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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2013 Session

BROWNS INSTALLATION, LLC v. WATERMARK SOLID SURFACE, INC.

Appeal from the Chancery Court for Davidson County
No. 09-2249-III Ellen H. Lyle, Chancellor

No. M2012-02264-COA-R3-CV - Filed October 21, 2013

Subcontractor B hired subcontractor A to install bathrooms in fulfillment of subcontractor B's contracts with general contractors. After it was terminated by subcontractor B, subcontractor A sued to recover payments owed for work subcontractor A completed before termination. Subcontractor B filed a counterclaim for damages and violation of the Tennessee Consumer Protection Act. The trial court dismissed subcontractor B's counterclaim and found that subcontractor A was entitled to quantum meruit recovery. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., and RICHARD H. DINKINS, JJ., joined.

G. Kline Preston, Nashville, Tennessee, for the appellant, Watermark Solid Surface, Inc.

Michael P. Dolan, Nashville, Tennessee, for the appellee, Browns Installation, LLC.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Watermark Solid Surface, Inc. ("Watermark"), is in the business of bidding on contracts for the construction of hospital bathrooms. Watermark does not install

the bathroom fixtures[1] but, upon award of a bid, procures, pays for, and furnishes the materials to a subcontractor such as Browns Installation, LLC ("Browns"), which then provides the installation services. The parties' relationship began when Steve Brown, who was working for a Hendersonville countertop shop, met Watermark's owner, Steve Elmore ("Mr. Elmore"), in early 2008. Upon Mr. Elmore's suggestion, Steve Brown and his brother, Larry, formed Browns in April 2008 and began installing bathrooms and fixtures to fulfill the hospital bathroom construction contracts that Watermark was awarded. Browns progressed to handling multiple installation projects at hospitals nationwide for Watermark.

Browns and Watermark operated under an oral agreement and developed a course of dealing in which Mr. Elmore would send Steve Brown blueprints from hospital contracts that Watermark was bidding on. Steve and Larry Brown would then calculate the estimated cost of performing the installation work, taking into account factors such as time, the number and type of showers and other fixtures to be installed, the number of workers required, the hospital's location, and related travel and lodging costs. For larger projects, Browns offered Watermark a percentage discount. Browns provided its estimate for any project to Mr. Elmore, who would then factor Browns's estimate into Watermark's bid on a given hospital bathroom installation project. If awarded the project, Watermark would purchase all materials and have them delivered for Browns to install. Browns supplied the labor and tools and purchased insurance to cover its workers. Watermark was not present at the installation sites, but Browns and its crew were.

Browns progressively billed Watermark, so each week it furnished Watermark with an invoice detailing the work completed. At the time, Browns also updated Watermark as to the progress of its projects through daily conversations and e-mails. At first, Watermark weekly paid Browns's invoices but, by early 2009, Watermark requested and Browns agreed to bi-monthly payments.

Watermark downsized in early 2009. It closed its Nashville office and the employees worked from their homes. Instead of reporting to Mr. Elmore, Browns reported to Tim O'Neil, Watermark's vice president, who was directly responsible for overseeing the work Browns performed at each hospital. Heather Brown, Browns's secretary and office manager, began sending the invoices for payment to her Watermark counterpart, Lynn Serio.

On March 3, 2009, Watermark presented Browns with a document entitled "Watermark Installation Contract," the proposed terms of which covered Browns's installation of Watermark's materials at Spotsylvania Regional Medical Center. Browns

[1] These fixtures include shower assemblies, sinks, toiletry shelving, shower stalls, shower rods, and grab bars and are commonly referred to as solid surface shower system materials.

made notations and changes to the proposed contract and returned it unsigned to Watermark. Neither party followed up.

Around mid-2009, Watermark's payments to Browns became untimely and the parties' relationship crumbled. Through its attorney, Browns sent Mr. Elmore a demand letter dated September 4, 2009 seeking Watermark's full payment of allegedly past due invoices and written assurances that Browns would "receive future progress payments as of the 15th and 30th of each month consistent with past practices." Non-compliance, warned Browns, would be cause for complaint to the project's general contractor and initiation of formal proceedings against Watermark. By its response sent the same day, Watermark terminated Browns and demanded that Browns vacate all the job sites at which it had been performing installation work for Watermark. As a result, two of the projects that Browns was working on were left incomplete, but Watermark ultimately had someone else complete them.

