NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0584

JAMES A. MARCHAND, JR.

VERSUS

THOMAS W. MULL, LORRAINE S. MULL, AND MULL & MULL LAW FIRM

Judgment Rendered: OCT 14 2008

* * * * * * * * * *

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2001-14290, Division "G"

Honorable Larry J. Green, Judge Presiding

* * * * * * * * * *

Laurie M. Pennison
Covington, LA

and

David J. L'Hoste
New Orleans, LA

Counsel for Plaintiff/Appellant #1
James A. Marchand, Jr.

Bruce S. Kingsdorf
New Orleans, LA

Counsel for Defendants/Appellants #2
Thomas W. Mull, Lorraine S. Mull,
and Mull & Mull Law Firm

* * * * * * * * *

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This matter comes before us on cross appeals of a judgment of the 22nd Judicial District Court, signed on September 4, 2007. The judgment awarded plaintiff/appellant #1, James Marchand, Jr., the amount of $45,000.00, plus interest, on a quantum meruit basis, but denied his claims that an oral contract existed between the parties or that the parties undertook a joint venture. For the following reasons, we affirm the judgment of the trial court.

FACTS

Plaintiff/Appellant #1, attorney James A. Marchand, Jr., was once employed by defendants/appellants #2, Thomas Mull, Lorraine Mull, and the Mull & Mull Law Firm (Mull & Mull). During the course of his three and a half year employment with Mull & Mull, he assisted in the handling of both state and federal hemophiliac/AIDS cases as well as other cases. In 2001, after Mr. Marchand had left the employ of Mull & Mull, the firm received settlements for the AIDS cases. On September 14, 2001, Mr. Marchand filed a petition seeking a portion of those fees alleging that he was entitled to same under an oral employment contract. Alternatively, Mr. Marchand alleged that he was entitled to a portion of the fees pursuant to a theory of joint venture or quantum meruit.

After a three-day trial in the 22nd Judicial District Court, a judgment was signed on September 4, 2007, denying Mr. Marchand's claims under oral contract, joint venture, or unjust enrichment theories. That judgment, however, also held in favor of Mr. Marchand on the basis of quantum meruit in the amount of $45,000.00. Both parties appealed.

ASSIGNMENTS OF ERROR

Mr. Marchand assigns as error the trial court's finding that there was no oral contract or joint venture between the parties and that he failed to show

unjust enrichment. Mull & Mull assign as error the trial court's finding that Mr. Marchand should recover under quantum meruit and that Mr. Marchand's claims had not prescribed. Both parties dispute the trial court's calculation of damages in the amount of $45,000.00.

A. Prescription

Mull & Mull contend that Mr. Marchand's claims had prescribed at the time he filed his petition. While we note that if evidence had been introduced at the hearing on this matter our standard of review would be the manifest error-clearly wrong standard, no evidence was introduced. We therefore must simply review the trial court's legal conclusion to determine whether it is legally correct. **Cangelosi v. Allstate Insurance Co.**, 96-0159 (La. App. 1 Cir. 9/27/96), 680 So.2d 1358, 1360.

The party pleading the objection raising the exception of prescription bears the burden of proof. Only if prescription is evident on the face of the pleadings does the burden shift to the plaintiff to show suspension, interruption, or renunciation. **SS v. State ex rel. Dept. of Social Services**, 2002-0831 (La. 12/4/02), 831 So.2d 926, 931 (*citing* **Lima v. Schmidt**, 595 So.2d 624, 628 (La. 1992)). "In the absence of evidence, the objection of prescription must be decided upon the properly pleaded material allegations of fact alleged in the petition, and those alleged facts are accepted as true." **Onstott v. Certified Capital Corporation**, 05-2548 (La. App. 1 Cir. 11/3/06), 950 So.2d 744, 747, **Thomas v. State Employees Group Benefits Program**, 05-0392 (La. App. 1 Cir. 3/24/06), 934 So.2d 753, 758. Moreover, in reviewing an objection of prescription, "appellate courts strictly construe the statutes against prescription and in favor of the claim that is said to be extinguished." **Onstott**, 950 So.2d at 747.

Mr. Marchand filed a "Petition for Damages Resulting From Breach of Contract" on September 14, 2001 against Thomas Mull, Lorraine Mull, and the Mull & Mull Law Firm. In that petition, he alleged that he and the Mulls had entered into a contract wherein he agreed, among other things, to participate in the AIDS litigation on behalf of the Mull & Mull firm in exchange for an interest in the fees it would generate. Mr. Marchand further alleged that:

X.

> In August of 1995, Thomas and Lorraine Mull told Marchand that they desired to alter the agreement between the parties described above. More particularly, defendants unilaterally informed Marchand that the original business relationship between the parties would terminate as of 1 September 1995, and that the agreement pertaining to Marchand's percentage of attorney's fees would not be honored by defendants, all of which constituted a breach of contract by defendants.

