

IN THE COURT OF APPEALS OF IOWA

No. 1-711 / 11-0254
Filed November 9, 2011

WELTE INSURANCE, INC.,
Plaintiff,

vs.

BIG RED LIGHTING AND ELECTRICAL,
INC., A Nebraska Corporations, et. al.,
Defendants.

**MICHAEL FREEMAN and AMY
FREEMAN,**
Third-Party Claimants-Appellants,

vs.

**BLAINE PRESLEY and CONNIE
PRESLEY d/b/a ADVANCED WALLS,
OMAHA PLUMBING, INC., A Nebraska
Corporation,**
Third-Party Defendants-Appellees

and JERRY STRANDBERG
d/b/a STRANDBERG HOMES,
Third-Party Defendants.

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel (order on third-party defendant's motion for summary judgment) and Richard H. Davidson (order disbursing funds), Judges.

Michael and Amy Freeman appeal the district court's dismissal of their third-party petition against Advanced Walls and Omaha Plumbing and appeal the district court's order disbursing funds to Lumbermen's Brick and Supply Co.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Thomas J. Anderson of Anderson Law Firm, Omaha, Nebraska, for Michael and Amy Freeman, Third-Party Claimants-Appellants.

William E. Rooney, III, of Pansing, Hogan, Ernst & Bachman, L.L.P., Omaha, Nebraska, for Advanced Walls and Omaha Plumbing Inc., Third-Party Defendants-Appellees.

Thomas Lauritsen, of Andersen, Lauritsen, & Brower, Omaha, Nebraska, for Lumbermen's Brick and Supply Co., Defendant-Appellee.

Heard by Sackett, C.J., and Vogel and Eisenhauer, JJ.

SACKETT, C.J.

Michael and Amy Freeman appeal the district court's dismissal of their third-party petition against Advanced Walls and Omaha Plumbing on Advanced Walls and Omaha Plumbing's motion for summary judgment. The Freemans claim there is a disputed material fact regarding the reasonableness of Advanced Walls's and Omaha Plumbing's manner of billing. In addition, the Freemans claim the district court erred in disbursing funds in the interpleader action to Lumbermen's Brick and Supply Co., where Lumbermen's did not file a mechanic's lien and the total amount of the contract price was exhausted by a prior claim of Millard Lumber. We affirm the district court's dismissal of the Freemans' third-party petition against Advanced Walls and Omaha Plumbing, but reverse the district court's award of \$2997.75 to Lumbermen's and remand the case for the entry of an order awarding these funds to the Freemans.

I. BACKGROUND AND PROCEEDINGS. This case arises out of the construction of the Freemans' house located on Coldwater Avenue, in Honey Creek, Iowa. On August 31, 2008, the Freemans hired Strandberg Homes as their general contractor and agreed on a price of \$244,670 to construct the home. Strandberg in turn contracted with subcontractors, including Advanced Walls, Omaha Plumbing, and Lumbermen's, to provide materials and labor to build the home. The Freemans did not have any direct contractual relationship with the subcontractors. Strandberg had similar subcontracts with Advanced Walls and Omaha Plumbing for another project he was working on in Elkhorn, Nebraska (the Caldwell project).

The Freemans had a construction loan through Washington County Bank, and authorized the bank to release funds on their behalf at the request of Strandberg. In October 2008, Strandberg presented an invoice to the bank in the amount of \$18,473.74 dated August 28, 2008, from Advanced Walls, claiming the invoice was for work done on the Freemans' home. The invoice was in fact for work done on the Caldwell project. On October 21, 2008, the bank issued a check to Advanced Walls in the amount of 18,473.79,¹ who applied the payment to the Caldwell invoice.

On October 6, 2008, Advanced Walls sent an invoice in the amount of \$13,636.19 to Strandberg for work done on the Freemans' house. This amount was paid on December 16, 2008, and applied to the Freeman invoice, but it was not paid out of the Freemans' construction loan with the bank.

Omaha Plumbing sent Strandberg an invoice in October of 2008 for \$10,962.00 for work done on the Caldwell project. In December of 2008, this invoice was presented to and paid by the bank on behalf of the Freemans. Omaha Plumbing applied this payment to the Caldwell invoice.

Omaha Plumbing sent Strandberg an invoice in February of 2009 for \$6732.00 for work done on the Freemans' home. This amount was paid by the bank and applied to the Freeman invoice. Omaha Plumbing sent another invoice to Strandberg dated May 19, 2009, in the amount of \$4743.00, which has not been paid.

¹ There was a five cent discrepancy between the invoice amount and the check amount.

In January or February of 2009, the Freemans became aware Strandberg was not paying the subcontractors who were working on the house, and about the same time, Strandberg stopped working and disappeared. The Freemans also learned some lien waivers had been forged by Strandberg. As a result, the Freemans took over paying the subcontractors to complete their house. Lumbermen's provided materials and labor for the installation of the Freemans' fire place. It was paid for the materials provided, but not for the labor. Lumbermen's did not file a mechanic's lien.

When the house was substantially completed, Welte Insurance, a licensed title and escrow company, prepared to perform the closing services in order to pay off the home construction loan and put permanent financing in place. On June 15, 2009, the Freemans demanded Welte Insurance not disburse the remaining funds as the funds were in dispute between the Freemans and several subcontractors. Welte Insurance filed an interpleader action on June 23, 2009, seeking permission to deposit the remaining \$42,855.46 with the clerk of court, so that the court could resolve the dispute between the Freemans and the subcontractors. The court granted the interpleader and dismissed Welte Insurance from the action.

As a result of their investigation into the payments made by the bank at the request of Strandberg, the Freemans filed a third-party claim against Advanced Walls and Omaha Plumbing, asserting they had been overpaid as a result of overbilling or switching invoices by Strandberg. The Freemans claim Advanced Walls was overpaid \$4837.55, and Omaha Plumbing was overpaid

\$5874.00. They asked the court to require these subcontractors to remit the overpayments into the pool of funds deposited with the court. Advanced Walls and Omaha Plumbing denied they had been overpaid for the work they performed, and Omaha Plumbing alleged it had not yet been paid \$4743.00 for labor and materials used in the construction of the Freemans' home.

On May 3, 2010, the Freemans filed a motion for partial summary judgment against Advanced Walls and Omaha Plumbing asserting both subcontractors were overpaid "based on upon Jerry Strandberg switching the invoice for a larger one on a different property." The Freemans claimed there were no material facts in dispute and Advanced Walls and Omaha Plumbing should not be allowed to keep the overpayments.

Advanced Walls and Omaha Plumbing resisted the motion and the court issued its decision on August 24, 2010, denying the Freemans' motion. The court ruled that even if it assumed there was no factual dispute in the record, the Freemans' motion must fail as they failed to satisfy all of the elements of unjust enrichment. Specifically, the court found the Freemans failed to address the equity in requiring Advanced Walls and Omaha Plumbing to compensate them for Strandberg's fraud. The court found all three parties, the Freemans, Advanced Walls, and Omaha Plumbing, were innocent victims of Strandberg's actions and the Freemans should pursue their remedy against Strandberg.

Following the court's rejection of the Freemans' motion for summary judgment, Advanced Walls and Omaha Plumbing moved for summary judgment. The Freemans resisted, but the court granted the motions on November 1, 2010,

again finding the Freemans had not satisfied the elements of unjust enrichment as they had provided no evidence to show that it was equitable to require Advanced Walls and Omaha Plumbing to compensate them for Strandberg's fraud. The court acknowledged that the Freemans alleged Advanced Walls and Omaha Plumbing were not acting innocently or inadvertently, but found the Freemans offered no evidence to support their claim. The court stated the undisputed facts show Advanced Walls and Omaha Plumbing accepted in good faith the payments made with no knowledge of Strandberg's improper actions. While the Freemans allege otherwise, the court found there was no competent evidence to support the allegation and granted summary judgment in favor of Advanced Walls and Omaha Plumbing.

The interpleader action proceeded to final hearing with only the Freemans, Millard Lumber, Inc., and Lumbermen's Brick and Supply Co. appearing. The district court found the Freemans liable for the mechanic's lien filed by Millard Lumber, Inc. and ordered Millard Lumber receive \$14,400 of the interpleaded funds. This finding is not appealed. The court also awarded Lumbermen's \$2997.75 of the funds finding the Freemans equitably estopped from claiming priority to the funds over Lumbermen's despite the fact Lumbermen's failed to file a mechanic's lien and the original contract amount was exhausted by Millard Lumber's claim. The district court found the Freemans were on notice in early 2009 that their general contractor had failed to pay subcontractors, forged lien waivers, and otherwise abandoned the project. The court concluded the Freemans, with the assistance of others, decided which creditors should be paid,

and then on the eve of closing, demanded the agent hold the checks to the other creditors that were to receive payment at closing. Applying equitable principles to the case, the district court concluded Lumbermen's claim must prevail.

The Freemans appeal the district court's order to distribute \$2997.75 to Lumbermen's. Lumbermen's has waived its right to file an appellee brief in this case. The Freemans also appeal the district court's decision granting summary judgment in favor of Advanced Walls and Omaha Plumbing.

II. SCOPE OF REVIEW. This interpleader action was heard in equity, and as a result, our scope of review of the Freemans' claim against Lumbermen's is de novo. Iowa R. Civ. P. 1.251; Iowa R. App. P. 6.907. However, we review the district court's grant of summary judgment for correction of errors at law even though the nature of the action is equitable. *Koenigs v. Mitchell Cnty. Bd. of Supervisors*, 659 N.W.2d 589, 592 (Iowa 2003). We determine, "after reviewing the entire record, whether a genuine issue of material fact exists and whether the trial court correctly applied the law." *Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296, 297 (Iowa 1994). An issue is genuine if a "reasonable jury could return a verdict for the nonmoving party." *Fin. Mktg. Servs., Inc. v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 450, 455 (Iowa 1999).

III. ADVANCED WALLS AND OMAHA PLUMBING. The Freemans assert there are factual disputes that preclude summary judgment in this case. Specifically, they contend Advanced Walls and Omaha Plumbing did not act reasonably when they took money from the Freemans and misapplied it to other

properties. The Freemans contend both companies had notice and a fair warning that the amounts paid did not correspond to the property to which it was applied. They allege there is a question of fact regarding the companies' motive and knowledge behind the application of funds that resulted in the companies' monetary benefit.

The claim of unjust enrichment is based on the principle that "a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001). Unjust enrichment is an equitable claim that serves as a basis for restitution. *Id.* In order to recover under unjust enrichment, a plaintiff must prove "(1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances."² *Id.* at 154–55. The benefit need not be conferred directly by the plaintiff, as the benefits can be direct or indirect, and can come from third parties. *Id.* at 155. "The critical inquiry is that the benefit received be at the expense of the plaintiff." *Id.*

² The district court identified a fourth element to prove a claim of unjust enrichment, relying on our case of *Iowa Waste Systems, Inc. v. Buchanan County*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000). This fourth element was "there is no at-law remedy that can appropriately address the claim." The Iowa Supreme Court in *Palmer*, 637 N.W.2d at 155 n.2, clarified the elements of unjust enrichment when it said,

[t]he adequacy of a legal remedy is a general limitation on the exercise of equity jurisdiction and is properly considered when restitution is sought in equity, but no independent principle exists that restricts restitution to cases where alternative remedies are inadequate.

Thus, while we consider the adequacy of an at-law remedy, we find the district court incorrectly identified it as an independent element of unjust enrichment.

The district court found the Freemans provided no evidence, beyond mere conjecture or speculation, showing it was equitable to require Advanced Walls and Omaha Plumbing to compensate the Freemans for Strandberg's fraud. It found the undisputed facts indicated Advanced Walls and Omaha Plumbing accepted the payments in good faith with no knowledge Strandberg was acting improperly. We agree.

The invoices issued by Advanced Walls and Omaha Plumbing correctly identify the property where the work was completed. The invoices were sent to Strandberg who then submitted them to the bank for payment. The bank paid the invoices as requested by Strandberg. In the check to Advanced Walls, the bank identified the check was made on behalf of "Michael/Amy Freeman Construction" along with an invoice number that corresponded to the invoice Advanced Walls sent to Strandberg on the Caldwell project. There was no evidence Advanced Walls was aware the Freemans were not the owners of the Caldwell project. Advanced Walls had a contract with Strandberg, not with the Freemans. There was simply no evidence from which we could find Advanced Walls knew the check they received should not be applied to the Caldwell project. While the Freemans were identified on the check, there was no evidence that Advanced Walls knew who the owners of the Caldwell project were when they received the check from the bank.

With respect to Omaha Plumbing, Strandberg again submitted invoices to the bank claiming they were for the Freemans' home. The bank paid these invoices at the request of Strandberg. The Freemans have presented no

evidence to prove Omaha Plumbing knew the Freemans were not owners involved in the Caldwell project at the time they applied the Freemans' check to the Caldwell project.

Advanced Walls and Omaha Plumbing also assert on appeal, even if we were to find the Freemans conferred a benefit on them, they are entitled to keep the benefit under the "discharge for value" defense. This defense was recently adopted by our court in *National Bank v. FCC Equipment Financing, Inc.*, 801 N.W.2d 17, 19 (Iowa Ct. App. 2011). The "discharge for value" defense provides,

A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

Nat'l Bank, 801 N.W.2d at 19 (quoting Restatement (First) of Restitution § 14(1), at 55 (1937)). Based on this defense, Advanced Walls and Omaha Plumbing assert they are under no obligation to return the alleged overpayments they received from the Freemans as the money was received in good faith and they had no notice of the mistake made. The justification for this rule is that a creditor receiving money in satisfaction of a debt has not been unjustly enriched, even when that money was paid by mistake. *Id.* at 21. Both Advanced Walls and Omaha Plumbing assert they were paid for the work they performed, no more. In fact Omaha Plumbing asserts it was underpaid for the services it provided as the Freemans refused to pay its final invoice.

We agree with the district court that the Freemans failed to provide any evidence showing that it is equitable to require Advanced Walls and Omaha

Plumbing to compensate the Freemans for Strandberg's fraud. There was no evidence to support the Freemans' allegation that Advanced Walls and Omaha Plumbing acted improperly in billing Strandberg or applying the money received to the projects performed for Strandberg. It is the Freemans' obligation in resisting the motion for summary judgment to "come forward with specific facts constituting competent evidence in support of the claim advanced." *Winkel v. Erpelding*, 526 N.W.2d 316, 318 (Iowa 1995). They cannot rest on mere allegations or denials, but must demonstrate by affidavits or discovery answers that there is a genuine issue for trial. Iowa R. Civ. P. 1.981(5). If the Freemans needed more time to complete discovery in order to demonstrate to the court there was a factual issue, rule 1.981(6) allows the court to order a continuance to permit a party to obtain the needed information before the summary judgment motion is decided. The Freemans never requested a continuance from the court to further develop the record. Instead they filed their resistance, which was inadequate to demonstrate a factual issue.

The undisputed evidence shows Advanced Walls and Omaha Plumbing received money in satisfaction of a debt and have not been unjustly enriched despite the fact that the Freemans paid for work that was completed on another project. Therefore, summary judgment was proper. The Freemans' remedy for these overpayments lies in an action against Strandberg, not against Advanced Walls and Omaha Plumbing.

IV. LUMBERMEN'S BRICK AND SUPPLY CO. Next, the Freemans assert the district court erred in ordering \$2997.75 of the interpleaded funds to be

paid to Lumbermen's. The Freemans contend the total contract price for the construction of their home was exhausted after the mechanic's lien filed by Millard Lumber was paid. The Freemans assert Lumbermen's filed no mechanic's lien, and therefore, they are not entitled to any of the funds remaining.

Lumbermen's has waived its right to file an appellee brief, which leaves us with several options available. *Bosch v. Garcia*, 286 N.W.2d 26, 27 (Iowa 1979). When the appellee fails to file a brief, we "handle the matter in a manner most consonant with justice and [our] own convenience." *Bowen v. Kaplan*, 237 N.W.2d 799, 801 (Iowa 1976). In this case, we will not search the record for a theory to uphold the decision of the district court, but will "confine [ourselves] to the objections raised by the appellant." *Id.* In addition, we will not go beyond the ruling of the trial court in searching for a theory upon which to affirm its decision. *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209 (Iowa 1982).

