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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PATTERSON BUILDERS, Plaintiff and Respondent, v. MARTIN HSU, Defendant and Appellant.	B286315 (Los Angeles County Super. Ct. No. KC068455)

APPEAL from an order of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Affirmed.

Law Office of John A. Tkach and John A. Tkach for Defendant and Appellant.

Carlton & Alberola, Andrew C. Carlton and Edward Alberola for Plaintiff and Respondent.

INTRODUCTION

Appellant Martin Hsu (Hsu) was sued after he failed to pay costs incurred by Patterson Builders (Builders), the general contractor who remodeled Hsu's home. Hsu contended Builders had agreed to remodel his home for free. Builders contended it agreed to remodel Hsu's home at cost. Ultimately, a jury awarded Builders $36,000 for the reasonable value of its services and incurred costs, but found against Builders on its other theories of relief, including, among others, breach of contract. Hsu filed a motion for judgment notwithstanding the verdict, arguing the jury's verdict allowing Patterson to recover the reasonable value of its services was inconsistent with its verdict against Patterson and in favor of Hsu on the other causes of action. The trial court denied the motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Underlying Civil Action*

Builders performed general contracting services for Hsu by remodeling Hsu's residential property in Azusa. Builders alleged Hsu failed to pay the costs of the completed work, and on May 19, 2016, filed a lawsuit against Hsu, asserting the following causes of action: 1) breach of written contract; 2) breach of oral contract; 3) common count for work, labor, and services based on reasonable value; 4) account stated; and 5) open book account.

As for the breach of written and oral contract claims, Builders contended Hsu "failed, neglected and refused to pay . . . a sum no less than $64,000.00, plus interest from the date of breach" and that Hsu's failure to pay is "a breach of the contract between the parties."

As for the common count for work, labor, and services based on reasonable value, Builders contended Hsu "became indebted to [Builders] for the reasonable value of certain work, labor, materials, supplies and services provided . . . for the remodeling" of the property and that he failed to pay the amount, totaling "at a minimum" $64,000.

As for the account stated cause of action, Builders alleged "[w]ithin the last two years, an account was stated in writing by and between [the parties]" where it was agreed that Hsu was "indebted" to Builders in the sum of $64,000 for the remodeling of the property.

And finally, as for the open book account cause of action, Builders contended it maintained "a written, open book account" with Hsu and that there remains a "principal due . . . in an amount of no less than $64,000.00."

In its prayer for relief, Builders requested the "principal sum of no less than $64,000.00" and interest accrued thereon at the legal rate of 10 percent since the filing date of the complaint, for attorney's fees and costs, and for "such other further relief as the Court deems just and proper."

On June 22, 2016, Hsu filed his answer to the complaint, denying every allegation and raising 43 affirmative defenses. He contended Builders "gratuitously offered" to remodel his residence free of charge because Hsu had previously assisted Builders in fostering a business relationship with Hsu's employer (Town Center Courtyard) "to build shopping centers" in various Southern California counties.

The president of Builders, Dru Patterson (Dru), testified he entered into an "oral contract" with Hsu, where Builders "would do this work . . . *at cost*, . . . *no profit*, and help him with his home

and his remodel" as a thank you. (Italics added.) He explained how there were a series of "ongoing" agreements between them about the remodel—"under th[e] envelope or umbrella of a single oral agreement, there were smaller individual oral agreements being made as the job progressed[.]" According to Dru, he agreed not to charge Hsu for any general contractor fee/costs for the remodeling services and, in return, Hsu agreed to reimburse Builders solely for the "hard costs" associated with the remodeling of the property.

Dru testified Hsu "has either been handed or seen each one of" the costs and bid documents from Builders' sub-contractors for the remodeling of the property so he could approve the costs. Dru stated Hsu would review and sign off on the architect's drawings and on the materials that were to be used on the site.

According to Dru, Hsu had promised to reimburse him for the costs incurred by Builders; "the idea was that [Builders would] remodel the house, and that [Hsu], at some point, would refinance the house" and "after the refinancing, he'd pull money out of the house and pay" Builders back for the costs incurred. Dru provided information as to how he had previously loaned Hsu money to enable him to purchase the property in the first place. Dru confirmed that after three years, Hsu paid back the money he borrowed to purchase the property. He explained that he did these types of favors for Hsu because Hsu was his friend.

On the other hand, Hsu claimed that Dru had promised to do the remodeling for free until a "problem" (and later, litigation) developed between Dru and Hsu's employer. At that point, Dru claimed Hsu had agreed to pay the costs of the remodel and he started billing Hsu, in violation of their prior agreement.

A jury trial was held on August 8 and 9, 2017. After closing argument, the trial court entered a directed verdict for Hsu on the breach of a written contract cause of action, and told the jury that "Builders' claim for breach of a written contract is no longer an issue in this case." The jury thereafter deliberated and found in favor of Hsu and against Builders on the causes of action for breach of oral contract, account stated, and open book account. However, the jury returned a verdict in favor of Builders and against Hsu on the cause of action for common count for work, labor, and services based on reasonable value, in the amount of $36,000.

On August 31, 2017, judgment was entered in favor of Builders on the cause of action for common count for work, labor, and services based on reasonable value in the amount of $36,000, costs in the amount of $5,348.43, and post-judgment interest at the maximum allowable rate until paid.

B. *Motion for Judgment Notwithstanding the Verdict*

On October 2, 2017, Hsu filed a motion for judgment notwithstanding the verdict (JNOV motion). He argued that Builders is "not entitled" to a judgment on the common count for work, labor, and services cause of action because the jury determined Builders was not entitled to any relief on its claim for breach of an oral contract. According to Hsu, because: 1) the court entered a directed verdict against Builders on the breach of *written* contract claim, and 2) the jury found there was no breach of an *oral* contract, and 3) Builders had provided "no testimony [regarding] the existence of an *implied* contract," the jury's verdict as to the common count for work, labor, and services cause of action is "inconsistent as a matter of law and cannot stand." (Italics added.) Hsu also argued the evidence received at

trial was insufficient as a matter of law to support the jury's verdict on the common count. Hsu finally claimed Builders' lawsuit was time barred, i.e., the statute of limitations had run.

On November 7, 2017, the trial court denied Hsu's JNOV motion. The court found Builders' causes of action were not time barred. The court also disagreed with Hsu's claim that the judgment on the common count action was inconsistent with the rest of the verdict. In its ruling, the trial court cited *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410 (*Hedging Concepts*). "A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is *implied by law for reasons of justice*. [Citation.] However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation. [Citations.]" (*Id.* at p. 1419, italics added.) The trial court reasoned in its ruling: "A party is permitted to plead common counts as an alternative to breach of contract, in the event the contract cause of action fails for some reason. [Citation.] This is precisely what [Builders] did here."

Hsu timely appealed.

DISCUSSION

On appeal, Hsu contends the trial court erred in denying his JNOV motion because: 1) the judgment in favor of Builders' common count for work, labor, and services based on reasonable value is "inconsistent" with the jury's finding that there was no breach of oral contract, no account stated, and no open book account; 2) Builders did not present sufficient evidence to demonstrate the reasonable value of services rendered; and 3) Builders never pled the existence of an "implied contract or an

implied promise to pay" in its moving paperwork and did not produce testimony or evidence to that effect during trial.

We conclude the trial court correctly denied Hsu's motion.

A. *Law Governing JNOV Motions and the Standard of Review*

A trial court must grant a JNOV motion "whenever a motion for a directed verdict for the aggrieved party should have been granted." (*Pacific Corporate Group Holdings, LLC, v. Keck* (2014) 232 Cal.App.4th 294, 309 (*Keck*).) The power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. (*Ibid.*) A motion for a directed verdict is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. (*Ibid.*)

Ordinarily, when reviewing a trial court's ruling on a JNOV motion, an appellate court will use the same standard the trial court used in ruling on the motion, by determining whether it appears from the record, viewed most favorably to the party securing the verdict, that any substantial evidence supports the verdict. (*Keck*, *supra*, 232 Cal.App.4th at p. 309.) If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied.[1] (*Ibid.*) On an appeal from a JNOV motion, the appellate court

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[1] To be substantial, evidence must be "reasonable, credible, and of solid value—such that some reasonable trier of fact could find that the judgment and each essential element thereof w[ere] established by the appropriate burden of proof." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 414.)

must read the record in the light most advantageous to the party who obtained the verdict, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320.)

B. *Applicable Substantive Law*

To state a claim for quantum meruit, the plaintiff must allege he or she performed certain services for defendant, the reasonable value of those services, the services were rendered at the special instance and request of defendants, and the services are unpaid. (*Haggerty v. Warner* (1953) 115 Cal.App.2d 468, 475 (*Haggerty*).) A "quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. [Citation.] However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation. [Citations.]" (*Hedging Concepts*, *supra*, 41 Cal.App.4th at p. 1419.) Quantum meruit is an "equitable theory" that provides implicitly missing contractual terms "by implication and in furtherance of equity." (*Ibid.*) " 'Quantum meruit refers to the well-established principle that "the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered." [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that "the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made" [citations].' " (*Unilab Corp. v. Los Angeles-IPA* (2016) 244 Cal.App.4th 622, 642 (*Unilab Corp.*).)

An "implied-in-law contract or quasi-contract is not based on the intention of the parties, but arises from a legal obligation that is imposed on the defendant. [Citation.] 'The right to restitution or quasi-contractual recovery is based upon *unjust enrichment*. Where a person obtains a *benefit* that he or she may not *justly retain*, the person is unjustly enriched. The quasi-contract, or contract "implied in law," is an *obligation* . . . created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money.' " (*Unilab Corp.*, *supra*, 244 Cal.App.4th at p. 639.)

C. *Trial Court Did Not Err in Denying Hsu's JNOV Motion.*

Hsu first contends the trial court erred in denying his JNOV motion because the judgment on Builder's common count for work, labor, and services based on reasonable value cause of action is "inconsistent with the jury finding that [Builders] was not entitled to judgment on his claims for Breach of Oral Contract, Account Stated[,] and Open Book Account and the court's dismissal of the breach of written contract cause of action." Hsu argues Builders is not entitled to a judgment predicated on the common count cause of action "[a]s a matter of law."

Hsu misunderstands the law. A party is permitted to plead common counts as an alternative to breach of contract, and it is the province of the trier of fact to decide which is supported by the evidence. (*Haggerty*, *supra*, 115 Cal.App.2d at pp. 474–475.) Where, as here, the triers of fact found no express written or oral contract between the parties, Builders was entitled to fall back on its common count theory of recovery and the jury was entitled to decide whether the circumstances disclosed that Builders'

services were not gratuitously rendered. (*Hedging Concepts, supra*, 41 Cal.App.4th at p. 1420, fn. 8 ["By contrast, if a court finds no contract formation, the court can then in certain circumstances find an implied contract to pay reasonable value for beneficial services rendered with a mistaken belief that a contract had been formed."]; *Haggerty*, at p. 475 [As long as plaintiff seeks only one recovery, it is entitled to pursue both contract claims and quantum meruit claims arising out of the same transaction.].) Under *Hedging Concepts*, the findings by the court and jury that the parties did not enter into a written or oral contract set the stage for the jury's consideration of recovery under a theory of quantum meruit.

Next, Hsu argues the verdict is not supported by substantial evidence because Builders "never argued or presented any evidence as to the reasonable value of his work, labor[,] and services. The record is devoid of any claim for the reasonable value of [Builders'] work, labor[,] and services. It was always argued there was an express agreement" and Builders "never plead an implied contract." He argues that if "no written contract existed and no oral agreement existed", then the jury's decision in favor of Builders (on the common count) "can only be rationalized as being the jury's attempt to split the baby."

Hsu again appears to fall back on his mistaken belief that in order to recover anything, Builders had to prevail first on one of its contract claims. As set out above, this is a misreading of the doctrine of quantum meruit. Recovery under quantum meruit only applies where there is no express agreement. Here, the jury and trial court found no express agreement.

Notwithstanding the contract claims, substantial evidence was presented to support the reasonable value of the costs and

services Builders sought to recover. A common count for reasonable value has the following elements: 1) plaintiff performed certain services for the defendant; 2) the reasonable value of those services; 3) the services were rendered at the request of the defendant; and 4) the services were unpaid. (*Haggerty*, *supra*, 115 Cal.App.2d at p. 475; see also *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460.) The first and second elements were met when Builders produced evidence at trial of bills, invoices, and emails that Dru testified he provided to Hsu ("I would meet with [Hsu] regularly on the job and/or on the job site, and I would show him the invoices. Some got . . . emailed over, texted over, or he was told over the phone. [¶] He wanted to know all the costs. He wanted to keep it low.") The third and fourth elements were met as Hsu himself testified that he received the services for which he did not pay.

Finally, Hsu argues Builders should not be able to recover because its complaint did not expressly plead an "implied promise to pay." As set out above, there is no such pleading requirement for a common count for recovery on a theory of quantum meruit, as it is a contract that is "implied in law" (see *Unilab Corp.*, *supra*, 244 Cal.App.4th at p. 639).[2]

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[2] We do not address the argument Hsu raises for the first time on appeal that the jury's $36,000.00 award to Builders qualifies as a "jury compromise verdict" warranting a new trial. We ignore arguments, authority, and facts not presented and litigated in the trial court. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 [issues raised for the first time on appeal which were not litigated in the trial court are waived].)

D. *We Deny Builders' Motion for Sanctions Against Hsu.*

On June 6, 2019, Builders filed a timely motion for sanctions, and requested that we impose sanctions against Hsu and his counsel in the amount of $11,590 for filing what Builders alleged is a "frivolous appeal" per California Rules of Court, rule 8.276, subdivision (a)(1). According to Builders, sanctions are appropriate because Hsu's appeal is "based on two erroneous arguments that are indisputably without merit": 1) that the trial court "misapplied" *Hedging Concepts*, and 2) that it was error as a matter of law for the jury to find in favor of Builders on the common count for reasonable value. Builders argues that Hsu's contentions "are not only at odds with the law but are also contrary to logic."

Although Hsu does not prevail on his arguments on appeal, we will not go so far as to declare that his appeal indisputably has no merit and that Hsu's "only discernable purpose in doing so is to further harass and demoralize" Builders. We believe Hsu's appeal, though unsuccessful, should not be penalized as frivolous as Hsu and/or his counsel set forth reasoned arguments in terms of the existing law. Accordingly, we deny Builders' motion for the imposition of sanctions.

DISPOSITION

The trial court's order denying appellant Hsu's motion for judgment notwithstanding the verdict is affirmed. Respondent Builders is awarded costs on appeal.

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.