COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1054

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

KUJAWA ENTERPRISES, INC.,

PLAINTIFF-RESPONDENT,

V.

MICHAEL AND JUDITH SERWIN,

DEFENDANTS-APPELLANTS,

CRAIG T. ELLSWORTH AND
COMPREHENSIVE DESIGN, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Michael and Judith Serwin appeal from a judgment entered after a bench trial requiring them to pay Kujawa Enterprises, Inc. $54,000

for the value of landscaping services rendered. The Serwins claim the trial court erred: (1) when, instead of basing damages on the submitted written and oral bids, it accepted Kujawa's assertion that the project was performed on a "time and material" basis and determined Kujawa was entitled to the award under the theory of unjust enrichment; (2) when it failed to offset the $7,350 partial payment the Serwins made from the $54,000 damage award; (3) when it accepted the testimony of Kujawa's landscape expert as to the value of the services rendered; and (4) when it delayed in issuing its findings of facts and conclusions of law, thereby prejudicing the Serwins. Because the trial court's unjust enrichment application was appropriate; because an offset was not required; because the trial court's credibility determinations as to which expert to believe constituted a proper exercise of discretion; and because there is no evidence that any delay in issuing the decision prejudiced the Serwins, we affirm.

I. BACKGROUND

In July 1989, the Serwins purchased a single-family home that required extensive renovation, construction and landscape improvements. The Serwins entered into a contract with Craig T. Ellsworth to serve as architect, construction manager and agent of the Serwins for the renovation, construction and landscape work to be performed on the Serwins's property.

Ellsworth hired Kujawa to be the general and primary landscape contractor. In November 1989, Kujawa performed some initial landscape work on the Serwins's property pursuant to a verbal agreement between Ellsworth and Kujawa. In the Spring of 1990, Ellsworth solicited two written bids from Kujawa for additional work: one bid dated April 30, 1996, was for draintile installation to be performed for $2,650, and the other, dated April 26, 1996, was for grading,

soiling and seeding the east side of the lot for $7,000. Subsequently, Ellsworth solicited verbal quotations from Kujawa for additional work.

Kujawa proceeded to provide extensive landscaping services to the Serwins without any written contract. As work proceeded, variations and modifications were made to the project by Ellsworth and/or by the Serwins. As a result of the modifications and changes from the initial bids and quotations, all work performed was ultimately billed in a final invoice on a time and material basis. The work actually performed included rough grading, fine grading, railroad timber retaining wall work, draintile installation, draintile replacement, loffelstein tile wall installation, modification and reinstallation, and debris clean-up. Kujawa submitted a final invoice seeking payment in the amount of $59,606, plus tax. When the Serwins refused to pay the invoice, Kujawa filed this lawsuit.

A trial to the court took place in August 1996. The trial court determined that the modifications and alterations made by either Ellsworth or the Serwins were the equivalent of a counter-offer, which operated to negate the original bids. It concluded that no contract existed between the parties and, as a result, Kujawa was entitled to be paid under a theory of unjust enrichment. The trial court utilized Kujawa's account of the time and materials expended in concluding that the value of the services was $54,000, plus tax. Judgment was rendered accordingly. The Serwins now appeal.

II. DISCUSSION

A. Unjust Enrichment.

The Serwins claim the trial court erred when it awarded judgment based on the value of services under an unjust enrichment theory instead of giving effect to the "contractual agreements" of the parties. In essence, the Serwins's argument on this issue is that the trial court's finding that no contract existed was erroneous and the trial court should have given effect to the bids, which formed the contract between the parties. We are not persuaded.

In reviewing the trial court's findings and conclusions, we apply the following standards of review. We will not disturb the trial court's findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS. Conclusions of law will be reviewed *de novo*. *See* ***Tourtillott v. Ormson Corp.***, 190 Wis.2d 291, 295, 526 N.W.2d 515, 517 (Ct. App. 1994).

The trial court found that, although there were two initial written bids and subsequent verbal quotations, there was no written contract between the parties. It found that it "is undisputed that the parameters of work performed by [Kujawa] kept changing on the job," and that "modifications and variations were made to the project by Ellsworth and/or … the Serwins … [and a]s a result, it became impractical for [Kujawa] to bill the Serwins based upon bids which were modified, no longer effective or not being adhered to." These findings are not clearly erroneous as they are supported by the record. Ellsworth conceded that the parameters of the project "evolved," and that he directed Kujawa to perform a significant portion of the work on the Serwin property without any written

contract. Although Mr. Serwin testified that he insisted on written bids only and refused all oral agreements, he conceded that he had accepted oral agreements for the project. Neither Ellsworth nor the Serwins ever ordered Kujawa to cease working until a written contract could be executed. Chris Kujawa testified that Kujawa performed all work as requested by Ellsworth or the Serwins on a time and material basis.

Moreover, the trial court's decision details its credibility determinations, stating that Ellsworth and Mr. Serwin were simply not credible because they offered contradicting testimony and evasive, reluctant responses. These determinations are for the trial court to make, *see* ***Leciejewski v. Sedlak***, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984), and support the trial court's conclusion that no written contract existed.

Because the trial court found that no contract existed, it proceeded to address whether Kujawa established a claim for unjust enrichment. It concluded that the absence of any written contract or other "meetings of the mind" resulted in a situation where Kujawa is equitably entitled to be paid on a time and material basis under a theory of unjust enrichment. We agree.

A claim for unjust enrichment is established when three elements are present: (1) a benefit conferred on the defendants by the plaintiffs; (2) an appreciation of or a knowledge by the defendants of the benefit; and (3) acceptance and retention by the defendants of the benefit under circumstances making it inequitable for the defendants to retain the benefit without payment of its value. *See* ***Kelley Lumber Co. v. Woelfel***, 1 Wis.2d 390, 391-92, 83 N.W.2d 872, 873 (1957). In the instant case, each element has been satisfied.

The Serwins undisputedly received a benefit from Kujawa when it performed a myriad of landscape services, and the Serwins acknowledge such benefit. They live on the property where the services were provided. Moreover, the Serwins have accepted and retained the benefit without paying for the value of the benefit. It would be inequitable to allow retention without payment because the work was done at the request of the Serwins or Ellsworth and the Serwins approved or acquiesced in the providing of all the landscape services. The trial court's decision that unjust enrichment was the appropriate equitable theory to apply here was not erroneous and this conclusion is amply supported by the trial court's findings of fact.

B. Offset.

The Serwins complain that the trial court did not offset the $7,350 payment they made from the $54,000 judgment it awarded. There is no basis for this court to order the offset as requested by the Serwins.

It is undisputed that the $7,350 payment was made. The trial court was aware of this undisputed fact and did make a finding to that regard in its decision. Moreover, the trial court was aware of the Serwins's belief that such amount should be offset from the value of the services. This belief was presented via the Serwins's proposed findings of fact and conclusions of law. The record demonstrates that the trial court heard testimony regarding exactly what services were performed and viewed photos of different work. The trial court heard testimony regarding the value of the services and reviewed documentation of the amounts charged for the services rendered. The trial court also heard testimony that the Serwins were not charged for a substantial amount of time devoted to the

services provided. Chris Kujawa testified that, after subtracting the $7,350 paid, the Serwins still owed approximately $55,000.

It would have been preferable for the trial court to specifically state in its decision that the judgment amount was for the value of services for which the Serwins had not paid Kujawa. Based on the foregoing, however, we infer that the judgment award of $54,000 constitutes the value for services that the Serwins have not yet paid. Accordingly, we see no reason to offset the $7,350 payment from the $54,000 award.

C. Expert Testimony.

The Serwins argue that Kujawa's expert witness did not provide sufficient testimony to allow the trial court to base its decision on any values referenced by this expert witness. We do not agree.

The trial court made several findings with regards to Kujawa's expert witness, David J. Frank, and the Serwins's landscape expert, Patrick Cullinane. It noted that it evaluated the weight of the expert opinion offered and considered the qualifications and experience of each expert. It found that Frank had extensive experience, including thirty-seven years of landscaping experience, and that his testimony was credible because it was consistent, and supported by detailed data. To the contrary, the trial court found Cullinane's testimony to be less credible because he had limited field experience, and his opinion was not as detailed or specific as Frank's.

These findings are supported by the record and the testimony of these witnesses. Therefore, they are not clearly erroneous. The Serwins, citing a small portion of Frank's testimony, argue that he never actually gave his opinion

regarding the reasonable value of the work, but rather testified as to how much Frank would have charged to do the project. This is purely a matter of semantics. It is clear from Frank's testimony as a whole and, when read in full context, that in his opinion, the reasonable value of the work Kujawa performed was in excess of $52,000.

D. Decision Delay.

The Serwins claim that because the trial court failed to issue its decision within sixty days of conclusion of the trial, they were prejudiced because the trial court's recollections were not fresh, as evidenced by its failure to reference two exhibits. We are not persuaded.

Section 805.17(2), STATS., provides:

> If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

Although this statute appears to support the Serwins's claim that the trial court erred in failing to issue the decision within sixty days, case law dictates otherwise. The sixty-day time deadline in this statute is merely directive, not mandatory. *See* ***Merkley v. Schramm***, 31 Wis.2d 134, 138, 142 N.W.2d 173, 176 (1966). Although the trial court's tardy decision was in violation of this statutory directive, there is no evidence to show that the delay prejudiced the Serwins. The trial court decision was a detailed and comprehensive analysis of the evidence and clearly demonstrated the trial court's understanding of the issues, the facts, and the law. The absence of reference to two exhibits does not mean the trial court lacked

recollection of these exhibits. Rather, the absence reflects the trial court's belief that specific reference to these two exhibits was not necessary.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.