The district court found Lumbermen's was entitled to recover a share of the funds based on "equitable principles" and found the Freemans were "equitable estopped from claiming priority over Lumbermen's." It is unclear what "equitable principles" the district court was relying on, or how the Freemans were "equitable estopped" from claiming priority. Based on our review de novo review of the record, we find the district court erred in disbursing \$2997.75 to Lumbermen's.

It was undisputed that Lumbermen's failed to file a mechanic's lien in this case. It did file an answer and cross-petition in the interpleader action alleging

the Freemans paid Welte Insurance the \$2997.75 Lumbermen's was owed under its contract with Strandberg on or around July of 2009, and that Welte Insurance and the Freemans represented to Lumbermen's it would be paid at closing. However, at trial Lumbermen's offer no evidence of this promise. Neither the Freemans nor the representative from Welte Insurance had any recollection of speaking with anyone from Lumbermen's, and Lumbermen's offered no evidence of its own.

Iowa Code section 572.14(2) (2009)³ was enacted to "avoid hardship when the principal contractor goes bankrupt or becomes defunct." *Henning v. Sec. Bank*, 564 N.W.2d 398, 402 (Iowa 1997). When this occurs, a mechanic's lien provides a subcontractor with an alternative source of payment when it supplied material or labor to a construction project. *Id.* "Without a mechanic's lien, a subcontractor has only the general contractor to look to for payment." *Id.* This is because the subcontractor has no contract with the homeowner, and thus, no remedy against them. *Id.* In order to prove a right to the funds, Lumbermen's had to show that they filed a mechanic's lien, or they had a contract directly with the Freemans. They did neither.

³ Iowa Code section 572.14(2) provides,

In the case of an owner-occupied dwelling, a mechanic's lien perfected under this chapter is enforceable only to the extent of the balance due the principal contractor by the owner-occupant prior to the owner-occupant being served with the notice specified in subsection 3. This notice may be served by delivering it to the owner or the owner's spouse personally, or by mailing it to the owner by certified mail with restricted delivery and return receipt to the person mailing the notice, or by personal service as provided in the rules of civil procedure.

In addition, Lumbermen's is not entitled to the funds under a restitution or unjust enrichment claim. *Id.* at 403. Both these causes of action are contracts implied in law. *Id.* "The law will not imply a contract where there is an express contract." *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d 702, 712 (Iowa 1985). An express and implied contract cannot coexist with respect to the same subject matter, because the express contract supersedes the implied. *Id.* Lumbermen's had an express contract with Strandberg for the labor and materials it furnished on the Freemans' house. Unless it filed a mechanic's lien, Lumbermen's sole remedy to recover for the services it provided was to make a claim against Strandberg under that contract. Our court has adopted the Restatement (First) of Restitution, section 110, which provides, "A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person." See *Guldborg v. Greenfield*, 259 Iowa 873, 885, 146 N.W.2d 298, 305 (Iowa 1966). Thus, Lumbermen's is not entitled to recover from the Freemans simply because Strandberg failed to pay Lumbermen's for its services pursuant to the subcontract.

We see no "equitable principle" to justify the district court's award to Lumbermen's, nor do we see how the Freemans were "equitable estopped" from claiming priority over Lumbermen's. Just because the Freemans paid some subcontractors after it discovered Strandberg abandoned the job, does not mean it has to pay all subcontractors who made a claim. We reverse the district court's

order awarding Lumbermen's \$2997.75 of the interpleaded funds and remand for the entry of an order awarding these funds to the Freemans.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Eisenhauer, J., concurs; Vogel, J., dissents in part.

VOGEL, J. (concurring in part and dissent in part)

I respectfully dissent in part. The Freemans offered as part of their initial request for partial summary judgment numerous invoices and bank checks, which satisfy the Freeman's obligation to "set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). While the district court overruled that motion, the Freemans' evidence remained part of the record when Advanced Walls and Omaha Plumbing, Inc. later moved for summary judgment. All the Freemans request is that they have a trial on the issue of whether a portion of their funds was erroneously paid to Advance Walls and Omaha Plumbing, Inc. With material facts in dispute, I would find summary judgment inappropriate under this record, and remand for trial of the issues.

I concur with the majority's conclusion returning the Lumberman's award to the Freemans.