

STATE OF MICHIGAN
COURT OF APPEALS

COMPLETE AUTO & TRUCK PARTS, INC.,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED

July 3, 2007

No. 268485

Genesee Circuit Court

LC No. 04-080445-CK

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant City of Flint (the City) appeals as of right from a judgment entered on a jury verdict in favor of plaintiff Complete Auto & Truck Parts, Inc. (Complete). We affirm.

The City first argues that the trial court erred in permitting the jury to consider Complete's claim for unjust enrichment when Complete neither alleged nor proved that there was a meeting of the minds as to the towing and storage fees that the City accumulated after the termination of the contract. We disagree.

This Court reviews de novo a trial court's decision to deny a motion for a directed verdict thereby allowing an issue to be submitted to the jury. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). Generally,

[a] directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ. The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed. [*Id.* (citations omitted).]

This Court has previously stated the requirements for a claim of unjust enrichment as follows:

In order to sustain the claim of unjust enrichment, [a] plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. If this is established, the law will imply a contract in order to prevent unjust enrichment. However, a contract will be implied only if there is no express contract covering the same

subject matter. [*Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003) (citations omitted).]

Michigan recognizes two kinds of implied contracts: those implied in fact and those implied in law. *Wrench LLC v Taco Bell Corp*, 256 F3d 446, 456 (CA 6, 2001), citing *Cascaden v Magryta*, 247 Mich 267, 270; 225 NW 511 (1929). Under Michigan law, “[a] contract will be implied only if there is no express contract . . . [and] [t]here cannot be an express and implied contract covering the same subject matter at the same time.” *Burton v William Beaumont Hosp*, 373 F Supp 2d 707, 722 (ED Mich, 2005) (citing *Campbell v City of Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972)).

Contrary to the import of the City’s argument, mutual assent is required only for contracts that are implied in fact. A contract implied in fact arises between parties “when those parties show a mutual intention to contract,” *Kingsley Assoc, Inc v Moll PlastiCrafters, Inc*, 65 F3d 498, 504 (CA 6, 1995), citing *Erickson v Goodell Oil Co*, 384 Mich 207, 211-212; 180 NW2d 798 (1970), and it is “founded upon a meeting of the minds that, although not embodied in an express contract, is inferred, as a fact from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” *Hercules Inc v United States*, 516 US 417, 424; 116 S Ct 981; 134 L Ed 2d 47 (1996). Conversely, a claim of unjust enrichment is based on a contract implied in law, *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003), which does not require mutual assent, “but is imposed by fiction of law” even if no contract is intended. *Wrench LLC, supra* at 456. Therefore, in order to recover under its theory of unjust enrichment, an equitable theory based on a legal fiction, Complete was not required to prove mutual assent. Rather, Complete’s burden was limited to demonstrating only that (1) the City had received a benefit from it that was not founded on an express or implied in fact contract and (2) an inequity resulted to Complete because of the retention of the benefit by the City. *Belle Isle Grill, supra* at 478.

In denying the City’s motion for directed verdict, the trial court correctly reasoned that, while Complete’s breach of contract claim was based on an express contract between the parties, its unjust enrichment claim was founded on services Complete provided to the City after the parties’ express contract had terminated. Complete presented sufficient evidence to allow the jury to conclude that, as a result of those services provided to it by Complete, the City received a benefit not founded on an express or implied in fact contract and that retention of that benefit by the City resulted in an inequity to Complete. Therefore, the trial court did not err in denying the City’s motion for a directed verdict.

The City also argues that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV), for a new trial or for remittitur as to the issue of whether Complete had mitigated its damages because there was no evidence in the record that Complete attempted any such mitigation. We disagree.

This Court reviews de novo the denial of a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 121, 131; 666 NW2d 186 (2003). When reviewing the trial court’s decision on a motion for JNOV, this Court views the evidence and all legitimate inferences drawn from the evidence in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). “Only if the evidence so viewed fails to

establish a claim as a matter of law, should a motion for [JNOV] be granted.” *Id.* This Court reviews for an abuse of discretion a trial court’s denial of motions for a new trial and for remittitur. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 595; 708 NW2d 749 (2005); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000).

