RENDERED: APRIL 15, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001799-MR

RAY HUDSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 07-CI-004438

MARK LECHNER;
CHRIS DISCHINGER; AND
LDG DEVELOPMENT, LLC — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Ray Hudson appeals from the Jefferson Circuit Court's summary judgment against him in favor of Appellees Mark Lechner, Chris Dischinger, and LDG Development, LLC upon Appellant's claim for damages

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

based on unjust enrichment. Upon our review, we hold that the trial court erred when it *sua sponte* entered summary judgment in favor of Appellees as to this allegation. Thus, we reverse and remand for further proceedings consistent with this opinion.

In July and August of 2006, Appellant loaned approximately $25,400 to a man who referred to himself as Master Khalid A. Raheem, I. Raheem told Appellant that he owned properties located at 712 South 35th Street and 858 South 22nd Street in Louisville and wished to use the loans to make repairs at those properties. In exchange for the loans, Raheem gave Appellant promissory notes purporting to encumber the properties and he told Appellant that he would be repaid when the properties were sold. However, it was later determined that Raheem did not own either property and was instead only leasing the properties from Appellees, the actual owners. Raheem subsequently defaulted on the leases and was evicted.

Raheem failed to repay Appellant as agreed, and on September 1, 2006, Appellant filed mechanics' and materialman's liens asserting an interest in the two properties. Although the recorded liens listed Appellee LDG and Raheem as owners of the properties, Appellant never notified LDG or the other Appellees of his intent to file the liens prior to filing them. The record also reflects that none of the Appellees ever signed any promissory notes regarding the properties.

Appellant subsequently filed suit against Raheem in an effort to recover the loan amount. Appellant then filed an amended complaint in which he

accused Raheem of fraud and added Appellees as defendants. In the amended complaint, Appellant contended that he was entitled to recover the amounts loaned to Raheem from Appellees pursuant to KRS 376.010, which addresses mechanics' and materialman's liens. In the alternative, Appellant argued that he was entitled to recover from Appellees under the common-law theory of *quantum meruit*, or unjust enrichment. He claims that building materials purchased with the loan proceeds had been used to improve Appellees' properties, thereby increasing their value.

Appellees sought summary judgment against Appellant on the grounds that Appellant was not entitled to foreclose the mechanics' and materialman's liens because of a failure to comply with the procedural requirements associated with such liens. In response, Appellant conceded that his lien claims were time-barred because he had failed to sue Appellees within twelve months of filing the liens, as required by KRS 376.090.[2] Consequently, the trial court dismissed Appellant's claims brought pursuant to KRS 376.010 because of his failure to timely file suit. However, the trial court also dismissed Appellant's claim based on unjust enrichment despite the fact that Appellees had not addressed this claim in their motion for summary judgment. This appeal followed.

On appeal, Appellant concedes that his lien claims were time-barred as a matter of law pursuant to KRS 376.090, so he does not challenge the trial

[2] KRS 376.090(1) provides, in relevant part: "Any lien provided for in KRS 376.010 shall be deemed dissolved unless an action is brought to enforce the lien within twelve (12) months from the day of filing the statement in the clerk's office, as required by KRS 376.080."

court's entry of summary judgment as to those claims. Instead, he contends that summary judgment was prematurely granted as to his claim of unjust enrichment because Appellees had not sought summary judgment regarding that issue. The standards for reviewing a trial court's entry of summary judgment are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Id. at 436 (internal footnotes and citations omitted). Because summary judgments involve no fact finding, we review the trial court's decision *de novo*. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

"Recovery under the theory of *quantum meruit* can be had regardless of the absence of an enforceable contract." *Quadrille Bus. Sys. v. Kentucky Cattlemen's Ass'n, Inc.*, 242 S.W.3d 359, 365 (Ky. App. 2007).

> A contract implied by law allows for recovery *quantum meruit* for another's unjust enrichment. It is not based upon a contract but a legal fiction invented to permit recovery where the law of natural justice says there should be a recovery as if promises were made. The courts supply the fiction of the promise to permit the recovery. Furthermore recovery *quantum meruit* may be had irrespective of the intentions of the parties, and sometimes even in violation of them.

Perkins v. Daugherty, 722 S.W.2d 907, 909 (Ky. App. 1987) (citations omitted).

"However, merely because work was performed that benefited another does not necessarily warrant recovery." *Quadrille*, 242 S.W.3d at 365. Instead, a party claiming the applicability of *quantum meruit* must establish four elements:

> 1. that valuable services were rendered, or materials furnished;
>
> 2. to the person from whom recovery is sought;
>
> 3. which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and
>
> 4. under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person.

Id. at 366, *quoting* 66 Am.Jur.2d Restitution and Implied Contracts § 38 (2001).

The trial court held that Appellant had satisfied the first element of this test because he loaned money to Raheem but concluded that Appellant had "failed to meet his burden" as to the remaining three elements. The trial court said:

> The loans were not made to LDG. LDG did not accept or receive services from Hudson. There is absolutely no evidence that LDG had knowledge of Hudson's or Raheem's actions. Finally, nothing in the record

> indicates that Hudson ever expected LDG to repay Raheem's obligations on the loans. To the extent that Hudson alleges that improvements were made to the two properties that benefited LDG, he had brought forth no evidence that he did any work or that he provided the materials for any work. At best, he loaned money under the belief that the money would be used to make improvements.
>
> . . . It was incumbent upon Hudson to bring forth at least some evidence of how his efforts benefited LDG and he did not.

From the foregoing it is clear that the trial court granted relief not sought and misallocated the evidentiary burden. A non-moving party is only required to produce the type of proof identified by the court when faced with a "properly supported summary judgment motion." *See Steelvest, Inc. v. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). " '[U]nless and until the moving party has properly shouldered the initial burden of establishing the apparent non-existence of any issue of material fact,' the non-movant is not required to offer evidence of the existence of a genuine issue of material fact." *Goff v. Justice*, 120 S.W.3d 716, 724 (Ky. App. 2002), *quoting Robert Simmons Const. Co. v. Powers Regulator Co.*, 390 S.W.2d 901, 905 (Ky. 1965). Here, Appellees had not yet made an effort to challenge Appellant's claim of unjust enrichment. Instead, the trial court appears to have rejected Appellant's claim of its own accord. The prevailing rule on this point is well-stated as follows:

> Appellees cite us to no authority that allows a trial court to circumvent the civil rules and enter summary judgment *sua sponte* where the legal issues have not been submitted for determination. While a court might be

> justified in using its inherent powers to dismiss *sua sponte* for lack of subject matter jurisdiction, it is fundamental that a trial court has no authority to otherwise dismiss claims without a motion, proper notice and a meaningful opportunity to be heard. CR 56.01 and CR 56.02 clearly provide that a "party" may seek a summary judgment. The rules do not contemplate such a proceeding on the court's own motion.

Storer Communications of Jefferson County, Inc. v. Oldham County Bd. of Educ., 850 S.W.2d 340, 342 (Ky. App. 1993). Perhaps there are exceptions to this rule, but nothing presented here reveals a need to avoid routine application of the rule.

Consequently, upon the record before us, Appellant was under no obligation to produce evidence in refutation of an argument that had not been made. Accordingly, the trial court's summary judgment on Appellant's unjust enrichment claim is reversed and this cause is remanded for further consistent proceedings.[3]

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel Manly
Louisville, Kentucky

BRIEF FOR APPELLEE:

Dennis J. Stilger
Louisville, Kentucky

[3] We note, however, that this decision should not be viewed as a bar on any future summary judgment proceedings if they are found to be appropriate.