STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0873

Stephen Anthony Gfrerer,
Respondent,

vs.

Kimberly Ann Lemcke,
Appellant,

The Morris Long Group, et al.,
Defendants.

Filed March 24, 2009
Affirmed
Minge, Judge

Scott County District Court
File No. 70-CV-06-27799

Charles C. Kallemeyn, Kallemeyn & Kallemeyn, 3200 Main Street Northwest, Suite 370, Coon Rapids, MN 55448 (for respondent)

Diana Longrie, 1321 Frost Avenue East, Maplewood, MN 55109 (for appellant)

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant claims that the district court erred when it awarded judgment to respondent for work he performed on appellant's home and yard, arguing (1) respondent's claim is barred by Minn. Stat. §§ 513.075–.076 (2008); (2) the evidence did not support the judgment; and (3) the damage calculation was erroneous. Because the claim is not statutorily barred and there is sufficient evidence to support the judgment and damage award, we affirm.

FACTS

Appellant Kimberly Ann Lemcke and respondent Stephen Anthony Gfrerer met online and began dating in September 2004. In 2005, they began living together in appellant's home in Prior Lake with plans to marry. Because both parties had children from earlier relationships, they agreed that respondent, who previously was a residential building contractor, would oversee substantial remodeling of appellant's home and yard to accommodate the larger family. Eventually they agreed on construction plans, that appellant would pay for the materials through a home equity loan, that respondent would take off several months of work to undertake the project, and, that in exchange for his work, respondent's name would be placed on the property title subsequent to the marriage. Appellant, however, declined to put the agreement in writing.

The project progressed through much of 2005 and 2006. Respondent performed extensive work on the home and yard. Initially, appellant paid expenses and occasionally respondent would pay for materials and then be reimbursed by appellant. Eventually

respondent was authorized to write checks directly against appellant's home equity line of credit. As the project progressed, respondent provided invoices to appellant that were meant to establish the value of the services he provided for the improvement of appellant's home compared to the cost of hiring a contractor. Respondent testified that he prepared the invoices in the manner he prepared bills for customers when he was a contractor and that he did this, not to request payment, but to resolve disputes regarding the project and because he sensed a slowly souring relationship.

In September 2006, when the work on the home was almost complete, the parties' relationship ended. Appellant asked respondent to move out of the home, and he complied. Respondent was not compensated for his labor or some expenses. However, respondent owed appellant money for certain matters, some unrelated to the project.

When the parties failed to resolve their dispute over finances and compensation for respondent's work, respondent filed a mechanic's lien on the home. In November 2006, respondent sued appellant, estimating the value of his uncompensated labor and expenses at $97,860. Over the next year, the parties' claims and counterclaims were pared down by partial summary judgment and partial settlement.

Following the bench trial, the district court determined that respondent was entitled to recover $53,043.37. This amount reflects detailed and careful adjustments made by the district court for improperly claimed interest, the value of rent, personal expenses, and other miscellaneous matters. Conversely, the district court awarded appellant $1,855.63 for funds she advanced respondent. Other claims and defenses were dismissed. Appellant moved the district court to amend its findings or to order a new

trial and requested an opportunity to provide additional testimony regarding several matters related to the damage calculation, including respondent's hourly wage, the value of the work completed by respondent, and the voluntary work performed by others on the project. The district court heard arguments on the motion and modified certain findings, but it denied the requests to provide additional testimony and for a new trial. This appeal follows.

D E C I S I O N

I.

The first issue is whether the Minnesota anti-palimony statutes, Minn. Stat. §§ 513.075–.076 (2008), prohibit respondent's contract claim. "Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001) (citing *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998)), *review denied* (Minn. May 29, 2001).

The anti-palimony statutes "prevent an unmarried couple living together in 'contemplation of sexual relations' from receiving the legal rights conferred upon married couples." *In re Estate of Palmen*, 588 N.W.2d 493, 496 (Minn. 1999). The law provides that

> a contract between a man and woman who are living together . . . out of wedlock . . . is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is in writing and signed by the parties, and (2) enforcement is sought after termination of the relationship.

Minn. Stat. § 513.075. It has been interpreted narrowly to prevent enforcement of agreements only "where the *sole* consideration for a contract between cohabitating parties is their 'contemplation of sexual relations . . . out of wedlock.'" *In re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983). The statutes do not prevent a person from recovering from another person simply because they cohabitated. *Id.* Our supreme court has observed that:

> If the claimant can establish that his or her claim is based on an agreement supported by consideration independent of the couple's living together in contemplation of sexual relations . . . out of wedlock *or* that he or she is seeking to protect [his or] her own property and is not seek[ing] to assert any rights in the property of a cohabitant, the statutes do not operate to bar the claim.

Palmen, 588 N.W.2d at 496 (emphasis added).

In this case, the parties agreed to an arrangement whereby respondent exchanged his labor for appellant's promise to add his name to the home's title subsequent to their marriage. Neither the cohabitation relationship nor marriage was consideration for respondent's labor. It was simply the setting in which a property-improvement agreement was reached. Because this is not a situation contemplated by the Minnesota anti-palimony statutes, we conclude that the district court did not err when it determined that the statutes do not bar respondent's recovery.

II.

The second issue is whether the district court's judgment was clearly erroneous. Appellant argues that the district court's judgment was based on the legal principle of account stated—not a contract theory—and argues that there was insufficient evidence to

support a judgment on the account-stated principle. While we observe that respondent pled several recovery theories in his complaint and the district court's order does not state unambiguously what was and was not the theory on which it granted recovery, our review of the record and the district court's order indicates that the district court did not award judgment on the theory of account stated. Thus, it is legally irrelevant that the evidence does not support this theory. It is sufficiently clear to us that the district court awarded judgment under the contract theory of mutual rescission as it was construed in *Busch v. Model Corp.*, 708 N.W.2d 546, 551-52 (Minn. App. 2006), and we review the judgment accordingly. Further, we note that neither party contests the district court's findings that (1) a contract existed, implied by the parties' conduct; (2) the terms of the contract were that respondent would take off several months of work to perform the construction project, that appellant would pay for the costs associated with construction, and that to compensate respondent for his labor, his name would be added to the title subsequent to the parties' marriage; and (3) both parties were aware that respondent was not undertaking the improvements gratuitously but that he expected compensation.

"Whether a contract is to be implied in fact is usually a question to be determined by the trier of fact as an inference of facts to be drawn from the conduct and statements of the parties." *Bergstedt, Wahlberg, Berquist Assocs., Inc. v. Rothchild*, 302 Minn. 476, 479-80, 225 N.W.2d 261, 263 (1975). Whether there was a mutual rescission is a question of fact. *Miller v. Snedecker*, 257 Minn. 204, 205, 101 N.W.2d 213, 216 (1960); *Berg v. Ackman*, 431 N.W.2d 264, 266 (Minn. App. 1988). In actions tried to the district court, the district court's findings of fact shall not be set aside unless clearly erroneous.

Minn. R. Civ. P. 52.01; *see also Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (stating that, to warrant reversal, the factual findings must be "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole") (quotation omitted). "If there is reasonable evidence to support the district court's findings, we will not disturb them." *Rogers*, 603 N.W.2d at 656. When reviewing a judgment in a bench trial, "we view the record in the light most favorable to the judgment of the district court." *Id*. We will not reverse the district court's judgment merely because this court views the evidence differently. *Id.*

"Rescission is the unmaking of a contract which not only terminates the contract but abrogates it and undoes it from the beginning." *Johnny's, Inc. v. Njaka*, 450 N.W.2d 166, 168 (Minn. App. 1990) (citation omitted). As a general rule, rescission "is justified only by a material breach or substantial failure in performance." *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 49 (Minn. App. 1998). However, "[b]oth parties to a bilateral contract may rescind the contract if each demonstrates intent to rescind and there is mutual assent." *Busch*, 708 N.W.2d at 551. "Mutual assent to rescind a contract may be inferred from the attendant circumstances and conduct of the parties." *Id.* "A repudiation of a contract by one party, acquiesced in by the other, is tantamount to a [mutual] rescission." *Minnesota Ltd., Inc. v. Pub. Utils. Comm'n*, 296 Minn. 316, 319, 208 N.W.2d 284, 286 (1973). "In determining contractual intent, the question is not what a party may have subjectively intended but what intent his words and acts objectively manifest." *Id*. at 321, 208 N.W.2d at 287.

In this case, after the parties' relationship ended, respondent moved out of appellant's home and stopped working on the construction project, and appellant hired someone else to finish the project. Because it was clear that their romantic relationship had ended, the parties separated and withdrew from their construction arrangement. Respondent did not seek to finish the project or claim that because he performed the work his name should be placed on the title of appellant's house. Appellant did not ask respondent to keep working. However, incident to the rescission, respondent sought payment for his completed labor or for the value his work added to appellant's house and appellant tried to convince respondent he was compensated for his labor by being able to live at her home rent-free. In viewing the record and the "attendant circumstances and conduct" of the parties, we conclude that there was sufficient evidence to support the district court's finding of mutual rescission. We further conclude that the record supports the conclusion that, incident to the rescission, appellant had an implied contractual obligation to compensate respondent.

III.

The third issue is whether the district court's damage award to respondent was an abuse of discretion. "Rescission is an equitable remedy that seeks to put the parties in the same position they would have been had the contract never existed." *Busch*, 708 N.W.2d at 551 (quotation omitted). "Granting equitable relief is within the sound discretion of the trial court. Only a clear abuse of that discretion will result in reversal." *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). A reviewing court will not

disturb a damage award "unless its failure to do so would be shocking or would result in plain injustice." *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 199 (Minn. 1986).

Ordinarily, "[i]f there is mutual rescission, the parties must return any benefit received under the contract and put the other party as nearly as is possible in his or her situation before the contract." *Busch*, 708 N.W.2d at 551. However, because of the nature of certain benefits received under a contract, e.g., labor and materials incorporated into a completed project, the parties may be unable to return them. *Id.* at 552. When that occurs, the district court must devise an alternative-damage award. *See id.* One permissible formulation of such an award is to monetize the value of labor and materials. *See id.*

The district court relied on *Busch* in calculating its damage award. In *Busch*, a contractor agreed to build a customer's garage, and he was given a $5,000 down payment. *Id.* at 548. The contractor completed a portion of the construction, and then the parties mutually rescinded their contract. *Id.* at 551. The district court decided that the contractor could keep the $5,000 down payment in compensation for building part of the garage. *Id.* at 552. The court of appeals affirmed this damage award, holding that the damage award was not error under the principle of mutual rescission or, in the alternative, the principle of quantum meruit.[1] *Id.*

In this case, respondent contributed labor for and oversaw a construction project. As in *Busch*, his contribution cannot be returned to him. Respondent completed and

[1] "A party may recover under quantum meruit where he or she has conferred a benefit to another and has not received reasonable compensation for this act." *Busch*, 708 N.W.2d at 552.

submitted invoices that estimate the value of his services and his contribution to the project. Although at the time respondent was not asking to be paid, as estimates of the value of his labor on the project, they constitute his way of quantifying his damages. Respondent testified that he prepared the invoices just as he prepared any bill for a typical customer. Although appellant questions whether using the invoices was a credible measure of the labor costs, this is a factual question. Here, the district court found the invoices credible and that they could be used to measure damages equitably.

Appellant challenges the accuracy of respondent's invoices, arguing that, because the parties never contracted for an hourly rate, the hourly rate estimated on the invoices may not be a true measure of the labor. However, appellant had an opportunity to cross-examine respondent after he introduced the invoices into evidence and to contest their accuracy. On appeal, appellant does not explain why the district court's reliance on the invoices would be clearly erroneous, an abuse of discretion, shocking, or a plain injustice. Thus, despite appellant's apparent concerns that she could have negotiated a more favorable hourly rate and that respondent's labor was not worth as much as he estimated, we conclude that based on this record, the use of the invoices to calculate the value of the labor was not reversible error.

After determining the value of respondent's labor based on the invoices, the district court made several subtractions in an effort to arrive at a fair value of his damages. The district court subtracted interest, which was not provided for in the contract, drought care, which the court found to be excessive, miscellaneous expenses, which the court found respondent did not provide, maintenance expenses, which the court

found respondent did not provide, and rent, which the court concluded appellant was entitled to receive from respondent for his occupancy of the home. It is sufficiently clear that the district court took care to arrive at a balanced damage award.

Appellant also argues that the damage award should be reduced because, when respondent was working on the construction project, he benefitted from the "voluntary efforts of others." At trial, there was testimony that appellant "helped [respondent] quite a bit" and appellant's father helped him for a weekend with framing up a new garage. We note that the invoices on which the district court relied to make its damage calculation refer only to the labor that respondent provided on the project, not the total value of labor or the labor by others. Appellant has not introduced evidence that indicates that respondent either double-billed appellant or billed appellant for work appellant or her family members performed. Because the implied contract provided that appellant would pay for the costs of the construction project, because appellant consistently paid for the labor performed by individuals other than respondent on the project, and because, if appellant or her father had not performed their work, the work presumably would have been performed by respondent or a paid laborer and reflected in higher statements provided by respondent, appellant—not respondent—presumably benefitted financially from the voluntary labor that appellant and her father provided.

Finally, we note that the district court considered unjust enrichment and could have applied different legal theories to determine the amount due respondent. In this regard, the record suggests that the value of the home had increased by $70,000 during the time these improvements were made. However, neither of the parties presented

appraisals or evidence of general inflation of residential real estate. Thus, the record is inadequate to use an increase-in-property-value measure of damages. This left the district court with a limited basis for determining damages. That basis was respondent's claim for the reasonable value of his services as he would have billed as a contractor. As stated earlier, on this record, we conclude that the district court did not improperly determine and award damages.

Because respondent's claim was not barred by Minnesota's anti-palimony statute and because there is sufficient evidence to support the district court's judgment and damage award, we affirm.

Affirmed.

Dated: