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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002413-MR
&
NO. 2010-CA-000068-MR

NEURODIAGNOSTICS, P.S.C. and NEURODIAGNOSTICS, INC. — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-00132

MODERN RADIOLOGY, PLLC — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

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

MOORE, JUDGE: Neurodiagnostics, P.S.C., and Neurodiagnostics, Inc., d/b/a Lexington Diagnostic Center (referred to herein, collectively, as "LDC") appeal from three orders entered by the Fayette Circuit Court. The first order, entered August 3, 2009, determined that LDC was barred from recovering on its claim against Modern Radiology, PLLC, for the return of several alleged overpayments it made to Modern under a contract and that Modern was entitled to summary judgment on LDC's claim because "equitable principles dictate that LDC should be equitably estopped from recovering[.]" This order was interlocutory in nature and was not made final and appealable until it was designated as such by a second, subsequent order of November 23, 2009. The third order, entered December 22, 2009, denied LDC's motion to alter, amend, or vacate the November 23, 2009 order.

Upon review, we find that equitable principles and equitable estoppel do not support summary judgment in this instance. Accordingly, we reverse and remand this matter to the trial court.

Additionally, Modern has filed a cross-appeal from the trial court's November 23, 2009 order. Modern argues that the trial court erred in denying Modern prejudgment interest for its successful breach of contract claim against LDC because the amount Modern was awarded was liquidated. Finding that the trial court did not adequately address the issue of prejudgment interest, we vacate that portion of the trial court's order and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

LDC employed Dr. Eric Fitzcharles as a staff radiologist between July 6, 1998, and March 15, 2004, and LDC paid Dr. Fitzcharles a salary consisting of a percentage of its gross monthly income. Prior to Dr. Fitzcharles' last day of employment with LDC, Dr. Fitzcharles organized Modern Radiology, PLLC. Dr. Fitzcharles and LDC both contemplated that Modern would succeed Dr. Fitzcharles as LDC's exclusive provider of radiology services and, on September 16, 2003, LDC and Modern executed a contract to this effect, with Fitzcharles signing as Modern's agent. Thereafter, Dr. Fitzcharles continued to provide services for LDC, but he provided those services as Modern's employee, pursuant to Modern's contract with LDC.

The contract between LDC and Modern, which became effective on March 16, 2004, specified that Modern was an independent contractor. This contract also stipulated that LDC would prorate the final amounts due to Dr. Fitzcharles for his employment with LDC, which included the amounts LDC owed Dr. Fitzcharles for the fifteen days he worked for LDC in March of 2004, and that LDC would pay these amounts directly to Dr. Fitzcharles. Prior to the effective date of the contract between LDC and Modern, Modern hired an additional radiologist, Dr. Jonathan Eugenio. Modern asked LDC for, and was given, a $75,000 loan to compensate Dr. Eugenio. Subsequent to March 15, 2004, LDC also paid Dr. Fitzcharles $44,303.67, which reflected the final amounts LDC owed Dr. Fitzcharles for his employment. Modern thereafter became LDC's radiology services provider.

All of the issues in this case revolve around how LDC was to pay Modern for its services, and whether it was proper for LDC to pay Modern beginning in March, 2004. In relevant part, the provision of their contract[2] governing Modern's remuneration reads:

> Compensation of [Modern]: [Modern] will be paid for its services by LDC an amount equal to 15% of the gross income received by LDC for imaging services performed at LDC or any of its related locations, which are subject to supervision and interpretation by [Modern's] professional staff. In the event LDC receives income from procedures or other sources not requiring [Modern's] interpretation, this income will not be included in this percentage. This amount will be paid within 10 working days after the end of each month for the previous month by the following formula:
>
>> The total monthly income received by [LDC] for LDC operations
>> Less any income not subject to [Modern's] interpretation
>> Less any LDC income from outside readings
>> Less any LDC income derived from PET Scans
>> Times 0.15
>> Plus MRI/CT interpretations for that month for Drs. Lefsky, Hoskins, Dubin and contracts with Alliance and Phoenix at $80.00 per scan.
>> Less expenses for any office space, computer and telephone expenses, secretarial usage, and any other itemized expenses not related to LDC interpretation and supervision.

