

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

FRANK GAY PLUMBING, INC.

CASE NO.: 2012-CV-19

Lower Case No.: 2011-SC-6767-A- O

Appellant,

v.

MCO ENTERPRISES, INC.,

Appellee.

_____ /

Appeal from the County Court, for Orange County,
Deborah B. Ansbro, County Judge

Carl D. Berry, Esquire for Appellant.

Wayne Golding, Sr., Esquire for Appellee.

Before BLACKWELL, G. ADAMS, S. KEST, J.J.

PER CURIAM.

FINAL ORDER REVERSING AND AFFIRMING IN PART TRIAL COURT

Appellant, Frank Gay Plumbing, Inc. (“G. Plumbing”), timely appeals the trial court’s Final Judgment in favor of Appellee, MCO Enterprises (“MCO”) rendered April 25, 2012 nunc pro tunc to March 20, 2012. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

Before this action arose, G. Plumbing provided plumbing services to MCO for 10 years. On or about July 22, 2010, G. Plumbing was called out to the Orlando International Airport to examine backed up water in a drain at a franchised restaurant that was operated by MCO. Upon arrival, the plumbers determined that there was a blockage in the drainage system. They issued a work order and attempted to clear the drain with their own equipment. A piece of snake cable became lodged in the drain line. For several days after July 22nd, the plumbers tried different procedures to remove the cable from the drain with no success.

At that point, G. Plumbing forwarded to MCO a proposal to repair the problem by cutting through the concrete to remove the cable from the drain with an estimated cost of \$39,575.00. MCO then sought a second opinion from another commercial plumbing company, Modern Plumbing, as to what it would charge to remove the cable and make the repairs. After receiving an opinion from Modern Plumbing and being quoted a lower estimate, MCO refused to accept G. Plumbing's proposal and instead, hired Modern Plumbing. Modern Plumbing then successfully removed the cable and repaired the drain system for the amount \$5,028.00.

G. Plumbing thereafter submitted invoices to MCO for the work its plumbers performed in the amounts of \$1,674.06 and \$4,444.12. According to MCO, the invoices appeared altered and contained charges for services that it did not provide and/or were unknown and unauthorized. MCO disputed G. Plumbing's billing and refused to pay for the charged services. MCO contended that G. Plumbing, in turn, owed them for negligent workmanship because it was G. Plumbing's cable that got stuck in the pipe and caused the damage to the drainage system.

The parties were not able to resolve their dispute and on December 15, 2011, G. Plumbing, via its President, Frank Gay, filed a pro-se a small claims action against MCO. The

Statement of Claim stated “not paid for plumbing work done” and included as exhibits copies of work orders/invoices and correspondence between the parties. On or about February 9, 2012 after a pre-trial hearing, MCO filed its Answer, Affirmative Defenses, and Counterclaim for negligent workmanship. The non-jury trial was held on March 20, 2012 and after the close of G. Plumbing’s case-in-chief, MCO moved for a directed verdict in its favor. The trial court granted the motion, entered the Final Judgment, and MCO voluntarily dismissed its Counterclaim.

Arguments on Appeal

G. Plumbing argues that: 1) The trial court erred by failing to consider its cause of action in quasi-contract and 2) The trial court erred in failing to liberally construe the rules of evidence per Florida Small Claims Rule 7.140(f). Conversely, MCO argues that: 1) The trial court properly granted the direct verdict because G. Plumbing failed to establish a prima facie case for breach of a written or oral contract and 2) The trial court did not fail to liberally construe the rules of evidence.

Standard of Review

At issue on appeal is whether the trial court properly granted a directed verdict thus, the standard of review is de novo and when reviewing the granting of a directed verdict, the court must review the evidence and all inferences of fact in a light most favorable to the non-moving party and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the non-moving party. *Crusselle v. Mong*, 59 So. 3d 1178, 1180 (Fla. 5th DCA 2011).

Also, the standard of review for a trial court’s rulings as to the admissibility of evidence and expert testimony is abuse of discretion. *Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984).

Discussion

From review of the trial transcript, during G. Plumbing's case-in-chief, a drawing of the site where the plumbing problems occurred was admitted into evidence. G. Plumbing also sought to introduce work orders/invoices into evidence. In addition, G. Plumbing's witnesses were Frank Gay and two employees, Ron Flowers and Gary Myers, who testified in detail about the subject plumbing work they performed. Also, on cross examination, Ron Flowers was questioned about entries in the invoice dated July 22, 2010 that appeared to be made after the work order was signed. The entries included charges for equipment and hours expended. He testified that he did not know who inserted the entries.