Alternatively, Mr. Marchand alleged that a joint venture existed between the parties or that he was entitled to attorney's fees under a quantum meruit theory.

More than one cause of action can be alleged in the same petition, and these causes may be inconsistent or mutually exclusive. LSA-C.C.P. art. 892. Mr. Marchand clearly seeks relief under contractual or, alternatively, quasi-contractual theories of law. Under LSA-C.C. art. 3499, Mr. Marchand's claims are therefore subject to a liberative prescription of ten years. The alleged breach of contract occurred in September of 1995 and Mr. Marchand's petition was filed in September of 2001, six years later. We find the legal conclusion of the trial court to be correct. This assignment of error lacks merit.

B. Joint Venture

Mr. Marchand argues that the trial court erred in finding that no joint venture existed between the parties. Although what constitutes a joint venture is a question of law, the existence or nonexistence of a joint venture is a question of fact. **Grand Isle Campsites, Inc. v. Cheek**, 262 La. 5, 262 So.2d 350, 357 (La. 1972).

A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The supreme court has announced a two-part test for the reversal of a factfinder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). See also **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Thus, the issue to be resolved by a reviewing court is not whether the trier-of-fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Stobart v. State, Department of Transportation and Development**, 617 So.2d at 882. Where factual findings are based on determinations regarding the credibility of witnesses, the trier-of-fact's findings demand great deference. **Boudreaux v. Jeff**, 2003-1932, (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 671; **Secret Cove, L.L.C. v. Thomas**, 2002-2498, (La. App. 1 Cir. 11/7/03), 862 So.2d 1010, 1016, writ denied, 2004-0447 (La. 4/2/04), 869 So.2d 889. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of

fact should not be disturbed upon review where conflict exists in the testimony. **Rosell v. ESCO**, 549 So.2d at 844.

"The jurisprudence has established that the essential elements of a joint venture are generally the same as those of a partnership, i.e., two or more parties combining their property, labor, skill, etc. in the conduct of a venture for joint profit, with each having some right of control." **Cajun Electric Power Cooperative, Inc. v. McNamara**, 452 So.2d 212, 215 (La. App. 1 Cir. 1984), writ denied, 458 So.2d 123 (La. 1984). Further, the same requisites that are applicable to a partnership are applicable to a joint venture and have been established as follows:

1. A contract between two or more persons;
2. A juridical entity or person is established;
3. Contribution by all parties of either efforts or resources;
4. The contribution must be in determinate proportions;
5. There must be joint effort;
6. There must be mutual risk vis-à-vis losses;
7. There must be a sharing of profits.

Cajun Electric Power Cooperative, Inc. v. McNamara, 452 So.2d at 215.

In the trial court's reasons for judgment, it clearly states that its finding was based upon the failure of Mr. Marchand to bear any cost or risk associated with the venture, as required. The trial court states "[a]t the end of the day even though those days might be long and occasionally at far distance from home, he [Mr. Marchand] picked up his check with no worry of the wolf at the door." We cannot say that the trial court was manifestly erroneous or clearly wrong in reaching this conclusion. This assignment of error lacks merit.

C. The Oral Contract, Quantum Meruit, and Unjust Enrichment

Mr. Marchand's main claim against Mull & Mull is its alleged breach of an oral contract. Specifically, Mr. Marchand alleges that he was to be paid a monthly salary of $3,000.00, as well as various percentages of attorney's fees earned on the cases he handled. In the event that the case was generated by

him, he was entitled to 50% of the fee. But in the event that the case was generated by Mull & Mull, either before or during his employ, he was to be given a varying percentage of the fee on a "sliding scale basis" and commensurate with the amount of work he performed. Although generally the fee amount for Mull & Mull cases was determined at the conclusion of the case, he alleged that once the AIDS cases began to demand more and more of his time, he spoke with Mr. Mull and they agreed on specific amounts for those cases. Specifically, Mr. Marchand alleged that he would receive 10% of the state case fees and 15% of the federal case fees.

Mull & Mull do not dispute that there was an employment agreement between it and Mr. Marchand wherein he was to be paid a monthly salary of $3,000.00 plus 50% of the fee from cases that he generated. Mull & Mull dispute, however, that the agreement included any specific amount owed to Mr. Marchand for his work on Mull & Mull cases, including the AIDS litigation. And although disbursement sheets were introduced showing that Mr. Marchand was paid various percentages of the fee from Mull & Mull cases, Mr. Mull contends that those payments were merely gratuitous. However, when questioned regarding Mr. Marchand's claims that he and Mr. Mull spoke specifically about the AIDS cases, Mr. Mull testified as follows:

> Q. Isn't it true, sir, that during the course of this, you had conversations, discussions with Mr. Marchand, about what he would realize on these AIDS cases, how much he would get on these AIDS cases?
>
> A. Well, we had discussions at his initiative. He wanted to know how much he would be paid if the AIDS cases ever settled. So we did have discussions about what he would be paid as a bonus if the AIDS cases settled. Yes. And we all, I believe it is consistent in this deposition, we agreed on the factors that would determine that. If he were here to get a bonus, what factors would determine how much bonus he would get.