[2] Our opinion references this provision as it appeared after LDC and Modern amended it on March 19, 2004. The prior version of this provision was substantially similar, and the amendments the parties made are not germane to this case.

During the first several months of Modern's contract with LDC, LDC received gross income from payments received for imaging services that it had performed days, months, and years prior to the beginning of Modern's contract. In fact, due to the ordinary delay in collecting payment for medical services, LDC did not actually receive any gross income from work performed by Modern until several months after their contract began. Nevertheless, beginning in March of 2004, LDC paid Modern 15% of its monthly gross income. LDC also deducted its $75,000 loan to Modern from the amount LDC paid Modern for March of 2004.

On June 19, 2007, LDC and Modern agreed to terminate their contract and determined that August 10, 2007, would be the last day Modern would provide services to LDC. After August 10, 2007, LDC made no further payments to Modern.

In September of 2007, Modern notified LDC that it was owed additional amounts under their contract for interpretation services it had provided for LDC prior to the termination of their 2004 agreement. Modern cited to the provision in the contract providing that it "will be paid for its services by LDC an amount equal to 15% of the gross income received by LDC for imaging services performed at LDC or any of its related locations, which are subject to supervision and interpretation by [Modern's] professional staff." Modern reasoned that it was entitled to additional amounts because LDC did not receive payment for some of Modern's services until after August 10, 2007.

However, LDC refused to pay Modern because LDC believed that it had overpaid Modern at the beginning of the contract. Quoting the same contractual language, LDC insisted that if Modern was entitled to continue receiving payments after August 10, 2007, then Modern was not entitled to keep approximately $100,000 which LDC had paid Modern over the course of the first several months of their contract. LDC reasoned that it was entitled to reimbursement from Modern because, under their contract, LDC was only required to pay Modern out of income LDC received from imaging services requiring Modern's interpretation and supervision; LDC did not begin to receive payment for many of Modern's services until after December of 2004; and thus, when Modern had been paid 15% of LDC's gross income beginning March of 2004, rather than 15% of the income LDC actually received due to Modern's services, Modern had been paid for imaging services it did not render.

Modern filed its complaint in this matter on January 10, 2008, asserting a claim against LDC for breach of contract.

LDC answered with a counterclaim to recover what it had allegedly overpaid Modern. It sought to offset any recovery awarded to Modern against its own claim and further contended that the amount Modern owed LDC was greater than the amount that LDC owed Modern.

In turn, Modern answered by arguing, first, that the contract entitled it to LDC's alleged overpayments. Second, Modern argued that LDC's claim was based upon a theory of unjust enrichment; that it would be inequitable or unjust for

LDC to recover any alleged overpayment from Modern; and that, because it would be inequitable, it would either be impossible for LDC to prove an essential element of its claim of unjust enrichment, or, alternatively, equitable estoppel precluded LDC from recovering. And third, Modern argued that LDC's claims were barred by the statute of limitations.

Over the course of the ensuing litigation, Modern moved for summary judgment in favor of its claim for breach of contract and against LDC's claim for overpayment. LDC moved for summary judgment in favor of its claim for overpayment. Subsequently, over the course of separate orders, the trial court summarily disposed of Modern's and LDC's respective claims.

The trial court began by rendering an interlocutory order on January 22, 2009, in which it made three rulings. First, the trial court granted Modern partial summary judgment on the issue of LDC's liability for breaching its contract with Modern, and the trial court allowed the parties to conduct additional discovery to ascertain damages on that claim. Second, the trial court denied Modern's separate motion for summary judgment regarding the statute of limitations applicable to LDC's cause of action, holding that the five-year period stated in Kentucky Revised Statute (KRS) 413.120(12) applied and that LDC's claim, filed prior to the expiration of that period, was timely. Third, the trial court denied LDC's motion for partial summary judgment on the issue of Modern's liability for repaying LDC the alleged overpayments. However, the trial court only denied LDC's motion "pending additional discovery on Modern's defenses to that claim."

On August 3, 2009, after LDC and Modern conducted further discovery regarding Modern's defenses, the trial court entered its second interlocutory order. There, the trial court granted summary judgment in favor of Modern regarding LDC's overpayment claim. Its order states only:

> Because the Court concludes that equitable principles dictate that LDC should be equitably estopped from recovering on its overpayment claim, IT IS ORDERED that modern's Motion for Summary Judgment on the remaining counts of the Counterclaim is GRANTED and that LDC's Motion for Summary Judgment is therefore DENIED.

The trial court entered its third order on November 23, 2009, which, by its own recitation, made each of its previous interlocutory orders final and appealable. The trial court also granted Modern damages in the amount of $84,649.06, but it also held that this amount consisted of unliquidated damages. Based upon that conclusion, the trial court's order further states that "[a]fter weighing the equities, the Court declines to award prejudgment interest." On December 2, 2009, LDC moved the trial court to vacate its decision to grant summary judgment in favor of Modern on its overpayment claim. On December 22, 2009, the trial court denied LDC's motion.

These appeals followed. LDC appeals the trial court's decision to grant summary judgment in favor of Modern on its overpayment claim. Modern appeals the trial court's decision not to award it prejudgment interest for its successful breach of contract claim. Additional information contained in the record will be addressed as it becomes relevant to our analysis.

II. THE DIRECT APPEAL OF LDC

A. STANDARD OF REVIEW

Summary judgment is a stringent standard. It serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. 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. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id.*, (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky.1985)).

On appeal, we must consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App.1996). Since summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the trial court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*.

Likewise, the issues in this case involve the interpretation and meaning of certain terms in the contract between LDC and Modern. The interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review. *First Commonwealth Bank of Prestonburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000).

B. ANALYSIS

LDC asserted a claim against Modern to recoup alleged overpayments it made under their contract. This being the case, LDC's cause of action was not an action to reform or rescind that contract, it was not based upon that contract, and it did not concern any fraudulent representations made regarding that contract. Rather, to quote the former Court of Appeals, LDC's action was

> based upon the implied contract to refund the money which was paid as a result of the mutual mistake.
>
> . . .
>
> This right of action is based upon the contract which the law implies as the result of justice and reason growing out of the mutual mistake of innocent parties, and is barred by the lapse of five years from the discovery of the mistake, if payment be made before that event."

Nave v. Price, 21 Ky. L. Rptr. 1538, 55 S.W. 882, 882-883 (1900). Stated more succinctly, LDC's cause of action constitutes a theory of unjust enrichment. *Union Central Life Ins. Co. v. Glasscock*, 270 Ky. 750, 110 S.W.2d 681, 686 (1937). To prevail under a theory of unjust enrichment, a party must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009).

As stated above, the trial court granted summary judgment in favor of Modern in its August 3, 2009 order after it determined that "equitable principles dictate that LDC should be equitably estopped from recovering on its overpayment claim." Arguably, this statement could refer to either Modern's affirmative defense of equitable estoppel, or the third element of unjust enrichment. Modern also asks this Court to affirm the trial court on alternate grounds, asserting that LDC failed to demonstrate the first element of its claim for unjust enrichment. In support, Modern contends that its contract with LDC proves that LDC did not overpay Modern and that LDC's alleged overpayments were actually a part of the original consideration for that contract. We begin our analysis by addressing Modern's alternate basis.

1. **Modern's alternate basis for affirming the trial court's decision: Benefit conferred upon defendant at plaintiff's expense**

Over the course of these proceedings, Modern never initiated any action to equitably reform or rescind its contract with LDC. Modern and LDC merely asserted two different interpretations of this contract, asked the trial court to interpret the contract as a matter of law, and sought to either enforce that contract as it is written, or use that contract to prove the existence of an overpayment. Modern prevailed on its own breach of contract theory against LDC by arguing that the remuneration provision of the contract unambiguously entitled Modern to be paid out of gross income LDC received, attributable to services Modern rendered, irrespective of the final date of their contract. As a threshold issue, now we review whether the remuneration provision in the contract between LDC and Modern also supports that LDC *overpaid* Modern.

LDC's position is that the remuneration provision of the contract unambiguously entitled Modern to be paid out of gross income LDC received, attributable to services Modern rendered. LDC reasons that the majority of its gross income, in the first few months of their contract, was unrelated to any services that Modern rendered. As such, LDC reasons that it when paid Modern 15% of its gross income over those first few months, it mistakenly overpaid Modern.