Upon hearing the testimony, the trial court stated that the work order/invoice could not be introduced into evidence because it was altered after it was signed and thus, should be stricken. The trial court also asked MCO's counsel what his position was on this issue. MCO's counsel agreed with the trial court and added that the document only contained signatures in the portion pertaining to removal of equipment after the work was completed, but the other signature block acknowledging that the work was completed and receipt of a copy of the work order was blank. The Court then asked MCO's counsel's position as to whether he thought the invoice should be stricken or the testimony be kept in the record that the invoice was altered. MCO's counsel stated that he thought the testimony should be left in because it related to some of MCO's affirmative defenses. After this discussion, the trial court ruled that the testimony would remain in the record and the document was admitted into evidence.

G. Plumbing also attempted to provide expert testimony from Christopher Rainaldi, a master plumber from another company. The voir dire examination began and when asked if he held any licenses in Florida, Mr. Rainaldi stated that he held a state license as a certified

plumbing contractor and a certified air conditioning contractor. The court then questioned Mr. Rainaldi as to whether he visited the site. He answered that he had not been to the site. The trial court then ruled that Mr. Rainaldi was not qualified to testify because he did not visit the subject site and therefore he did not have direct knowledge as to what occurred. Mr. Gay then stated that the reason why he was calling Mr. Rainaldi as a witness was because he was a master plumber who could explain the protocol for cleaning a sewer line. However, the trial court still did not allow Mr. Rainaldi to testify.

The Court then asked Mr. Gay if he had any other witnesses and he answered that he did not. At that point, MCO's counsel moved for a directed verdict arguing that G. Plumbing's evidence failed to establish a prima facie case that it did the plumbing work based on the altered invoice. The trial court granted MCO's motion and entered the Final Judgment with findings including:

The complaint as filed by the Plaintiff in this matter sounds a single claim of Breach of Contract.

Plaintiff has failed to present any credible documentary evidence which represents either a written or oral contract between Defendant or any representative of the Defendant.

Plaintiff's witness, Mr. Ron Flowers, at all times relevant, was employed by Frank Gay Plumbing, Inc. as a Senior Tech. The evidence presented by Mr. Ron Flowers, as well as the documentary evidence admitted as Plaintiff's Exhibit 2, supports a finding that the "contract" relied upon by Plaintiff was altered after it was signed by Defendant. The subsequently inserted entries included charges for equipment and hours expended. Mr. Flowers testified that he did not know who inserted several of the entries subsequent to execution by Defendant. Mr. Flowers candidly acknowledged these matters in his testimony before this court.

In light of the evidence presented during its case in chief, the court finds that Plaintiff, Frank Gay Plumbing Inc. failed to meet its burden to establish a prima facia [sic] case for Breach of Contract, either written or oral, against the Defendant, MCO Enterprises LC [sic].

Argument I - The trial court erred by failing to consider G. Plumbing's cause of action in quasi-contract:

G. Plumbing first argues that the trial court erred by failing to consider its cause of action in quasi-contract. The elements of a cause of action for a quasi-contract are that: 1) the plaintiff has conferred a benefit on the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred; and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying for it. *American Safety Insurance Services, Inc. v. Griggs*, 959 So. 2d 322, 331(Fla. 5th DCA 2007).

G. Plumbing alleged in its Statement of Claim that it was “not paid for plumbing work done” and MCO in its Second Affirmative Defense alleged:

The Defendant owes to the Plaintiff only amount for work, which was performed by the Plaintiff to unclog the drains as requested on July 22nd, 2010 and not for any amounts as billed by the plaintiff which resulting from plaintiff's attempts to remove the Plaintiff's own broken equipment from the plumbing system or to correct Plaintiff's faulty or negligent workmanship. The Defendant at all times relevant has disputed the total amount of invoices which the Plaintiff has billed on Invoice # 191057 dated 07/22/2010 on and Invoice # 190946 dated on 7/25/2010 in addition to any other related invoices.

By making these allegations in its Second Affirmative Defense, MCO acknowledged that G. Plumbing performed work on July 22, 2010 to unclog the drains as it requested. This allegation in conjunction with G. Plumbing's allegation that it was not paid for plumbing work done as evidenced by the testimony of Frank Gay and Ron Flowers supported G. Plumbing's quasi-contract claim as to the work performed on July 22, 2010. Therefore, the trial court erred in granting the directed verdict and the proceedings should have progressed to provide the opportunity for the remaining issues to be addressed and proven or disproven pertaining to the disputed amounts billed by G. Plumbing for work performed and MCO's allegation that G. Plumbing was negligent.

Argument II - The trial court erred in failing to liberally construe the rules of evidence per Small Claims Rule 7.140(f) by denying it the opportunity to be fully heard because key witness testimony and documents were not admitted into evidence:

Second, G. Plumbing argues that trial court erred in failing to liberally construe the rules of evidence per Small Claims Rule 7.140(f) by denying it the opportunity to be fully heard because key witness testimony and documents were not admitted into evidence. From what can be discerned from the trial transcript, the testimony the trial court did not allow was expert testimony from Christopher Rainaldi. The applicable statutes of the Florida Evidence Code pertaining to this issue are:

Section 90.702: Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Section 90.704: Basis of opinion testimony by experts.—The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

As discussed above, Mr. Gay informed the trial court that he was calling Mr. Rainaldi as an expert witness because he was a master plumber who could explain the protocol for cleaning a sewer line. Although the testimony was not proffered at the trial, it is reasonable to conclude that Mr. Rainaldi's testimony may have directly related to whether the steps taken by G. Plumbing's employees were correct when they assessed the drainage problem and attempted to clean the sewer line and whether the charges for these services were reasonable. Accordingly, the trial court abused its discretion by ruling that Mr. Rainaldi was not qualified to testify solely because he did not visit the subject site. Instead, the trial court should have allowed the voir dire

examination to continue to determine whether Mr. Rainaldi was qualified as an expert to testify and if so, then allow him to testify accordingly.

The documents that were marked for identification, but not admitted into evidence were: 1) a subsequent work order dated July 25, 2010 with invoice # 190946 in the amount of \$4,444.12; 2) the proposal dated July 28, 2010 from G. Plumbing to MCO regarding the cutting and/or removal of concrete to retrieve the cable from the drain; 3) the demand letter dated January 4, 2011 from G. Plumbing to MCO; and 4) the plumbing quotation scope of work document dated July 29, 2010 from Modern Plumbing to MCO.

Because the testimony of Frank Gay and Ron Flowers supported G. Plumbing's quasi-contract claim as to the work performed, both work orders/invoices were relevant. Further, via the testimony of Frank Gay as president of G. Plumbing, the work orders/invoices could have been properly admitted into evidence as business records under section 90.803(6), Florida Statutes, notwithstanding the alleged alternations made to the documents. Instead, the alleged alterations go to the credibility of the documents to be challenged on cross examination by MCO and/or during MCO's case-in-chief had the trial progressed. Lastly, if the trial court had considered the quasi-contract, the trial court could have ruled that G. Plumbing would only be compensated for the work that its employees performed as proven through the testimony of its employees and it would not be compensated for the disputed work related to the alterations made to the documents after they were signed by MCO's representative. Further, the demand letter could have been properly admitted into evidence via authentication by Frank Gay as President of G. Plumbing. Accordingly, the trial court erred as to the rulings addressing the admissibility into evidence of both work orders/invoices and the demand letter.

The other documents that were not admitted into evidence i.e. the proposal dated July 28, 2010 from G. Plumbing to MCO and the plumbing quotation scope of work document dated July 29, 2010 from Modern Plumbing to MCO, were not relevant to the crux of G. Plumbing's claim to be paid for the work it already performed. Instead, those documents dealt with proposed future work. Further, specifically as to Modern Plumbing's quotation document, there were no witnesses presented in G. Plumbing's case-in-chief to authenticate the document. Accordingly, the trial court did not abuse its discretion by not admitting these documents into evidence during G. Plumbing's case-in-chief.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED**:

1. The Final Judgment rendered April 25, 2012 nunc pro tunc to March 20, 2012 is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.
2. The trial court's rulings are **AFFIRMED** as to the proposal document from G. Plumbing to MCO and the plumbing quotation scope of work document from Modern Plumbing to MCO. The trial court's rulings as to the witness Christopher Rainaldi and the admissibility into evidence of both work orders, invoices, and the demand letter are **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 11th day of April, 2013.

/S/

ALICE L. BLACKWELL
Circuit Judge

/S/

GAIL A. ADAMS
Circuit Judge

/S/

SALLY D. M. KEST
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished to: **Carl D. Berry, Esquire**, The Strategic Legal Group, 11555 Heron Bay Blvd., Suite 200, Coral Springs, Florida 33076, legalmail@thestrategiclegalgroup.com and **Wayne Golding, Sr., Esquire**, The Golding Law Group, 1507 South Hiawasse Road, Suite 210, Orlando, Florida 32835, waynegjd@yahoo.com, waynegd@gmail.com, on this 11th day of April, 2013.

/S/ _____

Judicial Assistant