On November 25, 2009, Browns filed a complaint against Watermark seeking $78,207.05 and prejudgment interest[2] for breach of contract or, alternatively, quantum meruit. Browns alleged that it competently performed the installation work, that Watermark fell behind in its payments, and that when Browns demanded payment, Watermark wrongfully terminated the relationship and left unpaid invoices that Browns tendered for completed installation work at six hospitals.[3] On March 17, 2010, Watermark answered and counterclaimed for breach of contract and violation of the Tennessee Consumer Protection Act ("TCPA"), alleging that Browns's work was subpar and that Watermark incurred damages in fixing Browns's mistakes and poor performance. Ultimately, Browns went forward with its quantum meruit theory.

After a three-day bench trial beginning May 21, 2012, and by memorandum and order entered June 20, 2012, the trial court awarded Browns $74,400 on its quantum meruit claim.[4] However, upon finding that there existed "no enforceable contract, oral or otherwise, between the parties," the trial court dismissed Browns's breach of contract claim and also dismissed Watermark's breach of contract and TCPA counterclaims. The trial court denied Watermark's motion to alter or amend by order entered September 10, 2012.

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[2] *See* Tenn. Code Ann. § 47-14-123.

[3] Browns claimed that Watermark failed to fully pay for projects performed at Spotsylvania Regional Medical Center, Portsmouth Regional Hospital, North Austin Medical Center, Vanderbilt University Medical Center, Methodist Stone Oak Hospital, and Methodist Children's Hospital.

[4] We will discuss the testimony and the trial court's findings of fact and conclusions of law as relevant to the issues on appeal.

Watermark timely perfected this appeal.

ISSUES PRESENTED

Watermark raises the following issues for our review: (1) Whether the trial court erred in awarding Browns installation damages under the theory of quantum meruit; (2)Whether the trial court erred in failing to apply Watermark's unclean hands defense; (3) Whether the trial court erred in failing to credit Watermark for expenses incurred and payments made; and (4) Whether the trial court erred in dismissing Watermark's Tennessee Consumer Protection Act claim.

STANDARD OF REVIEW

Our review of the trial court's findings of fact is de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999). We also "give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007).

ANALYSIS

I. Quantum Meruit

We find that Browns proved its claim for unjust enrichment based on the doctrine of quantum meruit for which the trial court awarded Browns $74,400 against Watermark.

"Quantum meruit actions are equitable substitutes for contract claims." *Castelli v. Lien*, 910 S.W.2d 420, 427 (Tenn. Ct. App. 1995). Under a quantum meruit theory, a party may recover the reasonable value of goods and services provided to another if it demonstrates that:

> (1) There is no existing, enforceable contract between the parties covering the same subject matter;[5]

[5] The trial court found that no contract, written or oral, existed between Browns and Watermark. '"[A]n enforceable contract must result from a meeting of the minds in mutual assent to terms, must be based (continued...)

(2) The party seeking recovery proves that it provided valuable goods or services;
(3) The party to be charged received the goods or services;
(4) The circumstances indicate that the parties to the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and
(5) The circumstances demonstrate that it would be unjust for a party to retain the goods or services without payment.

Doe v. HCA Health Serv. of Tenn., Inc, 46 S.W.3d 191, 197-98 (Tenn. 2001) (citing *Swafford v. Harris*, 967 S.W.2d 319, 324 (Tenn. 1998)).

The trial court found that Browns proved the five essential quantum meruit elements by a preponderance of the evidence, but Watermark argues that Browns failed to prove the second of these elements, the value of its services. Courts will not award quantum meruit recoveries without some proof of the reasonable value of the goods or services, but the required proof may be an estimation of the value of the goods and services. *Id*. at 198 (citing *Castelli*, 910 S.W.2d at 427). The reasonable value of services should be "judged by the customs and practices prevailing in that kind of business." *Chisholm v. W. Reserves Oil Co.*, 655 F.2d 94, 96 (6th Cir. 1981). Also, a party who seeks quantum meruit damages "can explain the method used to arrive at a base fee and markup." *Nations Rent of Tenn., Inc. v. Lange*, Nos. M2001-02368-COA-R3-CV, M2001-02360-COA-R3-CV, M2001-02366-COA-R3-CV, 2002 WL 31467882, at *2 (Tenn. Ct. App. Nov. 6, 2002).

