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IN THE COURT OF APPEALS OF INDIANA

Bernard Lash,
Appellant/Cross-Appellee-Defendant,

v.

Fred Kreigh, d/b/a Urnest Construction, LLC,
Appellee/Cross-Appellant-Plaintiff.

January 18, 2023
Court of Appeals Case No. 22A-CC-1069
Appeal from the Noble Superior Court
The Honorable Steven T. Clouse, Judge
Trial Court Cause No. 57D01-2009-CC-206

Foley, Judge.

[1] Fred Kreigh ("Kreigh") partially constructed a home for Bernard Lash ("Lash") in 2019 and 2020. The parties did not sign a contract relating to the work. Kreigh subsequently brought suit, seeking damages pursuant to the theory of *quantum meruit*, after Lash refused to pay his bill. Lash raises a lone issue: whether the trial court's calculation of damages was clearly erroneous. Kreigh

cross-appeals, contending that the trial court erred when it denied his request for pre-judgment interest. Finding no error, we affirm the judgment of the trial court.

Facts and Procedural History

[2] Lash, Kreigh, and two other contractors met, and Kreigh relayed that he would build the shell of the home[1] for $60,000.00. Lash wrote a check for the amount and gave it to Kreigh prior to the commencement of the construction. Towards completion of the shell, Lash approached Kreigh and asked if he was interested in working on completing the interior of the home as well. Kreigh agreed and continued the construction, periodically incorporating a variety of changes in the original plans at Lash's request. The changes required additional time and materials. No contract was signed, and the record suggests that the parties did not discuss precisely how Kreigh would bill Lash for the work and materials.

[3] Kreigh provided Lash with an invoice and itemized list of charges for the construction. At that point, Lash owed $160,990.56, less the $60,000.00 payment, which Kreigh treated as a deposit. The figure included time of labor as well as materials Kreigh had paid for.[2] Lash was displeased with the amount, which had not been quoted to him up until that point. He refused to

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[1] "That means from the outside it looks done. Okay, from the inside there's nothing. For short, you walk in you see the studs. But from the outside it's got siding[,] a roof, windows." Tr. Vol. II p. 11.

[2] Kreigh eventually subjected the building materials to a twenty-percent markup, but that markup is not reflected in the April 12, 2020, invoice.

pay the bill and Kreigh filed suit on September 4, 2020. The trial court appointed a mediator. Though Lash did not complain during the construction, he produced a list of alleged construction deficiencies after Kreigh filed suit.

[4] After mediation was unsuccessful, the trial court held a bench trial on December 16, 2021. Kreigh testified, as did a fellow builder, that his hourly rate was typical of the field, and so was a twenty percent markup of the materials cost. Lash called an expert witness who performed a valuation of the home resulting from Kreigh's work. The valuation relied in part on a computer algorithm, though the expert witness appears to have been uncertain as to how the algorithm calculated the value of the home.

[5] On February 14, 2022, the trial court entered findings of fact and conclusions of law in favor of Kreigh. The trial court concluded that Kreigh was entitled to recover pursuant to the doctrine of *quantum meruit*, but that the amount of recovery would be offset by some of the deficiencies in the work that Lash presented. The trial court concluded:

18. The preponderance of the evidence is with the Plaintiff and against the Defendant. Plaintiff shall receive judgment against Defendant in the amount of $73,5090.29, which compilation is as follows:

ITEM/ DESCRIPTION	AMOUNT
Labor Costs for Plaintiff/ Plaintiff Employees	$44,373.00
Materials/ Subcontractors	$89,836.29
Payment made by Defendant	($60,000.00)
Offsets for deficiencies	($700.00)
TOTAL JUDGMENT AMOUNT	**$73,509.29**

[6] The trial court also denied Kreigh's request for prejudgment interest on the grounds that the amount of such interest would not have been easily calculable, as is required by our case law. Kreigh then filed a motion to correct error on February 22, 2022. The trial court found an error in its calculations and entered a corrected judgment, finding that the evidence submitted supported the conclusion that Kreigh's charges represented the fair market value of the work performed for Lash. Lash was ordered to pay $91,476.66 as well as post-judgment interest. This appeal ensued.

Discussion and Decision

[7] We first note that Lash sought findings of fact and conclusions of law from the trial court in accordance with Trial Rule 52(A). "We therefore apply the following two-tiered standard of review: we first determine whether the evidence supports the findings of fact and then determine whether the findings of fact support the judgment." *Hamilton v. Hamilton*, 103 N.E.3d 690, 694 (Ind. Ct. App. 2018) (citing *Troyer v. Troyer*, 987 N.E.2d 1130, 1134 (Ind. Ct. App. 2013), *trans. denied*). "We will set aside findings if they are clearly erroneous, which occurs only when the record contains no facts to support them either directly or by inference." *Id.* (citing *Campbell v. Campbell*, 993 N.E.2d 205, 209 (Ind. Ct. App. 2013), *trans. denied*).