Modern's position is that LDC's alleged overpayments were part of the consideration contemplated in the contract. Modern reasons that because it was entitled to these alleged overpayments, they cannot qualify as an unjustly-received benefit. Therefore, Modern urges that this Court may affirm the trial court's decision, alternatively, because it would be impossible for LDC to prove the first element of its unjust enrichment claim.

Modern attempts to support its position by arguing, now, that the remuneration provision *is* ambiguous.[3] Modern reasons that because this

[3] The trial court made no obvious finding as to whether the remuneration provision of this contract contained any ambiguities, but the record and the parties' respective briefs in this matter lead only to the conclusion that the trial court found it unambiguous. The trial court's January 22, 2009 order overruled LDC's motion for summary judgment only to allow Modern to develop evidence regarding its defenses to the enforcement of the contract. The trial court stated that it found the contract to be unambiguous at the close of the parties' arguments respecting LDC's

provision is ambiguous, 1) the trial court should have considered parol evidence to explain this provision; 2) parol evidence, *i.e.*, the course of performance between LDC and Modern, demonstrates that LDC paid Modern 15% of LDC's gross income beginning in March of 2004, regardless of whether any of that income was attributable to services that Modern provided; and 3) therefore, the course of performance between LDC and Modern resolves the ambiguity contained in this provision and explains that these alleged overpayments were actually part of the original consideration of the contract.

As to where this ambiguity could exist, Modern focuses upon the following two sentences of the remuneration provision and, in particular, the phrase "subject to supervision and interpretation by [Modern's] staff."

> [Modern] will be paid for its services by LDC an amount equal to 15% of the gross income received by LDC for imaging services performed at LDC or any of its related locations, which are subject to supervision and interpretation by [Modern's] professional staff. In the event LDC receives income from procedures or other sources not requiring [Modern's] interpretation, this income will not be included in this percentage.

First, Modern asserts that, because of the "subject to" language, this provision might be read to mean that LDC could have required Modern to re-interpret imaging that LDC had already performed prior to their contract.[4]

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motion. Both parties acknowledge in their briefs that the trial court found their contract to be unambiguous. And, the basis of the trial court's holding in this matter was equity, not the interpretation of that contract. Regardless, however, the trial court's answer to this question is subject to *de novo* review and is entitled to no deference from this Court. *West*, 55 S.W.3d at 835.

[4] Modern does not cite to any instance where LDC required it to reinterpret images that LDC had interpreted outside the scope of their contract.

Therefore, Modern reasons that all of LDC's imaging—even the imaging LDC performed prior to Modern's employment—was, potentially, "subject to" Modern's "interpretation and supervision," and that Modern was consequently entitled to be paid an immediate 15% of LDC's gross profits on that basis.

Second, Modern asserts that this provision could be interpreted to mean that LDC was obligated to pay twice for Dr. Fitzcharles' work. In support, Modern points to the language, "by [Modern's] staff," and to the fact that Dr. Fitzcharles later quit LDC to become a member of Modern's staff. As Modern reasons, LDC was probably receiving payments in March of 2004 for work performed by Dr. Fitzcharles, pursuant to his employment with LDC. Therefore, Modern further reasons that, even though Dr. Fitzcharles had already been paid for that work, Modern should have been paid, too.

In *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384-5 (Ky. App. 2002), this Court stated the general rules relating to the interpretation of a contract:

> The primary object in construing a contract or compromise settlement agreement is to effectuate the intentions of the parties. Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.
>
> Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument

> without resort to extrinsic evidence. A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms.

(Citations and internal quotation marks omitted).

After reviewing this provision in its entirety, as well as the four corners of this contract, it is unnecessary to resort to parol evidence to determine the intent of these parties; a reasonable person could only interpret this provision as LDC has interpreted it. The first sentence of this provision mandates that LDC pay Modern for "imaging services *performed* at LDC or any of its related locations, which *are* subject to supervision and interpretation by [Modern's] professional staff." The second sentence further defines the phrase "subject to supervision and interpretation of [Modern's] professional staff" to mean "*requiring* [Modern's] interpretation." A plain reading of both sentences reveals that 1) *if* imaging services are actually performed at one of LDC's locations; and 2) *if* those imaging services require Modern's interpretation, 3) *then* LDC will pay Modern, for the interpretation that Modern provides, an amount equal to 15% of the gross income received by LDC for those imaging services. We disagree with Modern's contention that this provision is ambiguous and, as such, there is no need to follow Modern's reasoning. The language of the remuneration provision does not supply an alternate basis for affirming the trial court's decision.