At trial, Browns introduced invoices detailing the amounts that Watermark had not paid for its services performed at the six hospital projects at issue. Steve and Larry Brown each explained how Browns arrived at its invoiced fees and the parties' custom and practice for the hospital projects. Larry Brown testified that it was custom for Browns to create an estimate, for Watermark to approve that estimate, and for Browns to "invoice off the estimate and get paid." For example, regarding Browns's work at two of the larger installation projects at Spotsylvania Regional Medical Center and Portsmouth Regional Hospital and the related invoicing, Larry Brown testified:

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[5](...continued)
upon sufficient consideration, must be free from fraud or undue influence, not against public policy and must be sufficiently definite to be enforced."' *Jones v. Lemoyne-Owen Coll.*, 308 S.W.3d 894, 904 (Tenn. Ct. App. 2009) (quoting *Klosterman Dev. Corp. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 635 (Tenn. Ct. App. 2002)). The evidence does not preponderate against the trial court's finding that there was no meeting of the minds on essential contract terms, and the parties do not dispute this on appeal.

Q. Now, on the Spotsylvania and Portsm[ou]th project, did you work with Steven on putting together invoices on those projects?

A. Yes, sir.

Q. Tell us how you put together those invoices. How did you determine what work was--

A. I would call Steve at the end of the week in between billing cycles and ask him, you know, walk through the hospital, do a number count, you know, what work has been completed, what have we installed. And then he would verbally communicate that back with me. I would call [the foreman] Robert up and say walk through the hospital, what work has been completed. He verbally communicate[d] it to me.

Browns also provided the court a detailed explanation of each invoice and the "progressive billing" system that Browns used. Heather Brown explained one such invoice from the Spotsylvania project that she created at Larry Brown's direction (trial exhibit #4):

Q. Can you tell on this bill, the total at the bottom is $53,605.71. Can you tell us what that is?

A. That's the remaining amount of money left on the job not paid.

Q. So work that hadn't been completed or billed for then.

A. Right.

Q. So if I look at this bill, what is it that Browns is invoicing Watermark for on this particular invoice?

A. Progressive draw for [installation of] the six 60-inch wall kits. Progressive draw for [installation of] six seamed-in back walls for the 60-inch wall kits, and the total for this invoice is $3,135.

Q. Okay. So can you, do you know what the $18,000, the negative $18,645 is that's on here?

A. That was what we previously billed for on 8/15.

. . .

Q. So did Browns Installation receive that $18,645?

A. No.

Q. Did they receive the $3,135?

A. No, sir.

. . .

Q. But you did send this bill to Watermark?

A. Yes.

Steve Brown explained trial exhibit #5, an invoice[6] for $4,600 that Browns sent Watermark for the service of fixing 184 defective parts that were required for the Spotsylvania project:

Q. Okay. But you do recall what [exhibit #5] was for, it was for the corners–

A. It was the, as it mentions on there, the outside corners of the shower, it's one inch by an inch, you know, outside corner trim that completely cleans up the corner. Well, it's supposed to have three sanded finished corners, you know, and it didn't.

. . .

That's what we did, we took and set up a little station on the job site, and I had one of my guys stand there and just sand corner trim.

Q. Did you get approval from Watermark to do that?

A. Yes.

Q. And did you talk with Watermark about the fact that you were going to charge them an additional $4,600 for that?

A. Yes.

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[6] This document is entitled "Estimate," but Steve Brown stated that it was later invoiced. Additionally, the document states: "Please note that once work is completed this estimate will be invoiced and payment is due."