I. Damages

[8] Lash asserts the trial court committed reversible error by calculating damages based upon the reasonable value of Kreigh's labor and costs of materials rather

than the difference between the fair market value of the real estate prior to and after the completion of the improvements constructed by Kreigh. "To prevail on a claim of *quantum meruit*, also referred to as unjust enrichment, the plaintiff must establish that a measurable benefit has been conferred upon the defendant under such circumstances that the defendant's retention of the benefit would be unjust." *King v. Terry*, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004) (citing *Inlow v. Inlow*, 797 N.E.2d 810, 816 (Ind. Ct. App. 2003)).

[9] We note that Indiana caselaw often uses the terms "quantum meruit" and "unjust enrichment" interchangeably. *See, e.g., Reed v. Reid*, 980 N.E.2d 277, 298 (Ind. 2012); *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991). The two are discretely different, however, and the distinctions between them are instructive with respect to the question of the appropriate measure of damages. "The measure of recovery for services furnished or goods received depends on whether the claim is for unjust enrichment *or* quantum meruit." 66 Am. Jur. 2d Restitution and Implied Contracts § 35 (emphasis added). "Quantum meruit, for instance, is a claim or right of action for the reasonable value of services rendered, or as otherwise stated, the reasonable value of work and material provided by a contractor is the issue in a quantum meruit case . . . ." *Id*. "[W]hereas in an unjust-enrichment case, the inquiry focuses on the benefit realized and retained by the defendant as a result of the improvement provided by a contractor." *Id*. For purposes of this appeal, however, we need not resolve the myriad of conflicts that arise from treating the two terms interchangeably.

[10] We do note that a careful reading of Indiana case law suggests that we have correctly recognized that claims for unjust enrichment sound in the law of restitution, rather than the law of contract. *See, e.g., Zoeller v. E. Chicago Second Century, Inc.*, 904 N.E.2d 213, 220 (Ind. 2009) ("'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" (quoting RESTATEMENT OF RESTITUTION § 1 (1937))); *see also* § 68:5 Restitution independent of liability on contract—Unjust enrichment, 26 Williston on Contracts § 68:5 (4th ed.) ("The Restatement Third, Restitution and Unjust Enrichment provides that a person who is unjustly enriched at the expense of another is subject to liability in restitution.").

[11] It is less clear to us whether *quantum meruit* should be rightly located in the law of restitution as opposed to that of contract. We note that the Restatement of Restitution makes only a single mention of *quantum meruit*. "Although speaking of quantum meruit in a restitutionary action, the Restatement identifies quantum meruit with contract implied in fact elements, saying that quantum meruit 'is the usual measurement of enrichment in cases where the benefits conferred were requested by the recipient, absent a valid agreement as to price.'" Candace Saari Kovacic-Fleischer, Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment, 27 REV. LITIG. 127, 135–36 (2007) (quoting Restatement (Third) of Restitution and Unjust Enrichment pt. 3, ch. 7, topic 1, introductory note (Tentative Draft No. 5, 2007); § 49 cmt. f). Indeed, in this case, we find an action in *quantum meruit* based upon a contract implied in fact. Such a finding casts serious doubt on

pronouncements such as "a contract precludes application of quantum meruit because (1) a contract provides a remedy at law and (2)—as a remnant of chancery procedure—a plaintiff may not pursue an equitable remedy when there is a remedy at law." *King*, 805 N.E.2d at 400 (citing *Bayh*, 573 N.E.2d at 408). We believe this statement should more accurately refer to *express* contracts. *See, e.g.*, *Troutwine Ests. Dev. Co., LLC v. Comsub Design & Eng'g, Inc.*, 854 N.E.2d 890, 897 (Ind. Ct. App. 2006).

[12] Lash does not dispute that this action is governed by the doctrine of *quantum meruit*. We decline to adopt his theory as to the measurement of damages. *Quantum meruit* requires that the measure of damages be viewed from the supplier's end. We conclude that the trial court did not commit clear error by calculating damages based upon value of Kreigh's services. The trial court reviewed evidence of the number of hours expended by Kreigh and his associates and heard testimony that the hourly rate was normal—or at the very least, not exorbitant—in the industry. The trial court also reviewed documentation of the materials costs accrued by Kreigh and heard testimony that a twenty percent markup of those costs—billed to the hiring party—is not uncommon in the industry. Accordingly, the trial court's valuation of the amount owed by Lash was not clear error.

II. Pre-Judgment Interest

[13] Our analysis is not concluded, however. On cross-appeal, Kreigh contends that the trial court erred in denying his request for pre-judgment interest. As we

have noted *supra*, this court has, on occasion, used the term *quantum meruit* interchangeably with "constructive contract" or "quasi-contract,". *See, e.g., Ahuja v. Lynco Ltd. Med. Rsch.*, 675 N.E.2d 704, 708 n.2 (Ind. Ct. App. 1996) (citing *City of Indianapolis v. Twin Lakes*, 568 N.E.2d 1073, 1078 (Ind. Ct. App. 1991), *reh'g. denied, trans. denied.*). For purposes of determining whether an award of pre-judgment interest is appropriate in the case at bar, the use of these terms interchangeably makes a material difference.