2. Basis for the trial court's decision: Equitable retention of benefit without payment for its value

In its August 3, 2009 order, the trial court determined that the evidence of record demonstrated only that it would be equitable for Modern to retain LDC's alleged overpayment. As noted above, the language of the trial court's order is unclear as to whether the trial court relied upon the third element of unjust enrichment, or Modern's affirmative defense of equitable estoppel, to reach this conclusion. But, Modern contends that the trial court relied upon both. As such, our analysis must begin with a closer examination of the third element of an unjust enrichment claim (*i.e.*, when the law considers it to be equitable for an overpaid party to retain that overpayment without refunding it) and the law regarding equitable estoppel. Our analysis follows with a determination of whether any evidence exists in the record placing these issues in dispute.

As to the third element of an unjust enrichment claim premised upon a mistaken overpayment,

> [M]oney paid to another under the influence of a mistake of fact may be recovered, provided the payment has not caused such a change in the position of a payee that it would be unjust to require a refund. For a change in position to defeat an action to recover the money, the change must be detrimental to the payee, material, and irrevocable. One who mistakenly pays money that should not have been paid has a right to sue for restitution, even if the payments were negligently made. If recipients of the overpayments have changed their circumstances in reliance on this overpayment, then the tables are turned once more, with the court examining the equities of both transactions to ascertain what should be the fair outcome.

28 Williston on Contracts § 70:201 (4th ed.) (internal cites omitted); *see also* *Jefferson County Bank v. Hansen Lumber Co.*, 246 Ky. 384, 55 S.W.2d 54 (1932)).

> It is generally considered a detrimental change of position in reliance upon the payment when one who receives a payment by mistake, believing that he or she is entitled to retain it, surrenders collateral security for a debt or suffers the loss of rights and remedies against others who could have been required to make payment, so that he or she cannot be placed in status quo.

66 Am.Jur.2d Restitution and Implied Contracts § 152 (citing *Jefferson County v. McGrath's Ex'r*, 205 Ky. 484, 266 S.W. 29, 41 A.L.R. 586 (1924).

Additionally,

> [i]f the payee incurs new debts or extraordinary living expenses in good faith reliance upon the right to an overpayment, the payee can establish that he or she detrimentally relied upon the mistaken overpayment by proving that but for the mistaken overpayment, the payee would not have incurred these costs and liabilities. However, it has been said there is no prejudice to the payee, and the payor may recover, when the payee has used the money to cover ordinary living expenses or to pay a preexisting debt since the payee would have assumed these liabilities and obligations regardless of the overpayment and therefore the payee cannot be said to have detrimentally changed his or her position in reliance on the overpayment.
>
> A change of position on the part of a payee is not detrimental and is not a defense to an action to recover payments made under a mistake if the change can be reversed or the status quo can be restored, without expense.

66 Am.Jur.2d Restitution and Implied Contracts § 152. (Internal citations omitted.)

Next, we turn to the affirmative defense of equitable estoppel. As stated in *Fluke Corporation v. LeMaster*, 306 S.W.3d 55, 62 (Ky. 2010),

> [u]nder Kentucky law, equitable estoppel requires both a material misrepresentation by one party and reliance by the other party[.] The essential elements of equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

(Internal citations omitted.)

As an obvious matter, the third element of unjust enrichment overlaps with the affirmative defense of equitable estoppel; both require good faith and detrimental reliance. However, within the context of the third element of unjust enrichment, the focus is upon whether *money paid to another*, in and of itself, caused the detrimental reliance. With regard to the affirmative defense of equitable estoppel, the focus is, instead, upon whether a *misrepresentation* caused the detrimental reliance. Stated differently, "[e]quitable estoppel requires a fraudulent misrepresentation as to a material fact[.]" *Sawyer v. Mills*, 295 S.W.3d 79, 90 (Ky. 2009).

Modern argues that it would only be equitable, under either the third element of unjust enrichment or under a theory of equitable estoppel, for Modern to retain LDC's overpayment, rather than repay it because

> In addition to deriving the benefit of years of radiology coverage, LDC at least implicitly represented that the new contract with Modern would calculate Modern's compensation during the initial months of the arrangement the same way that Dr. Fitzcharles's previous employee compensation had been calculated. This representation not only induced Modern to enter into the Agreement, but also to hire a new employee physician, Dr. Jon Eugenio.
>
> . . .
>
> Both parties were fully aware of Modern's intention to bring Dr. Eugenio on board as a second radiologist; in fact, the six-month delay between the contract's execution and its official start existed because of Dr. Eugenio's notice obligations in his current position. Moreover, LDC also "fronted" Modern $75,000.00 in the first month of the contract against its expected earnings to permit Modern to meet its financial obligations. Modern's professional staff filed affidavits in the record attesting to the fact that [they] would never have—and financially, could not have—agreed to provide the services they did without an expectation and understanding of an immediate compensation cash flow that would not exist under the contract interpretation upon which LDC premises its overpayment [claim].

After reviewing the evidence of record in this matter, the trial court erred if it granted summary judgment in favor of Modern on the basis of the third element of unjust enrichment. Modern does not contend that LDC's overpayment caused it to surrender any collateral security for a debt, or to suffer the loss of rights and remedies against others who could have been required to make payment. Modern's contention that LDC somehow benefitted from "years of radiology coverage" by overpaying Modern also has no merit because this "benefit," which Modern purports to have given LDC in exchange for the overpayment, was Modern's obligation under its contract with LDC. Similarly, if entering into a contract for services with LDC was detrimental to Modern, that detriment could not have been caused by any money that LDC paid to Modern. This argument is actually nonsensical because the parties entered into their contract on September 16, 2003, and LDC did not make any payments to Modern until well *after* that date. As Modern acknowledges above, Modern's argument is actually that it changed its position (*i.e.*, contracted with LDC and hired Dr. Eugenio) because of what it perceived as LDC's implied *representation* that LDC would immediately begin paying Modern six months from the date of their contract, not because it actually received any overpayment. Thus, Modern's defense of equitable estoppel is necessarily more applicable to the facts of this case.

Turning to equitable estoppel, we disagree that Modern was entitled to summary judgment on that basis, either. To begin, some evidence of record supports that when LDC made the payments at issue at the beginning of the contract, it did so acting under a mistaken interpretation of the contract, rather than pursuant to an intentional, fraudulent plan. Modern acknowledges that when LDC immediately began paying Modern under their contract, LDC was compensating

Modern exactly as LDC had compensated Dr. Fitzcharles under its previous contract with Dr. Fitzcharles. Like its previous contract with Dr. Fitzcharles, LDC stopped paying Modern after their contract terminated. And, LDC's president, Dr. Privett, stated in his deposition and interrogatory answers that he and LDC did confuse its contract with Modern with its prior contract with Dr. Fitzcharles; that he believed LDC was entitled to stop paying Modern after the final date of their contract; and that he and LDC did not realize that they had mistakenly interpreted LDC's contract with Modern until after they sought to terminate that contract in June of 2007.

Likewise, even if LDC's alleged implicit representation could rise to the level of fraud, some evidence of record demonstrates that Modern did have the means of discerning the truth of LDC's alleged, implied representation. Modern had a copy of their contract at all relevant times.

Finally, LDC produced some evidence demonstrating that Modern suffered no injury, detriment, or prejudice when it entered into its contract with LDC, or when it hired Dr. Eugenio. In light of the favorable judgment Modern received on its breach of contract claim, Modern has already received, or is entitled to receive, all of the benefits it bargained for under its contract with LDC. And, LDC's president, Dr. Privett, testified in his deposition that Modern hired Dr. Eugenio to accept more of LDC's increasing business requirements. If LDC's business and resulting profits increased and Modern was able to assist with that increasing business because of Dr. Eugenio, Modern was able to enjoy 15% of those increased profits.

In sum, the trial court erred when it granted summary judgment in favor of Modern on the basis of equitable estoppel because the record reveals several genuine issues of material fact relating to this defense. Consequently, we reverse this portion of the trial court's judgment and remand for consideration of Modern's defense of equitable estoppel on the merits. On remand, unless Modern proves its affirmative defense of equitable estoppel on the merits, the trial court shall enter judgment for LDC on its unjust enrichment claims.

III. MODERN'S CROSS APPEAL REGARDING PREJUDGMENT INTEREST

Prior to the final adjudication of this matter, Modern and LDC stipulated that the principal amount due to Modern under the contract was $84,649.06. However, they disagreed as to Modern's entitlement to prejudgment interest. Modern argued that its breach of contract claim was a claim for liquidated damages and entitled Modern to prejudgment interest as a matter of right. On the other hand, LDC contended that Modern's claim was for unliquidated damages, that the trial court had discretion not to award prejudgment interest on unliquidated damages claims, and that it was not equitable to do so under the circumstances of this case.

The trial court's November 23, 2009 order made no findings of fact regarding whether Modern's claim was for liquidated or unliquidated damages. Rather, the trial court's order simply states that

> Plaintiff Modern Radiology, PLLC is awarded judgment on the sole count of its Complaint against Defendants Neurodiagnostics, P.S.C. and Neurodiagnostics, Inc. for $84,649.06 in unliquidated damages. After weighing the equities, the Court declines to award prejudgment interest.

In its cross-appeal, Modern argues that the trial court erred in determining that its claim was for unliquidated damages. It contends that the amount that LDC was ordered to pay for breaching its contract with Modern was fixed, able to be computed, readily ascertainable and, thus, liquidated. As such, Modern further contends that it was entitled to an award of prejudgment interest as a matter of right.[5]

Where an award of damages is for a liquidated amount, then prejudgment interest is required. *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 141 (Ky. 1991). A "liquidated amount" is one that can be determined by simple calculation, can be determined with reasonable certainty, can be determined pursuant to fixed rules of evidence or can be determined by well-established market values. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 450 (Ky. 2005).

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[5] Modern acknowledges that the decision to award prejudgment interest on a claim for unliquidated damages falls within the trial court's sound discretion and is subject to equitable considerations. *Nucor Corp.*, 812 S.W.2d at 141. But, Modern does not argue that equity entitled it to an award of prejudgment interest in the event that its claim was for an unliquidated amount of damages.

> "Liquidated damages" are damages the amount of which has been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof. Liquidated damages are the sum which a party to a contract agrees to pay if he or she fails to perform and which, having been arrived at by good-faith effort to estimate actual damages that will probably ensue from breach, is recoverable as agreed-upon damages should breach occur. They are also defined as damages the amount of which has been ascertained by judgment or by the specific agreement of the parties or which are susceptible of being made certain by mathematical calculation from known factors. The term applies when a specific sum of money has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by either party for a breach of the contract by the other. The sum must be stipulated and agreed upon by the parties at the time they enter their contract, and such clauses are permissible where they are neither unconscionable nor contrary to public policy.
>
> By contrast, "unliquidated damages" are damages that have been established by a verdict or award but cannot be determined by a fixed formula so they are left to the discretion of the judge or jury. In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict.

22 Am. Jur. 2D *Damages* § 489 (2007) (citations omitted). According to the Supreme Court of Kentucky, to determine whether damages are liquidated or unliquidated, the trial court "must look at the nature of the underlying claim, not the final award." *3D Enterprises Contracting Corp.*, 172 S.W.3d at 450. Here, because of its summary disposition of this matter, we have no insight to the lower court's reasoning regarding this issue and have no way of reviewing whether or not

the lower court correctly exercised its discretion because it made no findings of facts or conclusions of law to review. Therefore, we vacate that part of the trial court's order regarding prejudgment interest and remand for it to reconsider the issue and to enter findings of fact and conclusions of law on this issue.

IV. CONCLUSION

We REVERSE the trial court's decision to grant summary judgment in favor of Modern on LDC's claim for mistaken overpayment and REMAND this matter for further findings and proceedings not inconsistent with this opinion.

As to Modern's cross-appeal, the trial court's order denying Modern prejudgment interest is VACATED IN PART and REMANDED with instructions set forth *supra*.

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