The trial court's findings as to the reasonable value of Browns's services include the following:

> 10. Work performed by Browns; Value to Watermark– The Court accredits the testimony of Steve Brown, [the foreman] Robert Whisman and Larry Brown that Browns' work on the six projects was competent and complete. The Court accredits the testimony of these witnesses that in connection with the September 4, 2009 termination, Browns inventoried and stored materials on site prior to demobilizing. This inured to the benefit of Watermark when it resumed work on the site. The Court further accredits the testimony of Larry Brown and finds that the value of [Browns's] work and its recovery in this case are as follows:
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> -Spotsylvania $50,830 (Trial Exhibits 3-6)
> -Portsmouth $14,975 (Trial Exhibits 11-13)
> -Vanderbilt $5,900 (Trial Exhibits 19, 23-24)
> -Stone Oak $225 (Trial Exhibit 21)
> -North Austin, Texas $775 (Trial Exhibit 22)
> -Children's Methodist Hospital $1,695 (Trial Exhibits 20 and 26)
>
> TOTAL: $74,400

The trial court also noted that Watermark's own witness, Tim O'Neil, bolstered Larry Brown's testimony about the work and value that Browns provided Watermark as well as some of the amounts billed. For instance, Tim O'Neil testified that it appeared Watermark owed the $18,645 that Browns billed as part of the Spotsylvania project. Watermark never produced a canceled check evidencing that the $18,645 was paid.

Lastly, Watermark attempts to argue on appeal that the "charges" Browns presented at trial through its invoices are distinct from the "value" of Browns's services. We reject this contention. Steve Brown, who served as the lead installer and manager of all projects, testified that, based on his perception and knowledge of the particular work performed, that the amounts Browns sought to be paid by Watermark represented reasonable values for that work. Furthermore, the record shows that when Browns submitted its invoices to Watermark, Watermark accepted them to the extent that it would then submit its own invoice to the projects' general contractors. At trial, the parties stipulated that the general contractors fully paid Watermark, including the amounts for change orders, for $1,266,630.35 on the six disputed hospital projects. Thus, Watermark's own actions imply that Browns billed Watermark for the appropriate and reasonable value of its services.

The evidence in the record sufficiently proves the reasonable value of Browns's services. Having received its payments in full, it would be unjust for Watermark to retain the benefits of Browns's work without making payment to Browns. For these reasons, we affirm the trial court's award of $74,400 to Browns.

II. Unclean Hands Defense

Watermark argues that the doctrine of unclean hands bars Browns's recovery in quantum meruit because Browns failed to send written daily reports to Watermark and because Browns submitted "inaccurate and deceptive invoices."[7]

The doctrine of unclean hands is a tenet of courts of equity based on the principles that "he who seeks equity must do equity and that he who has done inequity cannot have equity." *In re Estate of Boote*, 265 S.W.3d 402, 417 (Tenn. Ct. App. 2007) (citing *Tuck v. Payne*, 17 S.W.2d 8, 9 (Tenn. 1929)). The doctrine "enables a court to prevent a party from profiting from her own misconduct." *Emmit v. Emmit*, 174 S.W.3d 248, 253 (Tenn. Ct. App. 2005) (citing *McCallie v. McCallie*, 719 S.W.2d 150, 154 (Tenn. Ct. App. 1986)). "Decisions regarding the proper application of the doctrine of unclean hands are heavily fact-dependent and are addressed to the considerable discretion of the trial court." *In re Estate of Boote*, 265 S.W.3d at 418.

In his testimony, Steve Brown explained that, in March 2009, Tim O'Neil requested that Browns send daily reports from the project sites "to keep him more in the loop as to what was going on on [a] daily basis, even though we spoke pretty much every single day." Browns complied with Mr. O'Neil's request to the best of its ability, but time constraints and the lack of a method to send e-mail on site made it difficult for Browns to always send daily reports. Steve Brown recounted that one of Browns's workers filled out reports daily for the Portsmouth project, that the only way to submit them to Watermark was via fax, but that Mr. O'Neil was unable to provide a fax number.

More importantly, the trial court found and the evidence clearly shows that the parties' course of dealing never made submission of daily reports to Watermark a condition of payment. We have studied the record and conclude that the evidence does not preponderate against the trial court's finding that Browns's failure to always provide written daily reports does not constitute a defense to Watermark's payment for the services Browns provided. The trial court did not err in dismissing Watermark's unclean hands defense.