[14] "Quasi contracts, also known as contracts implied in law, are not contracts in the true sense."[3] *Wenning v. Calhoun*, 827 N.E.2d 627, 630 (Ind. Ct. App. 2005) (citing *Savoree v. Indus. Contracting & Erecting, Inc.*, 789 N.E.2d 1013, 1017–18 (Ind. Ct. App. 2003); *Indianapolis Raceway Park, Inc., v. Curtiss,* 179 Ind. App. 557, 559, 386 N.E.2d 724, 726 (1979)). Rather,

> [t]hey rest on a legal fiction imposed by law without regard to assent of the parties. They arise from reason, law, and natural equity, and are clothed with the semblance of contract for the purpose of a remedy. No action can lie in quasi contract unless one party is wrongfully enriched at the expense of another.

Id. (quoting *Roberts v. ALCOA, Inc.*, 811 N.E.2d 466, 475 (Ind. Ct. App. 2004)).

[15]

> One source of confusion is that quantum meruit is a cause of action in two fields: restitution and contract. Another is that in those two fields, quantum meruit has many synonyms. When

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[3] Quasi-contracts are also referred to as "constructive contracts" and we have case law anointing the practice of using both terms interchangeably with *quantum meruit*. *See,e.g., Zoeller,* 904 N.E.2d at 220-21.

> quantum meruit is an action in restitution, it can also be referred to as a "contract implied in law" or a "quasi-contract." When it is an action in contract, it can be referred to as a "contract implied in fact."

Kovacic-Fleischer, 27 REV. LITIG. at 129.

[16] The reason that this distinction matters is that a contract implied in fact *is* a contract, whereas a quasi-contract is not. Our case law regarding pre-judgment interest finds its home within the boundaries of contract law. Thus, the absence of a contract suggests that pre-judgment interest is inappropriate, whereas a contract implied in fact may justify such an award.

> The existence of a contract is established by evidence of an offer, acceptance, consideration, and a manifestation of mutual assent. *Ind. Dep't. of Corr. v. Swanson Servs. Corp.*, 820 N.E.2d 733, 737 (Ind. Ct. App. 2005), *trans. denied*. "To bring a contract into existence, an offer must be extended and the offeree must accept it, the communication of acceptance being crucial. Thus, a meeting of the minds between the contracting parties is essential to the formation of a contract." *Id*. This meeting of the minds must extend to all essential elements or terms for a contract to be binding. *Id*. Likewise, "[f]or an oral contract to exist, parties have to agree to all terms of the contract." *Kelly*, 825 N.E.2d at 857. "If a party cannot demonstrate agreement on one essential term of the contract, then there is no mutual assent and no contract is formed." *Id*.

Troutwine, 854 N.E.2d at 897. Here, based on the actions of the parties and their testimony regarding their communications, it is clear that services were requested, offered, and accepted. It is clear that Kreigh expected to be

compensated for those services (and the materials), and that Lash reasonably expected to provide the compensation. The fact that an exact price was not agreed upon is of no moment when the question is one of formation of contract.[4] We find that, given that the parties had a contract, an award of prejudgment interest may be appropriate.

[17] "'An award of pre-judgment interest in a breach of contract action is warranted if the amount of the claim rests upon a simple calculation and the terms of the contract make such a claim ascertainable.'" *Town of New Ross v. Ferretti*, 815 N.E.2d 162, 169–70 (Ind. Ct. App. 2004) (quoting *Olcott Int'l & Co. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063, 1078 (Ind. Ct. App. 2003), *trans. denied*). "The test for determining whether an award of pre-judgment interest is appropriate is whether the damages are complete and may be ascertained as of a particular time." *Id*. "The award is considered proper when the trier of fact does not have to exercise its judgment to assess the amount of damages." *Id*. (citing *Noble Roman's, Inc. v. Ward*, 760 N.E.2d 1132, 1140 (Ind. Ct. App. 2002)). "Importantly for purposes of our review, an award of pre-judgment interest is generally not considered a matter of discretion." *Id*. (citing *Olcott*, 793 N.E.2d at 1078; *Ward*, 760 N.E.2d at 1140).

[18] Here, we agree with the trial court. The amount of Kreigh's claim upon Lash's breach is not ascertainable from the parties' contract. The lack of any express

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[4] Indeed, it is precisely this lack of specificity which the doctrine of *quantum meruit* is intended to remedy.

term with respect to how Lash would be billed is exactly why the action was brought in *quantum meruit*. The eventual calculation may have been simple, but it required discretion on the part of the trial court to determine which factors should comprise the calculation. The trial court also exercised judgment when it decided to incorporate some of Lash's list of construction deficiencies as an offset. That certainly is not something that the parties clearly contemplated at the formation of the contract. This was a fashioned remedy, not of the rote type that pre-judgment interest tends to accompany. The trial court did not err in denying Kreigh's request for pre-judgment interest.

[19] Affirmed.

Robb, J., and Mathias, J., concur.