not be built on the rise because the basement would flood. After the groundwork for the installation of the basement was completed, a

week passed before the concrete foundation was poured. Both Mr. and Mrs. Perlmutter were present when the basement was poured. After the elevation of the home was established, Mr. Perlmutter constructed the window wells for the basement windows.

As construction of their home progressed, the Perlmutters were at the construction site almost every day. During these site visits, Mr. Perlmutter frequently instructed the subcontractors to make changes. For example, Mr. Perlmutter requested that the fireplace hearth be raised, additional can lights be installed, a bar be framed in, dimmer switches be installed, and the electrical system be upgraded from 200 amp to 400 amp. Mr. Perlmutter did not discuss these changes with Brandenberger and no written change orders were completed. Rather, Brandenberger frequently discovered the changes when at the site for other reasons.

During the course of the construction, animosity developed between the parties, and in December 2004, the Perlmutters served Brandenberger with a notice of default that alleged that Brandenberger had failed to: 1) perform work in accordance with plans and specifications; 2) provide detailed invoicing and documentation for which payment was demanded; 3) complete work in a good and workmanlike manner in accordance with the plans and specifications; 4) pay for materials and supplies; 5) pay for labor and subcontractors; 6) pay or provide insurance coverage for theft; and 7) provide them with the Indiana Quality Assurance Builder Standards.

Brandenberger asked the Perlmutters to set forth specific details in support of their allegations of default. Brandenberger also suggested a meeting to discuss the allegations as

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[1] The initial price was $306,000.00; however, the parties entered into a change order in July 2004

well as Brandenberger's concerns about the overages that the Perlmutters were accruing. The Perlmutters responded by letter on January 31, 2005, with specific details, including Brandenberger's alleged failure: to complete a driveway and interior and exterior painting; and install dimmer switches, an air conditioner, drip edges for gutters, and a refrigerator water line. The Perlmutters also alleged that several items were missing, such as a fireplace remote, shower glass, window screens, and a water softener, and that the basement and back patio elevation did not comply with plans and specifications. The Perlmutters asked Brandenberger to correct all items by February 15, 2005.

The day Brandenberger received the letter, Ted Brandenberger visited the site and reviewed all of the allegations. Following this inspection, Brandenberger responded to each of the Perlmutters' allegations and promised to remedy any defects immediately. To that end, Brandenberger ordered the subcontractors to return to the home and to begin working. In a February 2, 2005, letter, Brandenberger advised the Perlmutters that the house was ready to close as soon as they authorized the final draw on the construction loan and provided a certified check for all overages. Nevertheless, on February 15, 2005, the Perlmutters terminated the construction contract, thus preventing Brandenberger from remedying the alleged defects.

After hearing that the Perlmutters planned to convert their construction loan to a personal loan and pay it through only the fourth draw without paying Brandenberger the $61,200.00 fifth draw and overages, Brandenberger filed a breach of contract action against the Perlmutters. Brandenberger sought the final contract draw plus overages minus credits

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that increased the total price to $309,438.53.

for uncompleted work as well as prejudgment interest and attorney fees, for a total judgment of $108,406.69. Pursuant to Brandenberger's request, the Perlmutters' lender deposited the $61,200.00 final draw with the Huntington Superior Court Clerk.

The Perlmutters obtained a Certificate of Occupancy for the property on March 14, 2005. They also had an appraisal, which valued the property between $385,000.00 and $400,000.00.

In May 2005, the Perlmutters filed a counterclaim alleging that it was Brandenberger, not the Perlmutters, that breached the contract. The Perlmutters also alleged that Brandenberger failed to 1) complete the construction; 2) comply with the contract plans and specifications; 3) complete work on time; and 4) perform work in a workmanlike manner.

Following a hearing, in a September 2006 order, the trial court found and concluded as follows:

> 34. The Court finds that the [Perlmutters] acted in bad faith with regard to the construction contract. This was not the first new home that the [Perlmutters] had built. They were familiar with the construction process. The Defendant, Stephan Perlmutter, was present almost daily during the construction contract. Often, at least once or twice a week he would speak with the general contractor directly. During the construction process Stephan Perlmutter spoke with the various contractors, often giving directions and requesting modifications. To each subcontractor he expressed appreciation and satisfaction with their [sic] work. It was only at the end of the construction contract when the house was nearly complete that [Mr. Perlmutter] began expressing his concerns to the general contractor.
>
> The Court further notes that [Brandenberger] in good faith was effectively denied the opportunity to correct any minor defects or repairs that [the Perlmutters] had raised in their written correspondence by [the Perlmutters] locking the general contractor and any sub-contractors out of the real estate. The Court would further note that [the Perlmutters] and their Counsel failed to

respond to or meet with [Brandenberger] when requested to address the concerns that they had raised.

* * * * *

1. The parties entered into a written Construction Contract; however, both parties changed the terms and conditions of the written contract and acquiesced in changes throughout the construction project.

2. [The Perlmutters] have failed to pay for the improvements by having failed to pay for the final draw and overages and have been unjustly enriched by said failure.

3. [The Perlmutters] are in breach of contract by having failed to make payments to [Brandenberger] and [Brandenberger] is entitled to be paid for the balance of the contract price plus the overages, less the credits to be given to [the Perlmutters] for uncompleted items as set forth by [Brandenberger], together with interest at 18% per annum on said amount, together with its attorney fees [for a total judgment of $108,406.69 as requested by Brandenberger].

Appellant's App. at 12-13. The trial court also ordered that Boutique Interiors be paid $20,359.34 and Grabill Cabinet Company be paid $12,750.00 plus $1,405.64 in interest from the funds held by the Clerk of the Court. The Perlmutters appeal.

Discussion and Decision

At the outset we note that the trial court entered findings of fact and conclusions thereon pursuant to Brandenberger's request. Our standard of review is therefore two-tiered. Weiss v. Harper, 803 N.E.2d 201, 204-05 (Ind. Ct. App. 2003). First, we determine whether the evidence supports the findings, and second, whether the findings support the judgment. Id. at 205. We will not disturb the trial court's findings or judgment unless they are clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them. Id. A judgment is clearly erroneous when a

review of the record leaves us with a firm conviction that a mistake has been made. Id. We will neither reweigh the evidence nor judge the credibility of witnesses, but will consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. Id.

I. Unjust Enrichment

The Perlmutters first claim that the trial court erred in granting Brandenberger's claim for unjust enrichment. Brandenberger counters that the trial court's grant of the unjust enrichment claim properly reflected the amount by which the court found the Perlmutters had been unjustly enriched.

To successfully assert a claim for unjust enrichment, also referred to as quantum meruit, Brandenberger had to establish that a measurable benefit has been conferred upon the Perlmutters under such circumstances that the Perlmutters' retention of the benefit without payment would be unjust. The Perlmutters argue that the trial court's conclusion that they were unjustly enriched is contrary to Indiana law. Specifically, citing Boushery v. Ishak, 550 N.E.2d 784 (Ind. Ct. App. 1990), opinion modified in part on other grounds, 560 N.E.2d 116 (Ind. Ct. App. 1990), the Perlmutters contend that where there is a contract controlling the rights of the parties, there can be no recovery on the theory of unjust enrichment. This is the general rule. See City of Indianapolis v. Twin Lakes Enters., Inc., 568 N.E. 1073, 1079 (Ind. Ct. App. 1991), trans. denied.

Here, however, the items for which Brandenberger sought a quantum meruit remedy, including the raised fireplace hearth, the installation of additional lights and dimmer switches, and the upgraded electrical system, were not covered in the written contract. Under these

circumstances, the trial court did not err in concluding that the Perlmutters were unjustly enriched by upgrades that they requested and then refused to pay for. See id.

II. Contract Modification

The Perlmutters next argue that the trial court's finding that the parties modified the contract by their conduct is contrary to both the evidence and Indiana law. Specifically, the Perlmutters contend that the contract required Brandenberger to notify them in writing if the elevation of their house could not be built in accordance with the house's plans and specifications, that Brandenberger failed to provide such notice and built the house at an improper elevation, and that Brandenberger should be required to repair the elevation at a cost of $36,500.00.

Modification of a contract can be implied from the conduct of the parties. Id. at 1084. Even a contract providing that any modification thereof must be in writing may be modified orally. Id. at 1084-85. Questions regarding the modification of a contract are ones of fact, and are to be determined by the trier of fact based on the evidence in each case. Skweres v. Diamond Craft Co., 512 N.E.2d 217, 221 (Ind. Ct. App. 1987).

Here, assuming without deciding that the contract required Brandenberger to notify the Perlmutters in writing if their house could not be built at the planned elevation, our review of the evidence reveals that after construction on the house began, Brandenberger told the Perlmutters that the house could not be built on the rise because the basement would flood. Both Mr. and Mrs. Perlmutter were present when the basement was poured, and after the elevation of the house was established, Mr. Perlmutter constructed the window wells for the basement windows. This evidence supports the trial court's finding that the parties, both

orally and by their conduct, modified any provision that required Brandenberger to notify the Perlmutters in writing that their house could not be built at the planned elevation. We find no error.

III. Breach of Contract

The Perlmutters further argue that the trial court erred in finding that they breached the contract when they failed to pay Brandenberger the final draw, which was due at the completion of the work. Whether a party has breached a contract is a question of fact. Titus v. Rheitone, Inc., 758 N.E.2d 85, 94 (Ind. Ct. App. 2001), trans. denied. Here, in a February 2, 2005 letter, Ted Brandenberger advised the Perlmutters that the house was ready to close as soon as they authorized the final draw on the construction loan. Because the house was completed and ready to close, the Perlmutters breached the contract when they failed to pay Brandenberger the final draw.

Further, the Perlmutters' argument that they could not have breached the contract because Brandenberger did not give them a written notice of default as required by the contract also fails. Strict adherence to notice requirements in a contract may become less important if the evidence shows that one party has actual or constructive knowledge of facts or events underlying the claim. Northrop Corp. v. Gen. Motors Corp., 807 N.E.2d 70, 90 (Ind. Ct. App. 2004), trans. denied. Here the Perlmutters had actual knowledge that the house was ready to close and the final payment was due but simply refused to pay it. Under these circumstances, we find no error.[2]

[2] Because we affirm the trial court's finding that the Perlmutters breached the contract by failing to pay Brandenberger the final draw, we need not address the issue of whether the Perlmutters breached the contract when they terminated Brandenberger.

IV. Attorney Fees

The Perlmutters also argue that the trial court erred in awarding Brandenberger attorney fees. However, our review of the contract reveals the following provision:

> 6.13. Costs and Attorney Fees. In any action at law or in equity . . . the prevailing party shall be entitled to reasonable costs and expenses, including attorney fees. . . .

Appellants' Appendix at 23. Brandenberger was the prevailing party. Accordingly, pursuant to the contract, the trial did not err in awarding Brandenberger attorney fees.

V. Double Recovery

Lastly, the Perlmutters claim that Brandenberger was awarded a double recovery where he was awarded the full amount of the contract, and Boutique Interiors, Inc., and Grabill Cabinet Company were paid from the bank funds the Perlmutters deposited with the Clerk of the Huntington Superior Court. Brandenberger concedes that the money paid to Boutique Interiors and Grabill should have been deducted from the judgment. We therefore remand to the trial court to reduce the judgment in favor of Brandenberger to $79,694.14.

Conclusion

We conclude the Perlmutters were unjustly enriched by improvements they requested and then refused to pay for, the parties' conduct modified the terms of the construction contract, and the Perlmutters breached the contract. The trial court did not err in awarding Brandenberger attorney fees; however, the trial court awarded double recovery to Brandenberger and the judgment should be reduced by the amount of that double recovery.

Judgment affirmed in part and remanded in part.

VAIDIK, J., and BRADFORD, J., concur.