In general, the “[m]itigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing.” *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). Our Supreme Court has noted that:

“Where one person has committed a *tort*, breach of contract, or other *legal wrong* against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.” [*Shiffer v Bd of Ed of Gibraltar School Dist*, 393 Mich 190, 197; 224 NW2d 255 (1974), quoting McCormick, Damages, § 33, p 127 (emphasis in original).]

“[W]hile a plaintiff has a duty to mitigate his or her loss, it is the defendant who bears the burden of proving a failure to mitigate.” *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994).

Complete presented evidence at trial that, if believed, established that it attempted to mitigate its damages. Complete’s president testified that he notified representatives of the City that it had vehicles being stored on Complete’s lot after the termination of the contract. Additionally, Complete sent at least two letters to the City inquiring as to whether and when it would compensate Complete for its services, and informing the City that additional charges were being accumulated daily. Finally, there was uncontroverted testimony that, until the City provided to Complete the requisite paperwork, Complete could not mitigate its damages by lawfully disposing of the vehicles on its lot in any manner other than by returning them to the City.

The City correctly states on appeal that it put forward evidence that Complete breached its duty to mitigate its damages by refusing to allow the City to remove the vehicles from storage on its lot until the City paid the outstanding bill. However, there was sufficient evidence in the record to allow the jury to determine whether Complete attempted to mitigate its damages. Therefore, the trial court did not err in denying the City’s motion for JNOV, or abuse its discretion in denying the City remittitur or a new trial.

Next, the City asserts that the trial court erred when it gave a special jury instruction requested by Complete relating to actions for claim and delivery, because that instruction impermissibly shifted the duty to mitigate to the City. We disagree.

Our Supreme Court has stated the applicable standard of review as follows:

We review claims of instructional error *de novo*. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff’s claims and should not omit material issues, defenses, or theories if the evidence supports

them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. [*Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (citations omitted).]

At trial, the court gave the following instruction to the jury over the City's objection: "A party, whose property has been unlawfully taken or unlawfully detained, *can* file an action with a court to recover such property." (Emphasis added.) The instruction was based on MCR 3.105, which provides for a civil cause of action for "claim and delivery" (e.g., replevin) to recover "possession of goods or chattels which have been unlawfully taken or unlawfully detained, and . . . damages sustained by the unlawful taking or unlawful detention." MCR 3.105(A)(1), (2). See also MCL 600.2920 (governing actions to recover possession of goods and chattels).

In order to prevail on its causes of action for breach of contract and unjust enrichment, Complete was under a duty to make a reasonable attempt to mitigate its damages. *Lawrence, supra* at 15. The City, however, had the burden at trial to prove that Complete did not make such an attempt. *Id.* The City proffered evidence that Complete failed to mitigate its damages because Complete "was not going to let the City remove any of the vehicles it had," and that it "held the vehicles hostage that were on . . . [its] lot" in order to continue to accumulate storage fees. Unchallenged, the introduction of evidence to this effect likely would have prohibited Complete from success on its causes of action against the City. However, Complete's position at trial was that "the City . . . had the right to maintain a claim and delivery action to recover the . . . vehicles at Complete" had it chosen to do so, but that the City failed to exercise its legal right to recover the vehicles. Specifically, on cross-examination, Complete's lawyer asked Rick Johnson, a representative of the City, whether he had "any idea why [the City] . . . didn't go pick up those cars, since the contract was going to be terminated." Johnson replied that he had "no knowledge of" the City's reason for leaving the vehicles on Complete's lot. Complete requested that the jury be instructed on the applicable law, which permits an action for replevin to be brought by a person entitled to possession of the property. As a result, the trial court gave an instruction that accurately stated the legal requirements for a civil action under a theory of claim and delivery. Because the jury instruction was supported by the evidence adduced at trial and accurately stated the applicable law, there was no error requiring reversal as to this issue.

The City correctly notes that, during his closing argument, counsel for Complete stated that the City "had an obligation under the law to file a claim and delivery if . . . [it] wanted those cars back." Under the court rule and corresponding statute, no such duty exists. Therefore, Complete's closing argument misstated the applicable law to the jury. Nevertheless, as discussed above, the trial court properly instructed the jury as to the law. Moreover, the trial court instructed the jury that "[a]rguments, statements and remarks of the lawyers" were not evidence. Because jurors are presumed to follow the trial court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the City has failed to establish error requiring reversal based on the closing arguments of Complete's trial counsel.

Finally, the City argues that the trial court erred in denying its motion for a new trial based on the great weight of the evidence. We disagree.

This Court reviews a trial court's denial of a motion for a new trial based on the great weight of the evidence for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. [*Id.* (citations omitted).]

In this case, Complete's first cause of action was for breach of contract. "In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

The parties do not dispute the existence of a valid contract between them. Complete alleged that the City breached that contract by "fail[ing] to pay the balance in full according to the terms of the contract." At trial, evidence was adduced that indicated that the City had terminated the contract and had not paid for the services rendered under it. Therefore, there was significant evidence from which the jury could conclude that the City had breached its contract with Complete.

There was also ample evidence in the record supporting the jury's calculation of Complete's damages due to the breach. At trial, Complete's bookkeeper testified extensively regarding how she calculated the amount due by the City for services performed while the contract was in effect. This testimony was corroborated by Complete's trial exhibits, which included summaries of the amounts due from the City and invoices for the actual work performed. Complete's bookkeeper testified that \$74,539.65 in outstanding charges accrued during the contractual period. This evidence permitted the jury to find that Complete's damages due to the City's breach totaled \$71,252.25, the amount of the jury verdict on that count.

Complete's second count was for unjust enrichment. As previously discussed,

[i]n order to sustain the claim of unjust enrichment, [a] plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. If this is established, the law will imply a contract in order to prevent unjust enrichment. However, a contract will be implied only if there is no express contract covering the same subject matter. [*Belle Isle Grill, supra* at 478 (citations omitted).]

In this case, the essence of the City's argument is that the clear language of the contract could not permit the jury to find that the City had been unjustly enriched by Complete's services, because the contract "very specifically specified how Complete would be paid for" the vehicles that had been towed at the request of the City during the contractual period and that remained on Complete's lot after the termination of the contract.

However, there was significant testimonial evidence presented at trial to allow the jury to find that the provisions of the contract were ambiguous as to whether its terms continued to

apply after the contract was terminated. Generally, “[a] contract is ambiguous if its provisions may reasonably be understood in different ways.” *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). Our Supreme Court has reasoned that if a contract is ambiguous, its meaning presents a factual issue that must be determined by a jury. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003) (“In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, the jury is to consider relevant extrinsic evidence.”).

In this case, the jury was presented with conflicting testimonial evidence as to whether the provisions of the contract continued to govern the storage of vehicles on Complete’s lot that were present as of the date that the contract was terminated. Essentially, the City argues that the jury should have accepted its witnesses’ interpretation of the contract rather than the interpretation proffered by Complete’s witnesses. However, to the extent that the jury was required to make factual determinations and assess the credibility of the witnesses in order to make its determination, our Supreme Court has noted that:

the appellate court must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . .

Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. Where sufficient evidence exists, which may be believed by the jury, to sustain a verdict . . . , the decision of the jury should not be disturbed by an appellate court. [*People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974) (citations omitted).]

Therefore, because there was significant testimonial evidence presented at trial to support the jury’s finding that the contractual provisions ceased to govern the vehicles on Complete’s lot after the termination of the contract, we will not invade the province of the jury to decide the weight and credibility to be given to the testimony. As a result, we find that the jury’s verdict in favor of Complete as to this issue was not against the great weight of the evidence.

There was also significant evidence from which the jury could calculate the amount by which the City had been unjustly enriched by Complete’s services. Complete’s bookkeeper testified in detail as to “the items that remain owing for after cancellation,” and the trial exhibits included records and invoices that supported her calculations. The jury awarded damages to Complete based on its unjust enrichment claim in the amount of \$293,977.00, which was less than the amount requested by Complete, but within the range of proofs adduced at trial.

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood