

1997

Utco Associates, LTD v. K. Demarr Zimmerman : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 9 10190-CA

COURT OF APPEALS

UTCO ASSOCIATES, LTD, a
Utah limited partnership,
by and through its general
partner, Robert D. Kent

v.

Defendant/Appellee.

Argument Priority 15

Appeal from a Judgment on Jury Verdict of the Third Judicial
District Court for Salt Lake County,
Honorable Timothy R. Hanson, District Court Judge

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STATEMENT OF JURISDICTION

Appellant UTCO Associates, Ltd. ("UTCO") appeals a final Judgment of the Third Judicial District Court of Salt Lake County, Honorable Timothy R. Hanson presiding, entered on a jury verdict in favor of Appellees Sumerset Houseboats Div. SMI ("Sumerset") and its President, James E. Sharpe ("Mr. Sharpe").¹ Pursuant to Utah Code section 78-2a-3(2)(k)(1997), this Court has jurisdiction over this appeal as it was poured over by the Utah Supreme Court. [R1798]²

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this appeal:

1. Did the trial court err in declining to instruct the jury on UTCO's equitable promissory estoppel claim despite uncontroverted evidence establishing that:

- a) UTCO failed to exhaust its claim in bankruptcy against Mr. Zimmerman?
- b) UTCO had a valid, enforceable contract with Mr. Zimmerman for repayment of the funds sought from Sumerset and Mr. Sharpe?

¹ UTCO's claims against defendant K. Demarr Zimmerman ("Mr. Zimmerman") were stayed as a result of Mr. Zimmerman's bankruptcy and, therefore, they were not submitted to the jury.

² All citations are to the record as indexed by the Clerk of the Third Judicial District Court pursuant to Rule 11(b) of the Utah Rules of Appellate Procedure.

- c) UTCO had agreed to loan and had loaned the funds to Mr. Zimmerman prior to the alleged promise by Sumerset and Mr. Sharpe?
- d) UTCO admitted that the money transferred to Sumerset was Mr. Zimmerman's money, not that of UTCO?

The standard of appellate review for a trial court's refusal to give a proposed jury instruction is a question of law for which no deference is given to the trial court. E.g., Cornia v. Wilcox, 898 P.2d 1379, 1386 (Utah 1995); State v. Robertson, 923 P.2d 1219, 1231 (Utah 1997)(citing State v. Hamilton, 827 P.2d 232, 238 (Utah 1992)).

2. Did the trial court err in excluding evidence that the serial number tentatively reserved for the Zimmerman houseboat was, three months after the alleged fraud and after Zimmerman had canceled the purchase, assigned to another boat being manufactured for sale to an unrelated third-party? The standard of appellate review for a trial court's evidentiary ruling is an abuse of discretion and the trial court's ruling is given deference in light of its advantageous position. E.g., Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993)("abuse of discretion and reverse only if the ruling is beyond the bounds of reasonability"); Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992)("court's rulings regarding admissibility will not be overturned 'unless it clearly appears that the lower court was in error'"); State v. Wetzel, 868 P.2d 64, 67 (Utah 1993).

3. If the trial court erred in issuing a ruling precluding the introduction of evidence describing the houseboat to which the serial number was eventually assigned more than three months after the alleged fraudulent representation, was UTCO prejudiced as it introduced evidence: (1) That, at the time of the alleged fraudulent statement, there was no houseboat in existence with the serial number as set forth in the invoice between Somerset and Mr. Zimmerman; (2) That no houseboat with that serial number was ever built to the specifications in the invoice between Somerset and Mr. Zimmerman; and (3) That a houseboat bearing the serial number initially intended for the Zimmerman houseboat was sold to another party?

The standard of appellate review of a trial court's evidentiary rulings is whether there is a "reasonable likelihood that the error affected the outcome of the proceedings." E.g., State v. Wetzel, 868 P.2d 64, 67-70 (Utah 1993)(improper evidence ruling reversed only if showing of prejudice (i.e., "reasonable likelihood that the error affected outcome of the proceedings"))); State v. Hamilton, 827 P.2d 232, 240 (Utah 1992).³

³ UTCO's statement of the issues also sets forth, apparently inadvertently, an issue pertaining to an instruction given by the trial court pertaining to fraudulent intent. See UTCO's Brief of Appellant, Statement of Issues, no. 3 at pp. 3-4. UTCO failed to brief the issue, however, so it is not properly preserved for appeal and cannot be ruled upon by the Court. E.g., Utah R. App. P. 24; State v. Wareham, 772 P.2d 960, 966 (Utah 1989); Phillips v. Hatfield, 904 P.2d 1108, 1109 (Utah App. 1995); State v. Yates, 834 P.2d 599, 602 (Utah App. 1992); State v. Horton, 848 P.2d 708, 710-711 (Utah App.), cert. denied, 857 P.2d 948 (Utah 1993). Accordingly, Somerset and Mr. Sharpe do not address that issue.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES AND REGULATIONS

The following cases are determinative of the issues pertaining to the trial court's refusal to instruct the jury on UTCO's promissory estoppel claims: Knight v. Post,⁴ 748 P.2d 1097, 1099-1100 (Utah App. 1988)(pending bankruptcy claims against third-party barred equitable claims because of failure to exhaust all available legal remedies); Commercial Fixtures and Furnishing v. Adams,⁵ 564 P.2d 773, 774 (Utah 1977)(existence of valid contract with third-party to recover debt bars equitable claim seeking to imply contract against another).

The following Utah Rules of Evidence are determinative of the issues pertaining to the trial court's refusal to allow evidence pertaining to the reassignment of the serial number:

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States of the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

⁴ Attached as Addendum "A".

⁵ Attached as Addendum "B".

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

UTCO brought this action against Sumerset and Sharpe asserting claims for breach of contract, unjust enrichment, quantum meruit, contract implied in law, breach of the covenant of good faith and fair dealing, promissory estoppel, foreclosure of security interest, misrepresentation, negligent misrepresentation, conspiracy, conversion, implied in fact contract, prejudgment interest, and punitive damages. [R561-577] These same claims were asserted against Mr. Zimmerman who subsequently filed bankruptcy and the action was stayed as to him. [R108-109]

On July 11, 1996, Sumerset and Mr. Sharpe filed a Motion in Limine which sought the exclusion of evidence: (1) that the serial number tentatively reserved for Mr. Zimmerman's houseboat was eventually assigned to another houseboat more than three months after the alleged misrepresentations and after Mr. Zimmerman canceled the order and directed Sumerset to apply his \$58,384 to Mr. Zimmerman's then existing debt owed to Sumerset, and (2) that the second houseboat was eventually sold to a third-party. [1486-1490] The grounds for this Motion were that these subsequent events were irrelevant to UTCO's claims and, moreover, under Rule 403 of the Utah Rules of Evidence, any probative value would be substantially outweighed by the danger of unfair prejudice and confusion of the

issues, and would unnecessarily lengthen the trial. [Id.] On July 22, 1996, UTCO filed a Memorandum in Opposition. [R1744-1752] On July 22, 1996, the Court granted the Motion and stated:

I'm going to grant the motion. I can't see any relevance to the proposition that the, at least based on what I've heard so far, that the reassignment of a serial number to another boat, to a third person who is not claiming to be involved in this situation, has any relevance to the state of mind of the Defendant for purposes of committing fraud at the time these representations were made. I recognize after events may have some probative value, but in this case I can't see what it might be.

The fact that the boat with a serial number did not exist, and was never built to the specifications in the original invoice, is all the Plaintiff needs in that regard. The rest of it is surplusage and a waste of time. Unless the evidence changes, it's not coming in. The Motion is granted.

That doesn't mean you can't put in evidence that there was never a boat with that serial number, or that was the serial number on the invoices and there is no such boat, but it's not, I don't see any relevance to the fact that serial number now appears on some other boat. The Motion is granted.

[R1910]⁶

⁶ On July 22, 1996, Sumerset and Mr. Sharpe filed two additional motions in limine: (1) seeking to exclude any reference or mention of any complaint or investigation by any government agency, including the Federal Bureau of Investigation, which Plaintiff had initiated; and (2) seeking to exclude the testimony of two of Plaintiff's belatedly designated witnesses, Ellery Summer (Motor Vehicles Employee) and Ken Crooks (F.B.I.). [R1541-1547, 1560-1564] In chambers prior to trial, UTCO's counsel stated that they did not intend to introduce the evidence or call the witnesses these motions sought to exclude. Accordingly, these motions in limine became moot and, contrary to the representation in UTCO's Brief, were not granted by the trial court, or even decided. UTCO did not attempt to call the witnesses or introduce the evidence. Given that these motions were not ruled upon and the evidence was not offered at trial, and given that UTCO's Brief fails to address the merits of these motions, they are not properly before this Court on this appeal. See, e.g., State v. Horton, 848 P.2d 708 (Utah Ct. App.), cert.

UTCO's claims against Somerset and Mr. Sharpe proceeded to trial before the Third District Court, Honorable Timothy R. Hanson presiding.⁷ The matter was tried to a jury⁸ on July 22, 23, 25, 29 and 30, 1996. During the course of the trial, UTCO voluntarily dismissed its claims for conversion, quantum meruit, breach of the covenant of good faith and fair dealing, foreclosure of security interest, and conspiracy.

On July 25, 1996, after UTCO rested its case, Somerset and Mr. Sharpe filed Defendants' Combined Motion for Directed Verdict and Supporting Memorandum. [R1572-1584] Somerset and Mr. Sharpe's Motion for Directed Verdict sought judgment in their favor on, inter alia, UTCO's promissory estoppel claim. [R1573-1575 & 1580-1582] The Motion for Directed Verdict presented the following bases for directing verdict against UTCO on its equitable promissory estoppel claim: (1) UTCO's promissory estoppel claim is barred as UTCO failed to exhaust its legal remedies because it had an express contract with Mr. Zimmerman for repayment of the very funds sought against Somerset and Mr. Sharpe in its equitable claims, and claims under that contract were pending in the bankruptcy court along with a complaint for denied, 857 P.2d 948 (Utah 1983).

⁷ Somerset asserted two counterclaims and a third-party complaint which were dismissed, in part voluntarily by Somerset and in part by summary judgment of the Court. Neither the counterclaims nor the third-party complaint are at issue in this appeal.

⁸ UTCO's Brief incorrectly states that the matter was tried by the trial court without a jury. See Brief of Appellant at p. 5. To the contrary, the entire matter was tried to a jury.

nondischargeability; [R1580-1582] and (2) UTCO's promissory estoppel claim is barred as there was no reasonable reliance as UTCO had already loaned Mr. Zimmerman the \$58,384 prior to any alleged promise and UTCO admitted it had no ownership interest in that money. [R1573-1575, 1582] The issues raised by Defendants' Motion for Directed Verdict were extensively and fully argued by all parties. [R2390-2416].

While the trial court initially indicated that it was denying the Motion for Directed Verdict, [R2416] the trial court, based in part on the position asserted in the Motion for Directed Verdict, subsequently refused to instruct the jury on UTCO's promissory estoppel claim and stated:

I've indicated in chambers that I was not instructing on the equitable causes [sic] of action of promissory [sic] estoppel. For the record, the reasons I have determined not to do that is, I am satisfied the Plaintiffs [sic] have an adequate remedy at law and, I believe, it is the rule that equitable remedy is not available as long as there is an adequate remedy at law. And I believe there is here.

Also, I am satisfied that the concept promissory estoppel basically mirrors the causes of action that are being asserted in this case by the Plaintiff. And they'll just be surplusage.

Finally, I'm satisfied that the Court of Appeals case that was cited to me by Plaintiff's counsel, saying that they seem to suggest that the Court must send equitable causes of action to the jury, is factually distinguishable in this case and I'm satisfied that it would be inappropriate to submit that equitable claim to a jury, if it was otherwise proper.

[R2606-2607]

At the conclusion of the trial, the jury was instructed on UTCO's claims of fraud, negligent misrepresentation, punitive

damages and breach of contract, and the jury found in favor of Sumerset and Mr. Sharpe on all claims. [R1670-1672] Pursuant to the jury's verdict, the trial court entered judgment of no cause of action in favor of Sumerset and Mr. Sharpe. [R1771-1773] This appeal ensued.

STATEMENT OF RELEVANT FACTS

Sumerset is a Kentucky corporation engaged in the business of manufacturing and selling houseboats, [R1958] and has been in that business since 1953. [R1972] Mr. Sharpe was, at all relevant times, the President of Sumerset. [Id.]

In early 1991, K. Demarr Zimmerman, against whom this action was stayed as a result of his bankruptcy filing, was starting a business, Lake Powell-N-Houseboats, whereby he would purchase houseboats and then sell weekly shares in the boat to individuals, much like a time-share arrangement. [R1964-1965 & 1967-1968] Mr. Zimmerman visited Sumerset's sales office in Atlanta, Georgia and then visited Sumerset's manufacturing plant in Somerset, Kentucky. [R1964-1965] Over the next several months Zimmerman purchased six houseboats from Sumerset. [R2126]

On approximately November 20, 1992 Mr. Zimmerman's company, Lake Powell-N-Houseboats, approached Sumerset regarding the purchase of a 1993 model-year houseboat.⁹ [R2047] In connection with this proposed transaction, Sumerset created an

⁹ After this transaction Sumerset sold four houseboats to Mr. Zimmerman and related entities. [R2126] These transactions are not at issue in this litigation.

invoice describing the specifications and amenities of the houseboat to be custom built and indicating the purchasers as "Lake Powell-N-Houseboats/Demarr [Zimmerman]." [R2048] It was anticipated that manufacture of the boat would be completed in March, 1993, [R2079] and the purchase price would be \$120,000.00. [R2051]

To finance this purchase, Mr. Zimmerman contacted UTCO, a lending source he had previously used, seeking \$75,000 to be paid toward the purchase price. [R2178-2179] UTCO refused to make a \$75,000 loan to Mr. Zimmerman, but did agree to a loan in the amount of \$60,000. [R2178-2179] In connection with UTCO's loan to Mr. Zimmerman, as was the case with their prior loans, Mr. Nelson, UTCO's counsel, prepared a promissory note, security agreement, acknowledgement and UCC-1 Financing Statement, which were executed by Mr. Zimmerman on December 21, 1992. [R2179-2181, 2195, 2292, 2582-2583] Sumerset was not a party to these agreements nor were these documents provided to Sumerset. [R2540-2541]

Neither Sumerset nor Mr. Sharpe had any business dealing directly with UTCO. In fact, Mr. Sharpe testified that he did not know UTCO was lending money to Mr. Zimmerman and, for all Mr. Sharpe knew, Mr. Nelson was Mr. Zimmerman's lawyer. [R2538-2541]

After the loan was made, Mr. Nelson purports to have had two conversations with Mr. Sharpe which serve as the sole basis for, inter alia, UTCO's promissory estoppel claim. With

respect to these conversations, Mr. Nelson testified at trial as follows:

A. . . . I talked to [Mr. Sharpe] on the 19th, 20th, 21st. I don't have a calendar. I don't recall the day I talked to him, the week before Christmas, where I confirmed to him -- I think the 21st because that's the day Zimmerman signed the loan document. I confirmed to Mr. Sharpe that UTCO had made the loan, that Demarr [Zimmerman] had signed the documents, and that we were prepared to wire \$60,000 to fund the loan.

Q. What did he say to you?

A. He said that is great, wire the money.

[R2196; see also R2201, 2226, 2240] (emphases added).

Mr. Nelson further testified as follows:

Q. And during that conversation you told Mr. Sharpe that Mr. Zimmerman had signed the loan documents?

A. I believe that I did, yes.

Q. All right. And going on in your deposition, question, line 20, page 39. "Just so I understand the timing of this conversation, did this occur before or after UTCO had made the decision to actually loan funds to Mr. Zimmerman?

"Answer: It was after.

"Question: Did this conversation occur before or after the conversation you had with Mr. Zimmerman in which you informed him that UTCO would, in fact, loan him \$60,000.00?

The answer was after. Do you recall giving those answers to those questions during your deposition?

A. I don't recall the specific questions or answers but I have read them and the answers are correct.

Q. And that is consistent with your testimony here at trial, right?

A. That's correct.

[R2241-2242] (emphases added)¹⁰

On December 29, 1992, Sumerset received a wire transfer in the amount of \$58,384. [R2129] That wire transfer indicated it was to be applied to "Demarr Zimmerman Account", without mention of any particular boat. [R2129-2130, 2272] These funds belonged to Mr. Zimmerman and, based on its own admissions, UTCO had no interest in these funds wired to Sumerset.¹¹ [R2552-2553]

Mr. Zimmerman began making payments to UTCO as required under the promissory note, [R2201] however, he failed to pay the balance of the loan when it came due in July, 1993. [R2206] UTCO instituted this action against Mr. Zimmerman to recover payment under the promissory note upon which Mr. Zimmerman had defaulted. [R2314] In October of 1993, after this action was filed, Mr. Zimmerman filed a Chapter 7 bankruptcy and UTCO filed claims against Mr. Zimmerman in that bankruptcy to recover the

¹⁰ Mr. Nelson was the only individual associated with UTCO that had any discussions with Sumerset or Mr. Sharpe prior to the initiation of this litigation. More particularly, Mr. Kent, UTCO's sole general partner, expressly testified that he had no contact, conversations or communications with Mr. Sharpe at any time prior to this action. [R2363]

¹¹ With respect to the request for admission, the trial court stated to the jury as follows:

All right. The request is as follows. The Defendant, Sumerset, sent to the Plaintiff the following request and it reads as follows.

"Admit that you did not wire any funds to Sumerset that belonged to Plaintiff." Plaintiff is, of course, UTCO. The answer is, says, "See general objection." You don't need to worry about that, "but admitted," that it was admitted.

[R2552-2553]

same \$58,384 that was the subject of its claims against Sumerset and Mr. Sharpe. [R2363-2364, 2445-2447] In fact, at the time of trial UTCO's claims were still pending against Mr. Zimmerman in the bankruptcy proceeding, [R2364] and UTCO would receive a distribution under the bankruptcy. [R2447] Additionally, UTCO had filed a nondischargeability action in Mr. Zimmerman's bankruptcy which it had not pursued to completion and which UTCO stopped pursuing pending the outcome of the instant action. [R2448-2449]

Prior to completion of the Zimmerman houseboat, Mr. Zimmerman informed Sumerset not to ship the houseboat as he would not be able to pay for it. [R2127] Mr. Zimmerman instructed Sumerset to apply the funds in the amount of \$58,384 received by Sumerset to another boat, and Sumerset complied. [R2133, 2541-2542] Sumerset also "sidetracked" the Zimmerman boat by taking it out of the production line and setting it aside until a purchaser could be found so the boat could be completed to the buyer's specifications. [R2542-2543] More than three months later and after the sale with Mr. Zimmerman had been canceled, the serial number tentatively reserved for the Zimmerman houseboat was assigned to another houseboat that was sold to an unrelated, third-party. [R1487, 1905, 2210-2211]

No serial numbers were altered or changed as the serial number had not been affixed to the Zimmerman houseboat before Mr. Zimmerman canceled the order.

SUMMARY OF ARGUMENTS

The Trial Court Properly Refused To Instruct The Jury On UTCO's Equitable Promissory Estoppel Claim.

The trial court correctly held UTCO had an adequate remedy at law and declined to instruct the jury on UTCO's equitable claim of promissory estoppel. The only evidence at trial was that UTCO loaned the \$58,384 to Mr. Zimmerman under an express contract to which neither Sumerset nor Mr. Sharpe were parties. The uncontroverted evidence also showed that UTCO had filed claims against Mr. Zimmerman which were pending in the bankruptcy court seeking to collect those very funds, and those collection efforts were put on hold while UTCO pursued this equitable claim against Sumerset and Mr. Sharpe. Under this Court's holding in Knight v. Post, 748 P.2d 1097, 1099-1100 (Utah App. 1988) this attempted end-run around available legal remedies cannot be allowed and the trial court properly dismissed the equitable promissory estoppel claim. See also Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1997)(existence of valid contract with third-party to recover debt bars equitable claim seeking to imply contract against another).

The trial court's refusal to instruct on the promissory estoppel claim was also proper on the independent bases that the evidence conclusively established that UTCO did not reasonably rely on the alleged promise as: (1) UTCO had already agreed to loan and had loaned the funds to Mr. Zimmerman before the promise was purportedly made by Mr. Sharpe; and (2) The funds wired to

Sumerset belonged exclusively to Mr. Zimmerman and UTCO had no ownership interest in them.

The Trial Court Properly Precluded Admission Of Evidence Regarding The Assignment Of The Tentatively Reserved Serial Number To A Different Boat Three Months After The Transaction And Mr. Zimmerman's Cancellation Of The Houseboat Purchase.

Contrary to UTCO's implication throughout its Brief, there was no proffer or evidence of any alteration or changing of any serial number. The evidence excluded by the trial court was simply Sumerset's reassignment of the serial number tentatively reserved for Mr. Zimmerman's houseboat three months after any alleged misrepresentation and Mr. Zimmerman's cancellation of the purchase. That evidence was properly excluded under Rule 402 of the Utah Rules of Evidence as it had no relevance. That Sumerset reassigned the sequential serial number three months after the transaction at issue had absolutely no relevance as demonstrated by UTCO's repeated inability to articulate why or how the evidence was relevant.

This evidence was also properly precluded under Rule 403 of the Utah Rules of Evidence, even if it were somehow deemed relevant, as the evidence would have created unfair prejudice, confusion and a waste of time. Instead of focusing on the pertinent issues, UTCO sought to interject this evidence to attempt to raise the question that Sumerset somehow technically violated some statute concerning the assignment of hull identification numbers. While there was no evidence to support a violation by Sumerset, the jury would have been inundated with

vast amounts of evidence concerning the propriety of maintaining serial numbers in a sequential order and focusing on things that occurred three months after the transaction giving rise to UTCO's claims. Additionally, the jury would have been confused regarding the effect of the evidence and, assuming a violation occurred, very probably would have rendered a verdict on that fact instead of focusing on the relevant conduct which occurred at the time of the transaction between the parties themselves. Rule 403 is designed precisely to prevent this type of distraction and confusion during a trial and the trial court was clearly within its discretion in precluding this evidence.

ARGUMENT.

I. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON UTCO'S PROMISSORY ESTOPPEL CLAIM.

The trial court, at the conclusion of the evidence and after receiving and hearing argument from all parties on Sumerset's and Mr. Sharpe's Motion for Directed Verdict on the promissory estoppel claim, refused to instruct the jury on UTCO's promissory estoppel claim. A primary basis for declining to instruct the jury on this claim (i.e., that UTCO had an adequate remedy at law which barred its promissory estoppel claim) mirrors the chief basis upon which the Motion for Directed Verdict on the promissory estoppel claim was made by Sumerset and Mr. Sharpe. While the trial court did not expressly reference the immediately preceding Motion for Directed Verdict in its ruling, as UTCO concedes on appeal "the trial court's failure to cite its basis

[i.e., Rule 12 or 41, or directed verdict] for declining to instruct the jury on UTCO's promissory estoppel claim is of no moment as this Court pays no deference to the trial court's legal conclusions decided under any of these rules." UTCO's Brief at p. 11. The trial court was correct, as a matter of law, in declining to instruct the jury on UTCO's promissory estoppel claim and the judgment should be affirmed.

A. UTCOS PROMISSORY ESTOPPEL CLAIM WAS BARRED AS THEY HAD AN ADEQUATE REMEDY AT LAW AVAILABLE AND FAILED TO EXHAUST THESE LEGAL REMEDIES.

As a general rule, one must first exhaust his legal remedies before he may recover on the basis of an equitable claim. Knight v. Post, 748 P.2d 1097, 1099-1100 (Utah App. 1988); Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1977)(exhaustion of remedies required before pursuit of any equitable claim); see also UTCO's Brief at p. 16 ("it is true that where there is an adequate remedy at law, no equitable remedy will be applied"). As the evidence shows, UTCO had an adequate remedy at law and that remedy was its claim filed in Mr. Zimmerman's pending bankruptcy.¹² As a matter of law,

¹² Despite the briefing and argument before the trial court indicating that the legal remedy available to UTCO which barred the promissory estoppel claim was UTCO's remedy in Mr. Zimmerman's bankruptcy, UTCO's Brief argues that the trial court mistakenly concluded that the available legal remedy was an express contract between UTCO and Sumerset. That is simply incorrect. The Motion and argument before the trial court, including the argument of UTCO's counsel, [R2411] clearly demonstrate that it was not any express contract between UTCO and Sumerset that the trial court held was the legal remedy available to UTCO. Instead, it was the bankruptcy claim, as had been briefed and fully argued to the trial court that served as the

UTCO's pending claim in Mr. Zimmerman's bankruptcy was a legal remedy available to UTCO which barred them from pursuing the equitable promissory estoppel claim against Sumerset and Mr. Sharpe. Knight v. Post, 748 P.2d 1097, 1099-1100 (Utah App. 1988).

This Court's decision in Knight is dispositive of this issue. In Knight, the plaintiff brought an equitable claim against defendant for work plaintiff performed for a third-party which benefitted defendant. The plaintiff also had filed a claim in the third-party's pending bankruptcy. This Court, reversing the lower court's judgment against defendant and in plaintiff's favor, held as follows:

As a general rule, one must first exhaust legal remedies before he may recover on the basis of the equitable doctrine of quantum meruit. [citations omitted] The legal remedies available to [plaintiff] included. . . pursuit of the [third-party's] assets as a creditor in the [third-party's] bankruptcy proceeding, neither of which [plaintiff] successfully exhausted.

. . .

[Plaintiff] raised his claim in the corporation's bankruptcy proceeding, but at the time he initiated his lawsuit, he modified his claim to recover from the corporation only the amount that he did not recover from [defendant]. He did not pursue his claim in bankruptcy to its end to attempt to recover from corporate assets, but brought this action during the pendency of the bankruptcy action. Neither did he submit evidence to the lower court that pursuit of the bankruptcy claim would, in all

basis of its ruling.

likelihood, be fruitless. Thus, he did not adequately pursue this remedy.

[Defendant] should not be held liable as a consequence of [plaintiff's] failure to successfully assert his legal rights.

Knight, 748 P.2d at 1099-1100 (emphases added).

That is the identical scenario present in this case. The undisputed evidence establishes that UTCO filed claims against Mr. Zimmerman in his bankruptcy to recover the same \$58,384 that is the subject of UTCO's promissory estoppel claim against Sumerset and Mr. Sharpe. [R2363-2364, 2445-2447] UTCO's claims were still pending against Mr. Zimmerman in the bankruptcy proceeding, [R2364] and UTCO presented no evidence its claims in the bankruptcy would be fruitless. In fact, the only evidence at trial established that UTCO would receive a distribution under the bankruptcy. [R2447] Additionally, UTCO had filed a nondischargeability action in Mr. Zimmerman's bankruptcy which it had not pursued to completion and which UTCO stopped pursuing pending the outcome of the instant action. [R2448-2449] Thus, UTCO had a legal remedy available which it had failed to exhaust and, as this Court held in Knight, Sumerset and Mr. Sharpe "should not be held liable as a consequence of [UTCOS] failure to assert its legal rights." Knight, 748 P.2d at 1100. Accordingly, the trial court properly refused to instruct the jury on the equitable promissory estoppel claim as UTCO had failed to exhaust its legal remedies and, therefore, could not recover under that claim as a matter of law.

B. THERE ARE SEVERAL OTHER BASES UPON WHICH THE TRIAL COURT'S DENIAL TO INSTRUCT THE JURY ON THE PROMISSORY ESTOPPEL CLAIM WAS PROPER AS A MATTER OF LAW.

Even if Utah law were ignored and it was assumed that somehow UTCO's failure to pursue its claims in Mr. Zimmerman's bankruptcy did not bar its promissory estoppel claim in this action, there are several independent legal bases upon which the trial court's refusal to instruct the jury was proper and should be affirmed.¹³ They are addressed in turn.

1. UTCOS PROMISSORY ESTOPPEL CLAIM WAS BARRED AS THERE WAS AN EXPRESS AGREEMENT BETWEEN UTCO AND MR. ZIMMERMAN FOR REPAYMENT OF THE FUNDS AT ISSUE.

As a matter of law, the trial court also properly refused to instruct on UTCO's promissory estoppel claim as UTCO had a valid contract with Mr. Zimmerman for repayment of the very funds it sought to recover under its promissory estoppel claim. Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1997). This issue was also briefed in connection with the Motion for Directed Verdict filed by Sumerset and Mr. Sharpe and was argued to the Court. On this issue, as with the failure to exhaust legal remedies, Utah case law is determinative.

¹³ As the Utah Supreme Court has noted, the trial court is vested with discretion to properly advise the jury, which discretion also includes refusing to give instructions when they would be inappropriate. Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174, 176 (Utah 1977). The Utah Supreme Court has stated: It is well recognized that the parties are entitled to have their theories of the case presented to the jury in the form of instructions, but only if they are supported by the evidence. Id. (upholding trial court's refusal to instruct the jury on several theories).

In Commercial Fixtures, plaintiff sued defendant for unjust enrichment seeking to recover for improvements plaintiff made to defendant's premises pursuant to a contract with defendant's lessee. The lessee was not a party to the action. The Utah Supreme Court affirmed the trial court's rejection of the equitable remedy by stating:

It is also noted that there was an express contract between plaintiff and the lessee for the furnishing of materials, and when an express agreement exists one may not be implied.

Commercial Fixtures, 564 P.2d at 774.

UTCO, as did the plaintiff in Commercial Fixtures, asked the trial court to imply an agreement between itself and Sumerset or Mr. Sharpe, even though the evidence conclusively established that UTCO had an agreement with Mr. Zimmerman whereby Mr. Zimmerman was already obligated to repay the very funds UTCO was seeking to recover. Thus, the trial court's refusal to instruct on UTCO's promissory estoppel claim should be affirmed on this additional ground.

2. UTCO'S PROMISSORY ESTOPPEL CLAIM WAS PROPERLY NOT SUBMITTED TO THE JURY AS THE EVIDENCE CONCLUSIVELY ESTABLISHED UTCO DID NOT RELY ON THE ALLEGED PROMISES.

As a matter of law, the trial court also properly refused to instruct on UTCO's promissory estoppel claim as there was no basis upon which a jury could find that UTCO reasonably relied upon the promise alleged to have been made by Sumerset. This issue was also briefed in connection with the Motion for

Directed Verdict filed by Sumerset and Mr. Sharpe and was argued to the Court.

To prevail on its promissory estoppel claim, UTCO must establish that, inter alia, it reasonably relied upon the purported promise. E.g., Weese v. Davis County Comm'n, 834 P.2d 1, 4 (Utah 1992); Restatement (Second) of Contracts § 90. The evidence adduced at trial conclusively established that UTCO failed to prove this element.

a. No Reliance As UTCO's Decision To Loan And The Loan Itself Was Made Before Alleged Promise.

UTCO's promissory estoppel claim was based on Sumerset's alleged misrepresentation which, as described by Mr. Nelson, UTCO's counsel and witness,¹⁴ occurred in the course of phone calls he had with Mr. Sharpe. Mr. Nelson testified on direct examination that during the conversation during which the alleged promise was made, Mr. Nelson confirmed to Mr. Sharpe that UTCO had made the \$60,000 loan and Mr. Zimmerman had signed the documents.

On cross-examination, Mr. Nelson then confirmed twice that his own deposition testimony accurately reflected the timing of the conversation he had with Mr. Sharpe:

Q. Just so I understand the timing of this conversation, did this conversation occur before

¹⁴ Mr. Nelson was the only witness presented at trial with any personal knowledge of the alleged promise. UTCO had conceded that no one other than Mr. Nelson had any communications with anyone from Sumerset regarding this transaction.

or after UTCO had made the decision to actually loan funds to Mr. Zimmerman?

A. After.

Q. Did this conversation occur before or after the conversation you had with Mr. Zimmerman in which you informed him that UTCO would in fact loan him \$60,000?

A. After.

Thus, the undisputed evidence established that UTCO's decision to loan \$60,000 to Mr. Zimmerman and the loan itself occurred before the alleged promise. Accordingly, as a matter of law, there was no evidence upon which the jury could have concluded that UTCO relied (reasonably or otherwise) on the alleged promise underlying the promissory estoppel claim. E.g., Weese v. Davis County Comm'n, 834 P.2d 1, 4 (Utah 1992)(promissory estoppel requires showing of reasonable reliance). UTCO had already committed to make the loan, and had already made the loan when the purported promise was made to Mr. Nelson. Accordingly, as a matter of law UTCO did not reasonably rely on the promise and the trial court's refusal to instruct the jury on UTCO's promissory estoppel claim must be affirmed.

b. No Reliance As UTCO Had No Interest In The Funds Wired To Somerset.

As a matter of law, the trial court also properly refused to instruct on UTCO's promissory estoppel claim as there was no reliance as Mr. Zimmerman, not UTCO, owned the funds wired to Somerset. The undisputed evidence, including UTCO's own admission, established that UTCO had no ownership interest in the

funds that were wired to Somerset. Moreover, as discussed above, UTCO agreed to make the loan and made the loan before the alleged promise. Accordingly, there simply was no detriment suffered by UTCO as a result of any alleged promise and the promissory estoppel claim failed as a matter of law.

3. UTCOS ARGUMENT ON THIS ISSUE IS INAPPLICABLE AS THE TRIAL COURT PROPERLY DISMISSED THE PROMISSORY ESTOPPEL CLAIM ON LEGAL GROUNDS AND THE CLAIM WAS NEITHER SUBMITTED TO THE JURY NOR DECIDED BY THE COURT.

The argument set forth in UTCOS Brief in support of its claim on appeal that the trial court did not properly instruct the jury can be summarized as follows: The parties consented that the promissory estoppel claim would be tried to a jury instead of the court even though it is an equitable claim upon which a jury trial as a matter of right is not allowed. UTCO then sets forth authority for the proposition that parties can consent to a jury trial on equitable claims and if they do so the trial court should not decide at the last minute that it, not the jury, will be deciding the claim. From this premise, UTCO makes the nonsequitur argument that since the parties agreed that the claim would be tried to a jury that it was error for the trial court not to instruct them even though the claim was insupportable as a matter of law. That is not the law.

Under UTCOS logic, once both parties to a case consent to have a jury trial on an issue, the court could not refuse to let that case go to the jury for any reason. That would vitiate summary judgments, motions to dismiss, and directed verdicts.

UTC's position is simply wrong. While it is true that a case which proceeds through trial being tried to the jury should be decided by the jury as opposed to the court, that rule of law does not preclude a court from dismissing the claim if it is legally improper despite the parties' consent to a jury trial. UTC fails to cite a single case for the proposition that a court cannot dismiss a claim as a matter of law even though the parties consented to a jury trial. To the contrary, courts routinely and properly dismiss promissory estoppel (and other equitable claims) when they are not supported by evidence or law under the Utah Rules of Civil Procedure. E.g., State Bank of Southern Utah v. Troy Hygro Sys., Inc., 894 P.2d 1270, 1274-1275 (Utah App. 1995)(affirmed summary judgment on promissory estoppel claim where claim failed as a matter of law); Prows v. State, 822 P.2d 764, 768-769 (Utah 1991)(affirmed motion to dismiss where promissory estoppel claim failed as a matter of law); American Towers Owners Ass'n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1192-1193 (Utah 1996)(affirmed summary judgment on equitable claim where legal remedy available); Commercial Fixtures and Furnishing, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977)(same). Accordingly, the trial court's refusal to instruct the jury on the promissory estoppel claim was proper as a matter of law and the Judgment should be affirmed.

II. THE TRIAL COURT CORRECTLY PRECLUDED EVIDENCE THAT THE SERIAL NUMBER TENTATIVELY RESERVED FOR MR. ZIMMERMAN'S HOUSEBOAT WAS REASSIGNED TO ANOTHER BOAT MORE THAN THREE MONTHS AFTER THE ALLEGED MISREPRESENTATION AND AFTER MR. ZIMMERMAN CANCELED THE SALE.

Prior to trial, Sumerset and Mr. Sharpe filed a Motion in Limine seeking to exclude the introduction of the following evidence:

- (1) That the serial number tentatively assigned to the Zimmerman houseboat was reassigned more than three months after the alleged misrepresentation, and after Mr. Zimmerman canceled the sale and instructed Sumerset to apply the funds to his then-existing debt owed to Sumerset; and
- (2) That thereafter the second, different houseboat was sold to a third-party.

The Motion in Limine sought exclusion of this evidence under Rules 402 and 403 of the Utah Rules of Evidence.

UTCO, in response to the Motion just as in its Brief on appeal, was unable to articulate how this evidence concerning conduct occurring three months after the transaction at issue was relevant in any manner. Instead UTCO simply repeats the general proposition that the court, in a fraud case, is to consider all facts and circumstances. That explanation simply begs the question. For instance, under UTCO's conclusory logic the trial court would err in excluding evidence that Sumerset's production facility was painted a different color in March, 1993. While equally irrelevant, it is a fact and circumstance that under UTCO's logic would have to be presented to the jury. UTCO's position notwithstanding, fraud allegations are subject to the evidentiary requirements and limitations set forth in the Utah

Rules of Evidence as are all other claims.¹⁵ E.g., State v. Winward, 909 P.2d 909, 913 (Utah App. 1995)(Evidence of misconduct surrounding subsequent sale of property, sought to show fraudulent intent, was properly precluded under the Utah Rules of Evidence.)

UTC's inability to articulate the relevance of this evidence simply left the trial court without an explanation as to how something which occurred more than three months after the cancellation of the transaction at issue could have any possible relevance. After briefing and substantial argument to the court, the trial court granted the Motion and explained:

I'm going to grant the motion. I can't see any relevance to the proposition that the, at least based on what I've heard so far, that the reassignment of a serial number to another boat, to a third person who is not claiming to be involved in this situation, has any relevance to the state of mind of the Defendant for purposes of committing fraud at the time these representations were made. I recognize after events may have some probative value, but in this case I can't see what it might be.

The fact that the boat with a serial number did not exist, and was never built to the specifications in the original invoice, is all the Plaintiff needs in that regard. The rest of it is surplusage and a waste

¹⁵ UTC's true intention for introducing this evidence was to create unfair prejudice and confusion. It is clear that UTC intended to use the evidence to attempt to create a question regarding some perceived technical violation of the hull identification statute and then have the jury base its decision on this purported technical violation [R1519] instead of the actual issue in this case -- namely, Sumerset's and Mr. Sharpe's conduct toward UTC which the jury ruled upon and found did not support UTC's claims. While Sumerset disputes any violation of any law, it would be irrelevant, unfairly prejudicial and simply confuse the jury even if it were deemed to have occurred. Thus, the evidence was properly precluded.

of time. Unless the evidence changes, it's not coming in. The Motion is granted.

That doesn't mean you can't put in evidence that there was never a boat with that serial number, or that was the serial number on the invoices and there is no such boat, but it's not, I don't see any relevance to the fact that serial number now appears on some other boat. The Motion is granted.

[R1910]

In reviewing the trial court's evidentiary ruling, deference is given to the trial court's advantageous position in making this ruling and its decision will be affirmed unless "it clearly appears that the lower court was in error." E.g., Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992); cf. Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993)("reverse only if the ruling is beyond the bounds of rationality").

A. THE EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 402 OF THE UTAH RULES OF EVIDENCE AS IT WAS PATENTLY IRRELEVANT.

Rule 402 of the Utah Rules of Evidence expressly provides that "[e]vidence which is not relevant is not admissible." The trial court clearly acted within its discretion when it precluded the introduction of this evidence on the grounds it was irrelevant.

UTCO brought this action asserting claims for breach of contract, fraud, negligent misrepresentation and other miscellaneous claims arising out of the canceled sale of a houseboat by Sumerset to Mr. Zimmerman. UTCO's claim is centered on a \$60,000 loan it made to Mr. Zimmerman, a portion of which was forwarded to Sumerset in December, 1992 to be applied to

"Demarr Zimmerman Account." A few months later, Mr. Zimmerman canceled the purchase and directed Sumerset to apply the \$58,384 to Mr. Zimmerman's then-existing debt owed to Sumerset. Sumerset then "sidetracked" the production of the houseboat Mr. Zimmerman had ordered.

After Mr. Zimmerman canceled the purchase and the houseboat at issue was sidetracked, and more than three months after any alleged misrepresentation, Sumerset assigned the serial number initially reserved for Mr. Zimmerman's houseboat to another entirely different boat eventually sold to a third-party. The assignment of the serial number to a different houseboat and the sale of that boat to a third-party all occurred more than three months after the transaction at issue in UTCO's claims and that evidence is irrelevant to any of UTCO's claims. Therefore, the evidence was properly precluded under Rule 402 of the Utah Rules of Evidence.

At trial, UTCO was allowed to introduce all evidence that had any potential relevance to its claims. UTCO introduced the following evidence:

- 1) The houseboat at issue was never constructed; [E.g., R1910, 1928, 2097-2098]
- 2) The houseboat at issue did not exist on the date Sumerset received Mr. Zimmerman's \$58,384; [Id.]
- 3) There was no houseboat constructed matching the MSO and invoice created for Mr. Zimmerman's houseboat; [Id.]
- 4) The houseboat at issue never existed; [R1910, 1929, 2097-2098]

- 5) The houseboat described in the November, 1992 invoice with the serial number in that invoice was never manufactured by Sumerset; [R1910, 2097-2098]
- 6) The houseboat with the serial number on the Zimmerman invoice and MSO was sold to someone else. [R2210]

All evidence potentially relevant to the issues in this case was presented to the jury. What happened to the houseboat's serial number several months after the alleged misrepresentation and several months after Mr. Zimmerman canceled the sale of the houseboat is patently irrelevant; thus, the trial court did not abuse its discretion in precluding its introduction.

B. THE EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 403 OF THE UTAH RULES OF EVIDENCE AS ITS INTRODUCTION WOULD HAVE CREATED CONFUSION OF THE ISSUES AND UNFAIR PREJUDICE, AND WOULD HAVE BEEN A WASTE OF TIME.

Rule 403 of the Utah Rules of Evidence provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403.

As under Rule 402, it was within the trial court's discretion to preclude this evidence under Rule 403 of the Utah Rules of Evidence.

Even assuming there was some probative value to the subsequent assignment of the serial number to another houseboat months later, that probative value would have been substantially outweighed by the danger of unfair prejudice and confusion of the

issues, and would have unnecessarily lengthened the trial by several days. UTCO's apparent motivation in seeking to introduce evidence of the subsequent reassignment of the serial number and sale was to prejudice Sumerset and Mr. Sharpe and introduce confusion into the issues. UTCO intended to use this evidence to attempt to create some question that Sumerset subsequently violated the law regarding assignment and affixing of hull identification numbers to the Zimmerman houseboat or the second, different houseboat. [R1519] Such a use of this irrelevant evidence would directly violate Rule 403 of the Utah Rules of Evidence, particularly where there is no evidence of any alteration or changing of a serial number but merely a reassignment on paper of a serial number to avoid a gap in serial numbers. While Sumerset (which has been in the houseboat business for nearly 45 years) did not violate any laws in this transaction, even assuming that more than three months after the transaction at issue Sumerset somehow technically violated a statute regarding the assigning of hull identification numbers, the evidence would have been irrelevant, unfairly prejudicial, and result in nothing but confusion. The relevant issues for the jury to determine were whether the acts of Sumerset and Mr. Sharpe were fraudulent as to UTCO, not whether Sumerset later broke the law or defrauded some third-party. E.g., State v. Winward, 909 P.2d 909, 913 (Utah App. 1995).

If UTCO had been allowed to introduce evidence of the reassigning of the serial number months later, Sumerset and Mr.

Sharpe would have been forced to counter that evidence demonstrating why their subsequent actions were proper. This would have entailed several witnesses, substantial costs and expenses, and would have consumed a number of trial days. Additionally, it would have been unlikely that the jury would have perceived that its verdict should not turn on whether the subsequent reassignment of the serial number was proper, especially after the bulk of the trial would have been focused on this issue which is tangentially related, at best. It is precisely this type of confusing and prejudicial sidetrack that Rule 403 was designed to prevent. See McCormick, Evidence § 185; State v. Winward, 909 P.2d 909, 913 (Utah App. 1995)(evidence sought to prove fraudulent intent properly precluded under Rule 403 where the proffered evidence posed risk of diverting jury's attention from pertinent issue and would prejudice defendant); West v. Carson, 49 F.3d 433, 434-35 (8th Cir. 1995).

Thus, based on the foregoing the trial court's ruling excluding the evidence of the subsequent reassignment of the serial number to a second, different houseboat that was eventually sold was within the trial court's discretion and was proper under the Utah Rules of Evidence.

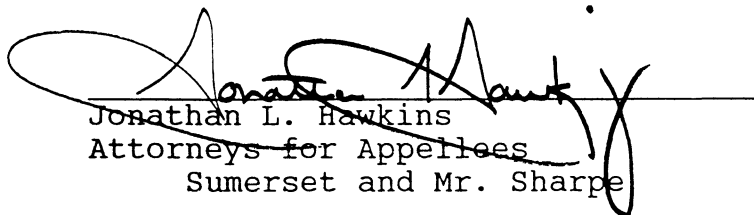
CONCLUSION AND RELIEF SOUGHT

The trial court properly declined to instruct the jury on UTCO's equitable promissory estoppel claim as UTCO failed to exhaust its legal remedies, had a valid contract with Mr.

Zimmerman for repayment of the funds, and, moreover, failed to rely on the alleged promise. The trial court also acted within its discretion in precluding UTCO from introducing evidence of the subsequent reassignment of the serial number tentatively reserved for Mr. Zimmerman's houseboat to another boat three months after the transaction at issue and after Mr. Zimmerman canceled the purchase. That ruling was proper under Rules 402 and 403 of the Utah Rules of Evidence. Accordingly, the Judgment rendered in favor of Sumerset and Mr. Sharpe by the jury should be affirmed and this appeal dismissed.

DATED this 29th day of December, 1997.

ATKIN & LILJA

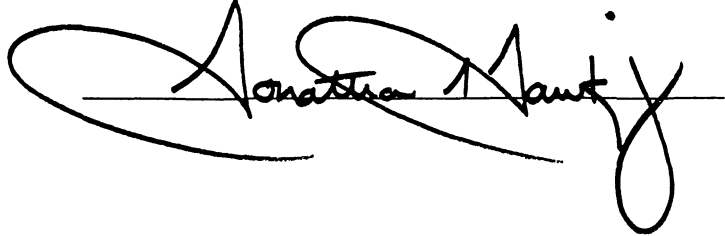


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Sumerset and Mr. Sharpe

CERTIFICATE OF SERVICE

This is to certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE was mailed, first-class, postage prepaid, this 29TH day of December, 1997, to the following:

Jeffrey M Jones
DURHAM, EVANS, JONES & PINEGAR
50 South Main, Suite 850
Salt Lake City, Utah 84144

A handwritten signature in black ink, appearing to read "Jonathan M. Jones", is written over a horizontal line. The signature is stylized with large, sweeping loops.

Tab A

*1097 748 P.2d 1097

Stan KNIGHT, dba Stanco Insulation Services,
Plaintiff and
Respondent,
v.
George P. POST, dba Post Petroleum Company,
Defendant and
Appellant.

No. 860120-CA.
 Court of Appeals of Utah.
 Jan. 22, 1988.

Company contracted with corporate operator of oil well to improve oil well site. When corporate operator did not pay and filed bankruptcy, company brought action against proprietorship which owned working interest in oil well to recover for services performed in improving oil well. The Seventh District Court, Uintah County, Richard C. Davidson, J., found in favor of company on basis of quantum meruit, and proprietorship appealed. The Court of Appeals, Garff, J., held that restitution based on quantum meruit was improper where company failed to first exhaust legal remedies, company did not show that proprietorship had been unjustly enriched, and company had no contractual relationship, either express or implied, with proprietorship.

Reversed.

1. APPEAL AND ERROR ☞845(2)

30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k844 Review Dependent on Mode of Trial in Lower Court

30k845 In General

30k845(2) Cases submitted below on agreed case or statement.

Utah App. 1988.

Where parties have stipulated facts for purposes of appeal, reviewing court does not apply clearly erroneous standard but will sustain court's decision only if convinced of its correctness.

2. IMPLIED AND CONSTRUCTIVE CONTRACTS ☞30

205H ----

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk30 Work and labor in general; quantum

meruit.

Utah App. 1988.

One must first exhaust legal remedies before he may recover on basis of equitable doctrine of quantum meruit.

3. MINES AND MINERALS ☞109

260 ----

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working.

Utah App. 1988.

Company which made improvements on oil well site pursuant to contract between company and corporate operator of well and which did not receive payment for work could not seek recovery on basis of quantum meruit since company did not first exhaust legal remedies where company failed to bring action enforcing mechanics' lien within statutory period, company did not pursue claim in bankruptcy to its end when corporate operator filed for bankruptcy, and company did not submit evidence to lower court that pursuit of bankruptcy claim would be fruitless.

4. BANKRUPTCY ☞2397(1)

51 ----

51IV Effect of Bankruptcy Relief: Injunction and Stay

51IV(B) Automatic Stay

51k2394 Proceedings, Acts, or Persons Affected

51k2397 Mortgages or Liens

51k2397(1) In general.

[See headnote text below]

4. MECHANICS' LIENS ☞260(4)

257 ----

257XI Enforcement

257k260 Time to Sue, Limitations, and Laches

257k260(4) Commencement of suit.

Utah App. 1988.

Corporation's bankruptcy action does not necessarily preclude recovery under properly filed mechanics' lien nor does it toll requirement of bringing action to enforce such lien within statutory 12-month period. U.C.A.1953, 38-1-5, 38-1-11.

5. IMPLIED AND CONSTRUCTIVE CONTRACTS ☞30

205H ----

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk30 Work and labor in general; quantum

meruit.

Utah App. 1988.

Two branches of quantum meruit are contracts implied in law, also known as quasi-contracts or unjust enrichment, which are not actions to enforce contract but are actually actions to require restitution, and contracts implied in fact, which are contracts established by conduct.

6. IMPLIED AND CONSTRUCTIVE CONTRACTS

☞ 2.1

205H ----

205HI Nature and Grounds of Obligation

205HI(A) In General

205Hk2 Constructive or Quasi Contracts

205Hk2.1 In general.

Formerly 205Hk2

[See headnote text below]

6. IMPLIED AND CONSTRUCTIVE CONTRACTS

☞ 3

205H ----

205HI Nature and Grounds of Obligation

205HI(A) In General

205Hk2 Constructive or Quasi Contracts

205Hk3 Unjust enrichment.

Utah App. 1988.

To prevail under theory of contract implied in law or unjust enrichment, plaintiff must show that plaintiff conferred benefit upon defendant, defendant was aware of benefit, and defendant retained benefit under such circumstances as to make it inequitable for him to retain benefit without payment of its value.

7. MINES AND MINERALS ☞ 109

260 ----

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working.

Utah App. 1988.

Although company conferred benefit of improvement of oil well site upon proprietorship which owned working interest in oil well, company did not show that proprietorship retained benefit under circumstances that would make it inequitable for it to retain benefit without payment of its value where company introduced no evidence to indicate that proprietorship requested services of company or deliberately misled it.

8. MINES AND MINERALS ☞ 109

260 ----

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working.

Utah App. 1988.

Company failed to show that there was either express or implied contract between it and proprietorship owning working interest in oil well on which company made improvements for which it was never paid where company did not know of proprietorship's existence at time it entered into contract with corporate operator of well and so could not have had any direct dealings including express contract with proprietorship.

9. IMPLIED AND CONSTRUCTIVE CONTRACTS

☞ 35

205H ----

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk33 Rendition and Acceptance of Services in General

205Hk35 Effect of request or promise to pay.

Utah App. 1988.

Required elements of recovery on theory of contract implied in fact are that defendant requested plaintiff to perform work, plaintiff expected defendant to compensate him, and defendant knew or should have known that plaintiff expected compensation.

10. MINES AND MINERALS ☞ 109

260 ----

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working.

Utah App. 1988.

Company did not have implied-in-fact contract with proprietorship which owned working interest in oil well on which company had made improvements pursuant to contract with corporate operator of well where company did not know of or deal with proprietorship prior to bankruptcy proceedings of corporate operator of well, proprietorship did not request company to perform work or expect to pay him because proprietorship did not deal with company, and company could not have expected proprietorship to pay it because it did *1097 not know of proprietorship's existence.

*1098 F. Alan Fletcher (argued), Pruitt, Gushee & Fletcher, Salt Lake City, for defendant and appellant.

John R. Anderson (argued), Vernal, for plaintiff and respondent.

Before BILLINGS, GARFF and JACKSON, JJ.

OPINION

GARFF, Judge:

The trial court found defendant/appellant, George P. Post, a part owner of an oil well, liable for labor and materials provided by plaintiff/respondent, Stan Knight, to improve the oil well site pursuant to a contract between Knight and the corporate operator of the well. Post seeks reversal of the judgment.

The parties agreed to the following statement of the record on appeal: Knight conducted an insulation business known as Stanco Insulation Services. Post, doing business under a proprietorship named Post Petroleum Company, owned a 33.75% working interest in an oil well located in Uintah County, Utah. Post Petroleum Company, Inc. (the corporation), was the corporate operator of the oil well. The corporation is not a party to this action and is a separate entity from Post's proprietorship.

In March 1982, Knight orally contracted with the corporation to furnish labor and materials for insulating an oil tank battery and erecting two buildings at the well site. At this time, he was unaware of the existence of the proprietorship, Post Petroleum Company, and did not know who owned the well. He satisfactorily completed the contracted work between March 18, 1982 and April 26, 1982, and then, according to instructions given by the corporation's president, *1099 Larry McLane, submitted his invoice for \$18,437.13 to the corporation. There was no dispute that this was a reasonable price for the work. Knight did not deal with George Post personally during the course of this work, nor was he aware of any relationship between the corporation and Post Petroleum Company.

The corporation never paid Knight, and, in the course of his several inquiries about the unpaid bill with McLane, Knight was never advised that he should bill any other party. However, both Post and the corporation knew that Knight was billing the corporation and not the proprietorship.

On July 14, 1982, Knight, unaware that the corporation had no possessory interest in the oil well, attempted to record a mechanics' lien on the oil well property, but placed an incorrect property description on his lien.

Several months later, the corporation filed a petition

in bankruptcy. On January 10, 1983, Knight filed a creditor's claim against the corporation in the bankruptcy proceedings, seeking payment of the entire amount due. Subsequently, Knight learned that the corporation had no interest in the well location, but was merely the operator of the well, and that George Post had an ownership interest in the well.

In March 1983, Post Petroleum Company, Post's proprietorship, which had taken over operation of the well, contracted with Knight to do additional work on the well for which it paid him \$395.60. Knight then sought payment from Post on his \$18,437.13 claim, but was refused. Knight initiated this lawsuit, seeking to recover the \$18,437.13 claim, 18% interest, and \$2,500 in attorney fees from Post. He then amended his still-pending bankruptcy claim, seeking only those sums which he did not recover from Post.

The trial court found in favor of Knight on the basis of quantum meruit, reasoning that the relationship between George Post and the corporation had unjustly confused Knight as to the proper party from whom to seek payment, and that Post was the ultimate beneficiary of the contract between Knight and the corporation. However, the court reduced the amount due Knight under the contract by the 66.25% of the well owned by non-parties to the lawsuit.

On appeal, Post argues that the trial court erred in awarding judgment against him on the basis of quantum meruit. We agree, reverse the trial court, and find that restitution based on quantum meruit was improper because: (1) Knight failed to first exhaust his legal remedies, (2) Knight did not introduce sufficient evidence to show that Post had been unjustly enriched; and (3) there was no contractual relationship, either express or implied, between Knight and Post.

[1] The Utah Supreme Court, in *Sacramento Baseball Club, Inc. v. The Great Northern Baseball Co.*, 748 P.2d 1058, 1060 (Utah 1987)(citation omitted), stated that "[w]hen a trial court relies on stipulated facts to decide a case, this Court does not apply the clearly erroneous standard, but will sustain the lower court's decision only if convinced of its correctness. Thus, we examine the facts de novo." Although, in the present case, the parties have stipulated facts for the purposes of appeal, we see no distinction, and the standard of review remains the same. *Christensen v. Abbott*, 671 P.2d 121, 123 (Utah 1983). Thus, we review both factual and legal issues.

I

Failure to Exhaust Legal Remedies

[2][3][4] As a general rule, one must first exhaust his legal remedies before he may recover on the basis of the equitable doctrine of quantum meruit. See *Interiors Contracting, Inc. v. Navalco*, 648 P.2d 1382, 1388 (Utah 1982); *Commercial Fixtures and Furnishings, Inc. v. Adams*, 564 P.2d 773, 774 (Utah 1977). The legal remedies available to Knight included a mechanics' lien on the well property and pursuit of the corporation's assets as a creditor in the corporation's bankruptcy proceeding, neither of which Knight successfully exhausted.

***1100** Knight failed to perfect his mechanics' lien against Post because he incorrectly described the affected property, thus not complying with Utah Code Ann. Sec. 38-1-7 (1981). See *Westinghouse Elec. Supply Co. v. W. Seed Prod. Corp.*, 119 Ariz. 377, 580 P.2d 1231, 1233 (App.1978); *Buehner Block Co. v. Glezos*, 6 Utah 2d 226, 310 P.2d 517, 520-21 (1957).

Further, Knight failed to bring an action enforcing the lien within the statutory period. Under Utah Code Ann. Sec. 38-1-11 (1974), (FN1) an action to enforce a mechanics' lien must be commenced within twelve months from the completion of the work. An untimely action under this section is jurisdictional and forecloses the parties' rights. (FN2) *AAA Fencing Co. v. Raintree Dev. and Energy Co.*, 714 P.2d 289, 290-91 (Utah 1986); *Morrison v. Carey-Lombard Co.*, 9 Utah 70, 33 P. 238, 239 (1893). Therefore, Knight did not exhaust this remedy, and, at this point in time, may not because his rights and remedies under the mechanics' lien statutes are extinguished. *Commercial Fixtures*, 564 P.2d at 774.

Knight raised his claim in the corporation's bankruptcy proceeding, but at the time he initiated this lawsuit, he modified his claim to recover from the corporation only the amount that he did not recover from Post. He did not pursue his claim in bankruptcy to its end to attempt to recover from corporate assets, but brought this action during the pendency of the bankruptcy action. Neither did he submit evidence to the lower court that pursuit of the bankruptcy claim would, in all likelihood, be fruitless. Thus, he did not adequately pursue this remedy.

Post should not be held liable as a consequence of Knight's failure to successfully assert his legal rights. See *Utschig v. McClone*, 16 Wis.2d 506, 114

N.W.2d 854 (1962). As in *Commercial Fixtures*, Knight has failed to exhaust his legal remedies, so may not recover on the basis of quantum meruit.

II

Quantum Meruit

Because the trial court based its ruling upon quantum meruit, we address that question even though our ruling on failure to exhaust legal remedies is dispositive of the case.

[5] In *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct.App.1987), this Court has identified two branches of quantum meruit: (1) contracts implied in law, also known as quasi-contracts or unjust enrichment, which are not actions to enforce a contract but are actually actions to require restitution; and (2) contracts implied in fact, which are contracts established by conduct. Knight cannot prevail under either of these branches.

[6] First, to prevail under the first branch of quantum meruit, contracts implied in law or unjust enrichment, Knight must show the following three elements: (1) Knight conferred a benefit upon Post; (2) Post was aware of the benefit; and (3) Post retained the benefit under such circumstances as to make it inequitable for him to retain the benefit without payment of its value. *Berrett v. Stevens*, 690 P.2d 553, 557 (Utah 1984); *Davies*, 746 P.2d at 269.

[7] It is undisputed that Knight conferred a benefit upon Post and that Post knew about and was using the benefit. However, Knight did not show that Post ***1101.** retained the benefit under circumstances that would make it inequitable for him to retain it without payment of its value. In *Commercial Fixtures*, the Utah Supreme Court defined inequitable circumstances as:

[t]he mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. There must be some misleading act, request for services, or the like, to support such an action. Mere failure of performance by one of the contracting parties does not give rise to a right of restitution.

Commercial Fixtures, 564 P.2d at 774 (emphasis added) (citation omitted).

Knight relies upon the reasoning in *Paschall's, Inc.*

Tab B

v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966), which states that recovery on a quantum meruit action may be had in some instances in which a materialman or subcontractor furnishes labor or materials which benefit the property of a person with whom there is not privity of contract. However, this is at variance with Commercial Fixtures.

Knight introduced no evidence to indicate that Post requested services of Knight or deliberately misled him. In fact, the parties stipulated that Knight did not even know of Post's existence until after the corporation had filed for bankruptcy. The only evidence introduced even suggesting a misleading act is the similarity in names between the corporation and the proprietorship. While we recognize the possibility that Post created a corporation and a proprietorship with the same name to deliberately defraud creditors, it and when the corporation went bankrupt, Knight has not introduced any such evidence. Therefore, he has not shown that it would be inequitable for Post to retain the benefit without payment of its value.

[8] Second, Knight has failed to show that there is either an express or implied contract between himself and Post, on which he may base recovery. See Commercial Fixtures, 564 P.2d at 774.

The stipulated facts indicate that Knight did not know of Post's existence at the time he entered into the contract, so could not have had any direct dealings, including an express contract, with Post.

[9][10] Also, Knight did not prove the required elements of the second branch of quantum meruit, contracts implied in fact, to show the existence of an implied contract with Post. To prevail under this theory, Knight was required to show that (1) Post requested Knight to perform the work, (2) Knight expected Post to compensate him; and (3) Post knew or should have known that Knight expected compensation. Davies, 746 P.2d at 269.

The facts indicate that Knight did not know of or

deal with Post prior to the bankruptcy proceedings, so Post did not request Knight to perform the work or expect to pay him because he did not deal with Knight, and Knight could not have expected Post to pay him because he did not know of Post's existence.

On the contrary, Knight had an express contract with the corporation, and dealt exclusively with it in contracting to do the work, attempting to collect his bill, and filing his mechanics' lien. Thus, Knight did not have an implied contract with Post. See Commercial Fixtures, 564 P.2d at 774.

Since there was no express or implied contract with Post, Knight cannot recover.

The judgment of the trial court is reversed. Costs awarded to Post.

BILLINGS and JACKSON, JJ., concur.

FN1. This statute reads, in relevant part, as follows:

Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract.... Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

FN2. We note that the corporation's bankruptcy action did not necessarily preclude recovery under a properly filed mechanics' lien nor did it toll the requirement of bringing an action to enforce such a lien within the statutory twelve month period. See Utah Code Ann. Sec. 38-1-5 (1974); Munson v Risinger, 114 So.2d 59, 61 (La.Ct.App.1959).

*773 564 P.2d 773

**COMMERCIAL FIXTURES AND
FURNISHINGS, INC., a Utah
Corporation, Plaintiff and Appellant,**

v.

**Eldon ADAMS, an Individual, and New Life
Health Spa, by and
through Eldon Adams, Defendants and
Respondents.**

No. 14700.

Supreme Court of Utah.

May 13, 1977.

A supplier of materials incorporated into leased property at the request of the tenant brought an action against the landlord after default under the lease had occurred, seeking recovery for the value of the materials under a theory of unjust enrichment. The Fourth District Court, Utah County, George E. Ballif, J., entered summary judgment for the landlord, and the supplier appealed. The Supreme Court, Hall, J., held that no basis for recovery was shown.

Affirmed.

Maughan, J., dissented and filed opinion in which
Crockett, J., concurred.

1. MECHANICS' LIENS ⚙️63

257 ----

257II Right to Lien

257II(C) Agreement or Consent of Owner

257k60 Necessity for Contract or Consent by
Owner

257k63 Improvements by lessee.

Utah 1977.

As general rule, tenant's creditors have no greater
right to charge land with value of improvements or
repairs than tenant would have.

2. CONTRACTS ⚙️188

95 ----

95II Construction and Operation

95II(B) Parties

95k188 Duties and liabilities of third persons.

Utah 1977.

Mere fact that third person benefits from contract
between two others does not make such third person
liable in quasi-contract, unjust enrichment, or
restitution; there must be some misleading act,
request for services, or the like, to support such
action, and mere failure of performance by one of the

contracting parties does not give rise to right of
restitution.

3. IMPLIED AND CONSTRUCTIVE CONTRACTS

⚙️31

205H ----

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk31 Materials furnished.

Formerly 412k3 WORK AND LABOR
Utah 1977.

Where tenant, who had agreed in lease to complete
such improvements in and upon leased property as its
business needs might require and to pay and discharge
all costs and expenses incident thereto to the end that
no liens would be placed on leased property,
contracted with supplier for certain materials, which
were incorporated into leased premises, and then
defaulted under lease, landlord was not liable to
supplier for value of such incorporated materials on
theory of unjust enrichment.

Jack Fairclough, Salt Lake City, for plaintiff and
appellant.

V. Pershing Nelson, Provo, for defendants and
respondents.

HALL, Justice:

This is an appeal from a summary judgment of no
cause of action rendered by the district court.

Defendant, Eldon Adams, is the owner of real
property located at 1140 South State Street, Orem,
Utah. He entered into a written lease with Great
Outdoors, Inc. under the terms of which the lessee
agreed to complete such improvements in and upon
said property as its business needs might require and
to pay and discharge all costs and expenses incident
thereto to the end that no liens would be placed on the
leased property. Great Outdoors, Inc. thereafter
contracted with plaintiff for the purchase of materials
which were ultimately furnished and incorporated into
the building on the leased premises. The appellant
was not privy to that agreement. Great Outdoors
subsequently defaulted in the performance of the
covenants of said lease and by court judgment the
lease was terminated and the property restored to
defendant. Plaintiff filed no lien against the lessee's
interest in the property and the time limited for filing
has expired.

Plaintiff has never instituted suit against the lessee

and brought this action directly against the defendant on a theory of unjust enrichment.

The foregoing recitation of facts are those stipulated to by the parties at the time they presented their respective motions for summary judgment to the trial court.

***774** [1] This appeal may be disposed of by the application of some very elementary principles of law. As a general rule, a tenant's creditors have no greater right to charge the land with the value of improvements or repairs than the tenant would have (FN1) and here the tenant had no such right having contracted it away.

The right of plaintiff to recover for the goods incorporated into defendant's real property must be based upon an agreement, either express or implied, and the stipulated facts are clear that none existed. Plaintiff placed no reliance at all on the credit of defendant and the lease agreement specifically imposed upon the lessee the sole obligation of payment. A case in point is *Howard v. Societa Di Unione E Beneficenza Italiana, et al.*, 62 Cal.App.2d 842, 145 P.2d 694.

[2] The mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. See 66 Am.Jur.2d 960. There must be some misleading act, request for services, or the like, to support such an action. Mere failure of performance by one of the contracting parties does not give rise to a right of restitution.

It is also noted that there was an express contract between plaintiff and the lessee for the furnishing of materials, and when an express agreement exists one may not be implied. (FN2)

[3] The action brought by plaintiff is one in equity and brought without any attempt to exhaust any legal remedies available. Also, the stipulated facts are that plaintiff has brought no suit against the lessee nor did he initiate any action to enforce a mechanic's lien, if any he had. As a consequence, such lien right was lost by passage of time. Nor has plaintiff shown any legal and sufficient excuse for his inaction against the lessee.

The authorities cited by plaintiff are distinguishable on the facts presented here and do not compel support of its position.

Judgment affirmed. Costs to defendant.

ELLETT, C.J., and WILKINS, J., concur.

MAUGHAN, Justice (dissenting):

Defendant is the owner of property located in Orem, Utah. In March 1974, the defendant leased the property to Great Outdoors, Inc. (hereinafter, lessee). Under the terms of the lease, Great Outdoors agreed to make improvements in the property and to operate a health spa business thereon.

Lessee contracted with the plaintiff to install certain fixtures. Plaintiff performed the contract at a cost of \$3,149.87. Lessee did not pay the plaintiff, and subsequently defaulted on the lease. Defendant lessor brought a successful action to regain possession of the property. After taking possession, the defendant continued to operate a health spa business on the premises under the name New Life Health Spa. Plaintiff brought this action to recover costs for materials and labor furnished. On simultaneous motions for summary judgment, the lower court held for the defendant finding the plaintiff failed to state a claim upon which relief could be granted. This Court should reverse.

The theory of plaintiff's case is that the defendant has been unjustly enriched at plaintiff's expense and should, therefore, make restitution to the plaintiff. The lower court found the plaintiff was precluded from maintaining this action, because there was no privity of contract between the plaintiff and defendant. This finding mistakes the nature of a claim based on unjust enrichment. Unjust enrichment is premised on a theory of quasi-contract, or a contract implied in law.

A contract implied in law is not a contract at all, but an obligation imposed by ***775** law for the purpose of bringing about justice and equity without reference to the intent or the agreement of the parties and, in some cases, in spite of an agreement between the parties. (Emphasis supplied.)

It is a non-contractual obligation that is to be treated procedurally as if it were a contract . . . (Emphasis in original.) (FN1)

The plaintiff's cause of action does not fail for lack of privity.

Defendant referred to several cases he claims support the lower court's judgment. These cases are

distinguishable and do not support defendant's assertions. For example, defendant claims, as a general rule, a tenant's creditors have no greater right to charge the value of the landlord's land with (the costs of improvements) than the tenant could have. In support of this position defendant relies on, among others, *American Bonding Co. v. Pueblo Investment Co.*, 10 Cir., 150 F. 17 (1906) and *Grizzle v. Runbeck*, 74 Riz. 92, 244 P.2d 1160 (1952). *American Bonding* involved a suit by a tenant's creditor against the tenant's surety. The case turned on whether the tenant had agreed, by the terms of the lease, to pay for improvements and whether the surety had, by incorporating the lease into the bonding agreement, agreed to pay for the improvements upon tenant's default. In the context of interpreting the terms of the lease, the court stated a lessee may not make repairs at the expense of the lessor unless there is an express agreement between them to do so. 150 F. at 28. There is no question in this case that the tenant agreed to pay for the material and labor furnished, both parties agree that he did. The question here is whether, as between plaintiff and defendant, defendant has been unjustly enriched: not whether the tenant defaulted on his obligation. The *Grizzle* case is also distinguishable. In that case, tenants brought suit against the landlord for the costs of repairs. The case turned on whether the landlord was under a duty to repair and the court held that without an agreement to the contrary the landlord was under no such duty. The question of the landlord's duty to the tenant is not involved here.

Defendant also relies on *Howard v. Societa Di Unione E Beneficenza Italiana*, 62 Cal.App.2d 842, 145 P.2d 694 (1944). In that case the lessor (Society) entered into an agreement with lessee for the rental of a baseball field. The lessee agreed to be responsible for the costs of repairs and improvements and then failed to pay for plaintiff's services. Plaintiff brought suit against the lessor claiming that lessor and lessee were joint venturers and therefore, the lessor was liable on lessee's debt based on a partnership theory. The court found no evidence of partnership or joint venture. The language quoted by defendant from that case is not only dicta, it was made in the context of determining the question of the existence of a partnership, and related to a finding of an implied in fact contract, not unjust enrichment.

Addressing himself directly to plaintiff's unjust enrichment claim, defendant argues that plaintiff's claim is barred because the enrichment of defendant was not unjust. Defendant cites a number of cases in support of this proposition, including *Buell v. Orion*

State Bank, 327 Mich. 43, 41 N.W.2d 472 (1950); *Utschig v. McClone*, 16 Wis.2d 506, 114 N.W.2d 854 (1962). The *Buell* case involved a transfer of stock that at the time of the transfer was of questionable value. The stock later became worth a great deal of money. Plaintiff brought suit claiming that when her husband transferred the stock he was not competent and that defendant had been unjustly enriched by the transfer. The court held the decedent was competent to make the transfer and although the defendant was enriched, he had taken considerable risk in accepting the *776 stock and his enrichment was not unjust. The services of plaintiff, here, were not of questionable value and defendant took no risk in accepting them. The *Utschig* case involved a suit by a subcontractor against a homeowner for the value of labor and materials furnished. The court held that a subcontractor could not maintain an action against the homeowner unless there was an express agreement between the two that the homeowner would be responsible for the debts of the principal contractor. The court stated that the homeowner was not liable on an implied contract simply because he had received services or goods. The court was not clear whether it was talking about an implied in fact contract or one implied in law. However, the case would not seem applicable here. The rules preventing a subcontractor from seeking payment directly from homeowners are based on the assumption that the homeowner has already paid the principal contractor and cannot be held liable twice on the same debt. That is not the case here. The other cases cited by defendant are similarly unpersuasive.

The question, then, remains has the defendant been enriched and is enrichment unjust. As was stated in *Baugh v. Darley*, 112 Utah 1, 184 P.2d 335, 337 (1947):

Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. . . . The benefit may be an interest in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt or duty owed by him; or anything which adds to his security or advantage.

On the facts of the *Baugh* case, the court held against the plaintiff. The case is, however, clearly distinguishable from the facts at hand and the general definition given of unjust enrichment is applicable to the case at bar. See also, *Fleming v. Wineberg*, 253 Or. 472, 455 P.2d 600 (1969). It would seem clear the defendant has been enriched. Improvements were made to his property that made it possible for him to

run a health spa business on the premises. In the lease the defendant required that these improvements be made. Presumably, the defendant would not have required these improvements if he did not expect to benefit from them.

Defendant did in fact regain possession of the property and is running a business with the aid of improvements that, without the lease, he would have had to pay for himself. In other words, defendant has obtained the benefit of plaintiff's services without having to pay for them. The case of Paschall's, Inc. v. Dozier, supra, is directly in point. In that case the daughter of the defendant contracted with the plaintiff to remodel a bathroom in defendant's house. The daughter was living with the defendant at the time. Plaintiff performed the services, but the daughter was unable to pay. Plaintiff sued the defendant homeowner on a theory of unjust enrichment. The court held that the plaintiff was entitled to restitution. The court stated:

The defendant asserts that an implied undertaking cannot arise against one benefited by the work performed, where the work is done under a special contract with another. While this may be the general rule, we do not think that it is applicable in every case. Indisputably, where one is afforded recovery from the person with whom he has a contract, he cannot also recover from third persons incidentally benefited by his performance. . . . However, the situation is dissimilar where a person furnishes material and labor under a contract for the benefit of a third party and that contract becomes unenforceable or invalid. In that situation there is certainly no reason to preclude the furnisher . . . from seeking recovery against the third person on the theory of (unjust enrichment). 407 S.W.2d at 154--155. (FN2)

While it is true, as defendant notes, that in these cases the defaulting party and the *777. defendant had some special relationship (father/daughter, mother/son, etc.) the basic reasoning of the cases applies to the facts at hand. In the case at bar, plaintiff entered into a contract with a defaulting party. That contract was at least in part for the

benefit of a third party--the defendant. The contract has become unenforceable, the defendant is enjoying the benefits of the contract without paying for them. The question to be answered in an unjust enrichment is, do justice and equity require that the defendant be forced to make restitution. Under the facts of this case, they do so require.

The plaintiff is not precluded by the Uniform Commercial Code from pursuing the remedy of restitution. Section 70A--1--103, U.C.A., provides that the principles of law and equity supplement the Code and are not usurped by it.

From the foregoing it can be seen that summary judgment was not proper. This being an action in equity, a wider exploration of the facts is called for. I would reverse and remand for an evidentiary determination of the central question, 'Why should plaintiff not recover.'

CROCKETT, J., concurs in Justice MAUGHAN'S dissent.

FN1. 49 Am.Jur.2d 702, Section 765, citing authorities.

FN2. 66 Am.Jur.2d 948, Section 6, citing Verdi v. Helper State Bank, 57 Utah 502, 196 P. 225, 15 A.L.R. 641.

FN1. Continental Forest Products, Inc. v. Chandler, 95 Idaho 739, 518 P.2d 1201, 1205 (1974). As stated in Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150, 154 (1966): 'It is well established that want of privity between parties is no obstacle to recovery under quasi-contract.' See also: Fowler v. Taylor, Utah, 554 P.2d 205 (1976); Rapp v. Salt Lake City, Utah, 527 P.2d 651 (1974); Trollope v. Koerner, 106 Ariz. 210, 470 P.2d 91 (1970).

FN2. See also, De Gasperi v. Valicenti, 198 Pa.Super. 455, 181 A.2d 862 (1962); Karon v. Kellogg, 195 Minn. 134, 261 N.W. 861 (1935); Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).