In order to establish an oral contract, LSA-C.C. art. 1846[1] requires that Mr. Marchand prove the contract with one witness and other corroborating circumstances. Ultimately, the trial court concluded that Mr. Marchand did not sufficiently corroborate his claims that an oral contract existed between he and Mull & Mull. However, based on the record before us, we find that in the least Mr. Marchand did establish an implied contract that he was to be paid an amount for the AIDS cases, but no agreement as to the amount was reached.

Although some confusion surrounds it, the doctrine of quantum meruit is utilized by the Louisiana courts in two circumstances: when a contract is implied from the circumstances, but no agreement as to price is reached, and when the plaintiff has conferred a benefit on the defendant in pursuance of a contract supposedly valid but in truth void. Comments, *Quantum Meruit in Louisiana*, 50 Tul.L.Rev. 631, 647 (1976); Nicholas, *Unjustified Enrichment in Civil Law and Louisiana Law*, 37 Tul.L.Rev. 49, 57 (1962). In the former, when a contract is implied from the circumstances but no agreement as to compensation has been reached, the missing term is supplied by the court, and the measure of damages is simply the reasonable value of claimant's services. **Dumas and Associates, Inc. v. Lewis Enterprises Inc.**, 29900 (La. App. 2 Cir. 12/22/97), 704 So.2d 433, 438. The latter instance, on the other hand, is a common law concept based on our doctrine of unjust enrichment. **Baker v. Maclay Properties Co.**, 94-1529 (La. 1/17/95), 648 So.2d 888, 896-897, **Morphy, Makofsky & Masson, Inc. v. Canal Place 2000**, 538 So.2d 569, 574-575 (La. 1989). Because we find that an implied contract existed between

---

[1] LSA-C.C. art. 1846 Contract not in excess of five hundred dollars

When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess of five hundred dollars may be proved by competent evidence.

If the price or value is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances.

the parties, quantum meruit as the term is used in civilian law, and not the common law quantum meruit concept which is equivalent to Louisiana's doctrine of unjust enrichment, applies to determine the compensation due Mr. Marchand. Accordingly, we find no error in the trial court's denial of Mr. Marchand's unjust enrichment claim and therefore pretermit that discussion. Moreover, we find no error in the trial court's finding that no oral contract was sufficiently established pursuant to LSA-C.C. art. 1846. These assignments of error lack merit.

D. Calculation of Damages

Both parties allege as error the trial court's calculation of damages. Under contractual quantum meruit, the measure of damages is the reasonable value of the services rendered. **Morphy, Makofsky & Masson, Inc. v. Canal Place 2000**, 538 So.2d at 574-75. In its reasons for judgment, the trial court noted that it was not provided with sufficient evidence of the fees that the Mull & Mull actually ultimately received from the AIDS cases.[2] The court, therefore, fashioned an award based upon the amount of the fee recovered by two other attorneys who also worked on the AIDS cases for Mull & Mull.

Peggy Vallejo testified that she originally began working for Mull & Mull as a legal secretary in 1984. Between 1984 and 1995 she acquired her paralegal certification and worked for the firm in that capacity. In 1996 she began law school at Tulane and returned to work for the firm intermittently until 2001. Ms. Vallejo testified that she received a "bonus" of $41,000.00 for her work on the AIDS cases.

Fran Phares testified that sometime around 1996 Mr. Mull approached her and asked if she would help work on the AIDS cases for compensation at a

[2] We note that Mull & Mull refused to disclose the amount of the net attorney's fees recovered when questioned, however we find that since the measure of damages is the reasonable value of the services rendered, it is immaterial what the ultimate recovery was.

rate of $200.00 per hour. She worked on this hourly basis from early 1996 until August when she and Mr. Mull entered into a written agreement wherein she would receive $36,000.00 per year, plus 5% of the net attorney's fees received by Mull & Mull. Although she denied knowing how much she actually ultimately earned, Ms. Phares admitted that she received in excess of $75,000.00 for her work on the cases.

Using as a guide the compensation amounts of Ms. Phares, who worked on the AIDS cases in the capacity of an attorney for Mull & Mull for approximately 6 years, and Ms. Vallejo, who worked on the AIDS cases for Mull & Mull in several capacities for approximately 16 years (but only a couple of those years as an attorney), the trial judge, in his written reasons, awarded Mr. Marchand $45,000.00 for his work over three and a half years. The court noted that Mr. Marchand provided the testimony of two other attorneys, Stewart Niles and James Irwin, who both stated that they were impressed with Mr. Marchand's performance in his representation of the AIDS clients. We cannot say that the amount awarded by the court is not a reasonable value of the services he rendered. The trial court did not abuse its discretion in making the award. This assignment of error lacks merit.

CONCLUSION

We find no error in the judgment of the trial court. Each party is to bear its own costs in this appeal.

AFFIRMED.