Nickerson Co. v. Energy West Mining Co.

Court of Appeals of Utah

December 10, 2009, Filed

Case No. 20090221-CA

Reporter
2009 Utah App. LEXIS 384 *; 2009 UT App 366

Nickerson Company, Plaintiff and Appellant, v. Energy West Mining Co.; Weyher Construction Co., LLC; Genwal Resources, Inc.; Employers Mutual Casualty Co.; and John Does 4 & 5, Defendants and Appellee.

Notice: NOT FOR OFFICIAL PUBLICATION

Prior History: [*1] Third District, Salt Lake Department, 060900169. The Honorable Anthony B. Quinn.

Counsel: Kyle W. Jones, Salt Lake City, for Appellant.

David C. Wright, Salt Lake City, for Appellee.

Judges: James Z. Davis, Judge. WE CONCUR: Gregory K. Orme, Judge, Carolyn B. McHugh, Judge.

Opinion by: James Z. Davis

Opinion

MEMORANDUM DECISION

DAVIS, Judge:

Nickerson Company (Nickerson) contends that the trial court erred in granting summary judgment in favor of Energy West Mining Co. (Energy West) on its quantum meruit and repossession claims. We affirm.

Summary judgment is appropriate when "'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Shattuck-Owen v. Snowbird Corp., 2000 UT 94, P 9, 16 P.3d 555, 558* (omission in original) (quoting *Utah R. Civ. P. 56(c)*). Review of a trial court's grant of summary judgment presents a question of law, which we review nondeferentially for correctness. *See id.* We review the facts and all reasonable inferences to be drawn therefrom in a light most favorable to the party opposing summary judgment. *See id.*

Based on the undisputed facts, [1] we conclude that the trial court did not err in granting summary judgment in favor of Energy West **[*2]** on Nickerson's quantum meruit claims. "Quantum meruit is comprised of two distinct theories: (1) contract implied in law, also know as quasi-contract [or unjust enrichment] and (2) contract implied in fact." [2] *Promax Dev. Corp. v. Mattson, 943 P.2d 247, 259 (Utah Ct. App. 1997)*. "Both branches . . . are rooted in justice to prevent the defendant's enrichment at the plaintiff's expense." *Davies v. Olson, 746 P.2d 264, 269 (Utah Ct. App. 1987)* (citation and

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[1] On appeal, Nickerson does not argue that there were material facts in dispute that precluded summary judgment. Accordingly, we address only the issue of whether the trial court erred, as a matter of law, in granting summary judgment **[*4]** in favor of Energy West.

[2] To the extent that Nickerson argues that summary judgment was improper under the second branch of quantum meruit--contract implied in fact--that issue is inadequately briefed. Accordingly, we do not address it. *See Utah R. App. P. 24(a)(9)* (setting forth briefing requirements); *Ball v. Public Serv. Comm'n (In re Questar Gas Co.), 2007 UT 79, P 40, 175 P.3d 545* (stating that courts may decline to address issues that are inadequately briefed).

internal quotation marks omitted). The first theory of quantum meruit--unjust enrichment--requires three elements before it may become the basis for recovery. *See* Concrete Prods. Co. v. Salt Lake County, 734 P.2d 910, 911 (Utah 1987).

> "[T]here must be (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value."

Id. (alteration in original) (quoting Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1984)). An action in unjust enrichment is not an action to enforce a contract "but rather is a legal action **[*3]** in restitution." Davies, 746 P.2d at 269. Accordingly, because "[t]he [unjust enrichment] doctrine is designed to provide an equitable remedy where one does not exist at law[,] . . . if a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment." American Towers Owners Ass'n v. CCI Mech., Inc., 930 P.2d 1182, 1193 (Utah 1996); *see also* id. at 1192 (affirming district court's determination that the plaintiff, who was a stranger to the contracts between the defendants, had no claim for unjust enrichment against the defendants because "the subject matter of the claim was preempted by the existence of express contracts [between the general contractor and the subcontractors]"); Mann v. American W. Life Ins. Co., 586 P.2d 461, 465 (Utah 1978) ("Recovery in quasi contract is not available where there is an *express contract covering the subject matter of the litigation*." (emphasis added)).

We conclude that the trial court did not err in granting summary judgment in favor of Energy West on Nickerson's unjust enrichment claim. First, Nickerson's express contract with Weyher Construction Co. (Weyher) covering the subject matter of the litigation, i.e., the cost and installation of the pumps, barred any claim for recovery against Energy West on a theory of unjust enrichment because unjust enrichment is "used only when no express contract is present." TruGreen Cos., LLC v. Mower Bros., 2008 UT 81, P 18, 199 P.3d 929. Second, even if there was no express contract covering the payment of the pumps, Energy West did not receive or retain any benefit for which it did not pay. Rather, Energy West paid Weyher the full **[*5]** contract price for the project, which included payment for the pumps Nickerson supplied. Moreover, "'[t]he mere fact that a third person benefits from a contract between two others does not make such third person liable in . . . unjust enrichment . . . . There must be some misleading act, request for services, or the like, to support such an action.'" Knight v. Post, 748 P.2d 1097, 1101 (Utah Ct. App. 1988) (alteration in original) (emphasis omitted) (quoting Commercial Fixtures & Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977)). Finally, Nickerson's failure to make a timely claim on the payment bond from Employers Mutual Casualty Co. also barred any unjust enrichment claim against Energy West because "one must first exhaust his legal remedies before he may recover on the basis of the equitable doctrine of quantum meruit." Id. at 1099 (emphasis omitted). Accordingly, there is no error in the trial court's grant of summary judgment on this issue.

We also conclude that the trial court did not err in granting summary judgment in favor of Energy West on Nickerson's repossession claim. The trial court determined,

> Pursuant to Utah Code [section] 70A-2-401, *unless otherwise explicitly* ***[*6]*** *agreed*, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods. Title to the pumps passed to Energy West when the pumps were delivered and installed at the Project. Energy West later transferred the Project to [Castle Valley Special Service District (CVSSD)]. As a result, Nickerson does not have title to the pumps and is not entitled to repossession. In addition, Energy West does not possess the pumps.

(Emphasis added.) To the extent that Nickerson contends that the trial court erred in applying Utah Code section 70A-2-401, *see* Utah Code Ann. § 70A-2-401 (Supp. 2009), this issue is inadequately briefed. Indeed, Nickerson's main argument on this point consists of two sentences wherein it states, "The court on its own initiative raised the issue as to whether or not [Utah Code section 70A-2-401] applied in this matter. This was not addressed or briefed by either party." In any event, the "express contract," which Nickerson claims "states that title does not pass [to Weyher] until the pumps are paid for in full," is actually a Nickerson invoice, which was not included as evidence in any of Nickerson's **[*7]** summary judgment papers and was thus not considered by the trial court when making its ruling. We therefore cannot say that the trial court erred in concluding that where there was no express agreement otherwise, title passed to Energy West at the time the pumps were delivered. Finally, Energy West had neither possession nor control of the pumps after August 2005, at which time CVSSD accepted the project in its entirety, including the pumps. [3] The trial court was therefore correct in

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[3] Nickerson knew by at least July 2006--almost a year before it amended its complaint to add Energy West--that CVSSD owned the project, including the pumps. Indeed, in a response to a request for information, CVSSD sent Nickerson's counsel a letter dated July 14, 2006, informing counsel that CVSSD had "become the eventual owner and operator of the [project]" and that "[a]fter the project was

concluding that Nickerson was not entitled to repossession of the pumps.

Affirmed.

James Z. Davis, Judge

WE CONCUR:

Gregory K. Orme, Judge

Carolyn B. McHugh, Judge

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completed[, CVSSD] accepted the project, including the pumps supplied by Nickerson." Despite this information, Nickerson never added CVSSD to the action.