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[7] To bolster its arguments that the trial court erred in dismissing its unclean hands defense and TCPA counterclaim, Watermark cites problems with the invoices Browns submitted. We reject both arguments for reasons set forth in section IV below.

III. Watermark's Counterclaim for Damages

Watermark assigns as error the trial court's dismissal of its counterclaim for damages based on Browns's allegedly defective workmanship. The trial court found that Watermark did not carry its burden of demonstrating by a preponderance of the evidence that Browns performed faulty work. We agree that the evidence Watermark presented does not substantiate its claim. Watermark failed to produce any e-mail or letter contemporaneous to Browns's performance on the six disputed projects, and offered no third-party testimony, such as that of a project's general contractor or the subcontractor hired after it terminated Browns, to establish incompetent or deficient work. Steve Brown defended the quality of Browns's work:

> Q. Okay. And as we sit here today, is it still your testimony that Browns received no complaints about the quality of the workmanship performed on any of these jobs from Watermark or any of the general contractors?
>
> A. No.
>
> Q. Browns never received one complaint?
>
> A. We never had any–on the six projects we're talking about here in this lawsuit?
>
> Q. Yes, sir.
>
> A. No. No, we never had any issues with our GCs or anybody. We were always liked and got along well.
>
> Q. And you did the work in a quality way?
>
> A. In a quality way. All the projects had minimal, very minimal punch lists.[8] No major tear-outs because of our work. Nothing.

On cross-examination, Tim O'Neil confirmed that, prior to Browns's termination, Watermark did not receive any notices or charge-backs from the general contractors for work Browns performed on the six installation projects. Mr. Elmore's testimony revealed that he

[8] Larry Brown explained that "[a] punch list is items that the general contractor, the architect, the owner, inspecting parties would find on items that we installed that needed to be corrected . . . ." A punch list is basically a "fix-it list."

lacked direct or personal knowledge of faulty work by Browns and confirmed that Watermark never received any complaints about Browns's work on the six projects. Even after Watermark stopped paying, Browns continued to provide its installation services. The trial court noted that, "[a]lso detracting from Watermark's claim of faulty work is that it was only after Watermark terminated Browns and the relationship deteriorated that Watermark claim[ed] quality problems."

Watermark did incur some expenses after it fired Browns when 35% of the work on the Spotsylvania project and 5% of the work on the Portsmouth project remained, but it was paid in full, as the parties stipulated. We hold that the trial court did not err in dismissing Watermark's counterclaim for damages against Browns.

IV. Watermark's Tennessee Consumer Protection Act Claim

Lastly, Watermark insists that Browns's actions, particularly its invoicing methods, amount to a violation of Tenn. Code Ann. § 47-18-104(a), part of the TCPA, which states that "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices and are Class B misdemeanors."

> In order to recover under the TCPA, the plaintiff must prove: (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an "ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated . . . ." [Tenn. Code Ann. § 47-18-109(a)(1).]

Tucker v. Sierra Builders, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005) (quoting Tenn. Code Ann. § 47-18-109(a)(1)). Whether a particular representation qualifies as "unfair" or "deceptive" is a question of fact. *Id.* at 116.

Based on our careful review of the record, we agree with the trial court's finding that the invoice template Browns used and delivered to Watermark was confusing, but not unfair, misleading, or deceptive. Heather Brown, who prepared these invoices based on daily reports from Steve and Larry Brown, explained them in detail. The trial court found that Lynn Serio's testimony "established that Watermark came to understand the unusual captions on the invoices and the accounting events these captions represented," though it was time-consuming.

Browns's confusing billing practices do not support Watermark's unclean hands defense or its TCPA claim. More importantly, because Watermark completed and was fully

paid for the installation work for which Browns was never paid, it did not prove that Browns's conduct caused an "ascertainable loss" as Tenn. Code Ann. § 47-18-109(a)(1) requires. We, therefore, affirm the trial court's decision to dismiss Watermark's TCPA claim.

CONCLUSION

We affirm the trial court's order in its entirety. Applying our discretion, we decline Browns's request for its attorney fees on appeal. Costs of appeal are assessed against Watermark Solid Surface, Inc., and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE